CHOICE OF LAW FOR INTERNET TRANSACTIONS: THE UNEASY CASE FOR ONLINE CONSUMER PROTECTION

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INTRODUCTION

An impressively large number of consumer transactions are occurring online these days. Today, millions of consumers buy billions of dollars worth of goods online in a single year, and the numbers continue to grow. Presumably, the benefits to online purchases are all about efficiency. Vendors can conserve on the costs of maintaining stores and hiring employees to properly staff them. Consumers can conserve on the time and travel costs associated with shopping; and, unlike their offline counterparts, the online stores never close. To this extent, Internet transactions have been a huge success.

Despite this success, states might not be doing all that they can to increase vendor competition and thereby decrease the prices paid by consumers. Empirical studies indicate that significant price disparities for the same or similar products still exist online. Moreover, unknown and new online vendors typically must pay an extra five to ten percent of the consumer's purchase price to third-party intermediaries who help ensure that the transaction goes smoothly. The numbers suggest that known vendors might well take in more revenues at lower expense to provide the same goods to consumers that unknown vendors provide.

This Essay explores the possibility that the market for online purchases fails to work as efficiently as it can because consumers lack trust in unknown vendors, and it argues that consumer distrust in unknown vendors can and often does take the form of categorical avoidance of other unknown vendors. This avoidance of unknown vendors as a class results from the fact that trust and distrust, as cognitive phenom-

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[†] Professor of Law, Vanderbilt University School of Law. I received generous research support for this project from Vanderbilt University School of Law. Erica Beecher-Monas, Allison Danner, Tracey George, John Goldberg, David Gordon, Chris Guthrie, Larry Helfer, Steve Hetcher, Owen Jones, Kevin McCabe, Greg Mitchell, Elinor Ostrom, Robert Rasmussen, Alan Stein, Peter Swire, Mike Vandenbergh, Paul Zak, and especially Claire Hill have provided very helpful comments and suggestions for this paper. Thank you also to Julie Reed for valuable research assistance.

ena, are subject to the same biases and limitations as are other cognitive phenomena. Unknown vendors often are willing to incur some costs to signal their trustworthiness to individual consumers. Unless the other unknown vendors adopt similar trust-promoting practices, however, the unknown vendor who incurs these costs might not experience a proportionate increase in consumer trust. Instead, the investing vendor can continue to be plagued by consumers' categorical resistance to unknown vendors. Put differently, consumer distrust of unknown vendors represents a negative externality that the actions of a single vendor are often powerless to resolve.

To be sure, some unknown vendors have been successful in adopting online sales practices that promote consumer trust. When successful, previously unknown vendors become known vendors for purposes of their relevant consumer market. For many goods and consumer market niches, however, unknown vendors remain at a competitive disadvantage relative to known vendors, and the question explored in this Essay is what, if anything, contract law should do to enable unknown vendors to compete more effectively. More specifically, this Essay explores the extent to which the contract doctrine applied to online transactions, if carefully developed and uniformly applied by courts, could serve a coordinating function for vendor behavior that might work to promote consumer trust in unknown vendors. If contract doctrine could successfully aid trust enhancement, then unknown vendors could compete more effectively online at lower expense, and consumer welfare would increase. For reasons explained in this Essay, contract doctrine may prove to be too indirect a tool for promoting consumer trust, but some experimentation could nevertheless be worthwhile.

Part I of this Essay describes trust as a cognitive phenomenon and presents an informal model of the relationship between trust and the law. Part II describes the problem of online trust by consumer purchasers. Part III explores the possible ways that contract doctrines can work to enhance consumer trust. It explores conspicuousness and clarity rules designed to better notify consumers of the terms of standard-form contracts, advocates close scrutiny of arbitration clauses and blanket warranty exclusions, promotes generous damage awards, and explores several possible rules regarding the provision of information and assent to terms on websites. Each of the rules or doctrines explored exists in at least one jurisdiction, but this Essay recommends that all of the proposed legal treatments be adopted in all jurisdictions. In the United States, this bundle of contract protections will

likely be more generous to consumers than the bundle that currently exists in any one jurisdiction, but the enhanced protections might help facilitate online competition and therefore be warranted.

Part IV explores ways that these contract rules can be applied uniformly across jurisdictions to better promote consumer trust and briefly examines the success of harmonization efforts. Part IV also advocates that in the interim states should follow a place-of-consumer-residence or place-of-delivery rule for choice of law in order to provide the best incentives for states to adopt efficient protections for online consumer contracts. Even if harmonization of the online consumer protections could be achieved, however, it is not clear that consumer trust in online vendors would be significantly enhanced. To avoid the costs of consumer opportunism, the reforms advocated in this Essay are quite modest, and perhaps too modest, given the remoteness of contract law to consumer decisions, to have the effect of enhancing consumer protection in unknown vendors. Nevertheless, a summary section in Part V argues that experimentation with these modest reforms could prove worthwhile.

I. TRUST AND ITS RELATIONSHIP TO LAW

A. *Trust as a Cognitive Phenomenon*

Law and psychology is an exciting field these days. Legal scholars have focused recently on empirical and theoretical questions surrounding the incorporation of insights about the psychology of human actors.[1] The motivation for much of the early work in one sub-

[1] *See generally* BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); LAWRENCE S. WRIGHTSMAN ET AL., PSYCHOLOGY & THE LEGAL SYSTEM (4th ed. 1998); Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993); Chris Guthrie, *Better Settle than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43; Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000); Chris Guthrie et al., *Judging by Heuristic: Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44 (2002); Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115 (2003); Russell Korobkin, *The Efficiency of Managed Care "Patient Protection" Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1 (1999); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153; Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psy-*

field of law and psychology, behavioral decision theory, was to challenge the rational actor assumption underlying virtually all of the scholarship in law and economics.[2] More recently, these alternative theories of human decision making have become fruitful areas of study in their own right, and have generated a lively debate about the policy implications of this new knowledge.[3]

Separately, a rich body of norms scholarship has recently developed that attempts to explain the extralegal influences on behavior.[4] According to this scholarship, norms come in two forms: social norms and internal (or personal) norms.[5] Social norms are premised on the idea that humans evolved in groups as a necessary means for survival,[6]

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chology of Punishment, 88 CORNELL L. REV. 419 (2003); Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002); Jeffrey J. Rachlinski & Forest Jourden, *The Cognitive Components of Punishment*, 88 CORNELL L. REV. 457 (2003).

[2] *See generally* James A. Fanto, *Quasi-Rationality in Action: A Study of Psychological Factors in Merger Decision-Making*, 62 OHIO ST. L.J. 1333 (2001); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000); Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000).

[3] *Compare* Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1177-1206 (2003) (discussing the notion that behavioral decision theory implicates legal constraints on individual choice), *with* Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003) (advocating regulation that interferes only with choices of those whose decisions are tainted by irrationality), *and* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003) (proposing a series of default rules that steer people away from irrational choices and encouraging government to frame sets of choices in a manner that encourages better decision making), *and* Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. (forthcoming 2005) (advocating procedural mechanisms that increase probablitiy that people will make choices without framing and other irrational influences).

[4] *See generally* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); ERIC A. POSNER, LAW AND SOCIAL NORMS (2000); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

[5] *See, e.g.*, Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 596 (2004) (defining the two types of norms).

[6] *See, e.g.*, MATT RIDLEY, THE ORIGINS OF VIRTUE: HUMAN INSTINCTS AND THE EVOLUTION OF COOPERATION 69 (1996) (stating that hunter-gatherers tended to band together in groups of about 150 persons); PAUL H. RUBIN, DARWINIAN POLITICS: THE EVOLUTIONARY ORIGIN OF FREEDOM 7 (2002) ("Based on our brain size compared with other primates, it appears that we are adapted to groups of 150 . . . .").

and, as a result, they are often highly influenced by the reactions of other group members to their behavior and views. No doubt we seek both formal and informal membership in those groups that are accepting of our views and our way of life.[7] But the group itself also influences, at least at the margins, the views and actions of its members.[8] Any legal efforts to control, influence, or modify behavior must take these social norms and private reward and sanction systems into account. Norms scholars have also focused on internal (or personal) norms, or rules of conduct that individuals develop as part of their moral and ethical beliefs about appropriate conduct.[9] The presence or absence of internal norms can also have profound effects on the degree of legal sanction necessary to effectively influence behavior. Legal rules and sanctions can in turn affect the development and strength of both internal and social norms, because the positive law provides a signal about the harmfulness or desirability of behavior and about the normative judgment of that behavior by the larger social/political/economic group to which a member belongs.[10]

As these two bodies of scholarship—norms theory and behavioral decision theory—have developed, a few legal scholars have turned their attention to interpersonal trust, a subject that incorporates insights from both the personal norms and the psychology literature.[11] Interpersonal trust is primarily a private phenomenon that has caught the attention of social scientists and lawyers alike.[12] Most trust scholars

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[7] *Cf.* McAdams, *supra* note 4, at 360 (discussing exit from groups by members who disagree with a particular normative consensus).

[8] *See id.* ("[G]roup discussion may produce . . . a consensus.").

[9] *See, e.g.*, Michael P. Vandenbergh, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 68-69 (2003) (outlining the characteristics of internal norms).

[10] *See* McAdams, *supra* note 4, at 349 (discussing how law can influence norms).

[11] *See generally* Erin Ann O'Hara & Claire Hill, Optimal Trust (unpublished manuscript, on file with author).

[12] *See generally* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1995); TRUST: MAKING AND BREAKING COOPERATIVE RELATIONSHIPS (Diego Gambetta ed., 1988); TRUST & RECIPROCITY: INTERDISCIPLINARY LESSONS FROM EXPERIMENTAL RESEARCH (Elinor Ostrom & James Walker eds., 2003); Joyce Berg et al., *Trust, Reciprocity, and Social History*, 10 GAMES & ECON. BEHAV. 122 (1995); Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001); Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463 (2002); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q.J. ECON. 1251 (1997); Rafael La Porta et al., *Trust in Large Organizations*, AM. ECON. REV., May 1997, at 333; Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515 (2004); *Special Topic Forum on Trust in and Between Organizations*, 23 ACAD. MGMT. REV. 387 (1998); Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 ECON. J. 295 (2001); JOHN W. DICKHAUT ET AL.,

seem to agree that interpersonal trust is key to the healthy functioning of our social, political, and economic systems. While trust scholars disagree to some extent about the nature of trust, all seem to accept that trust involves a willingness to make oneself vulnerable to another despite a risk that the other will exploit that vulnerability.[13] From a psychological perspective, trust as a concept fits comfortably into "the family of such notions as knowledge, belief, and the kind of judgment that might be called assessment."[14] In short, trust is beginning to be understood as an essentially cognitive phenomenon.[15]

Once trust is conceptualized as a cognitive phenomenon, it becomes possible to analyze trust as a judgment or assessment that is subject to the same types of biases to which other reasoning processes are subject. For example, the experimental literature indicates that people act as though they trust one another even in one-shot, anonymous, experimental settings where lack of trust might instead seem appropriate. If these subjects can be said to "overtrust" from the perspective of the rational actor, then we need an explanation for this systematic tendency to behave irrationally. Evolutionary theorists posit that initial tendencies to cooperate, at least where the stakes are small, help to foster the development of cooperative relationships, which are essential to human survival.[16] Norms of cooperation, whether social or internal, can help to strengthen these tendencies. Other cognitive biases appear to be present in the context of trust. For example, distrust of another person in one context can spill over into distrust of that person in other contexts[17] as well as into distrust of others associated with that person.[18] When trust is treated as a cognitive phe-

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TRUST, RECIPROCITY, AND INTERPERSONAL HISTORY: FOOL ME ONCE, SHAME ON YOU, FOOL ME TWICE, SHAME ON ME (Econ. Sci. Lab., Univ. of Ariz., working paper).

[13] *See* Denise M. Rosseau et al., *Not So Different After All: A Cross-Discipline View of Trust*, 23 ACAD. MGMT. REV. 393, 395 (1998) (noting the widely held scholarly definition of trust as "a psychological state comprising the intention to accept vulnerability based upon positive expectations of the intentions or behavior of another" (emphasis omitted)).

[14] RUSSELL HARDIN, TRUST AND TRUSTWORTHINESS 7 (2002).

[15] For a further explanation of this topic, see O'Hara & Hill, *supra* note 11.

[16] *See generally* Robert Kurzban, *Biological Foundations of Reciprocity*, *in* TRUST & RECIPROCITY, *supra* note 12, at 105.

[17] *See* O'Hara & Hill, *supra* note 11 (manuscript at 4).

[18] For a discussion of the difficulties associated with trusting members of an "outgroup," see Roderick M. Kramer, *Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. PSYCHOL. 569, 588 (1999). On ingroup and outgroup attitudes generally, see Marilynn B. Brewer & Roderick M. Kramer, *The Psychology of Intergroup Attitudes and Behavior*, 36 ANN. REV. PSYCHOL. 219 (1985).

nomenon, it also becomes possible to explore why trust is often slow to develop yet quick to break down.[19] Similarly, the cognitive perspective also enables us to predict and test the extent to which the average resilience of trust differs significantly across contexts.[20] Some of these trust biases might turn out to serve important functions and therefore be "rational" in some larger or longer-term sense, but the point here is simply that we cannot always count on individuals to trust one another at a socially optimal level.

The policy implications of using law to foster trust appear more complex when the psychological perspective on trust is adopted. If trust were indistinguishable from cooperation and trade, then, in all contexts outside of illegal conspiracies,[21] the law should work to maximize trust in relationships. After all, cooperation and trade generally appear to be unmitigated goods. Once we view trust as a cognitive assessment, however, it becomes clear that people are sometimes prone to trust too much and sometimes too little, depending on the social context of the trust assessment. Sweeping generalizations about the normative relationship between law and trust are no longer possible; instead, more trust is desirable in some cases and less trust preferable in others. In short, legal scholars need to begin to think about how to promote "optimal trust,"[22] and they must think hard about how trust is formed, maintained, and eroded in different types of relationships.

B. *Trust and Law as Complements or Substitutes?*

The positive relationship between law and trust is a subject of current commentary because scholars apparently disagree about the extent to which law and trust are substitutes for or complements to one another. Their disagreement stems in part from the fact that scholars disagree over the applicability of trust in different interpersonal settings. Oliver Williamson, for example, has taken the position that trust is reserved only for interactions in close, personal relationships

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[19] *See* Blair & Stout, *supra* note 12, at 1776 (discussing the potential fragility of trust); Diego Gambetta, *Can We Trust Trust?*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS, *supra* note 12, at 213, 233-34 (discussing the fragility of trust but also the immunity of distrust to contrary experience).

[20] *See* O'Hara & Hill, *supra* note 11 (manuscript at 5-6).

[21] *See* Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1325 (2003) (discussing the benefits of trust in criminal conspiracies); Leslie, *supra* note 12, at 547 ("Criminal conspiracies require trust just as beneficial cooperative ventures do.").

[22] *See generally* O'Hara & Hill, *supra* note 11.

and has nothing to do with interactions in business contexts.[23] Williamson reaches this conclusion because he believes trust is relevant only in situations where people are interacting for noninstrumental reasons. When parties behave instrumentally, policymakers must instead focus their analysis on building institutional constraints (including law) on parties' opportunism.[24] To Williamson, then, trust and law are not only substitutes for each other, they also cannot coexist as motivational factors.

To other scholars, however, trust is present even in those contexts where behavior is instrumental.[25] People often strive to structure their transactions and business relationships to maximize the likelihood that the parties behave appropriately, but despite these efforts, some duty is inevitably left unspecified, monitoring is expensive, and enforcement is imperfect.[26] In fact, to the extent that parties trust one another in a commercial context, they can conserve the transaction costs associated with structural constraints.[27] A broader conception of trust suggests that trust operates whenever the structural constraints cannot guarantee cooperative behavior. In these cases, the trust assessor must confront the possibility that the trust target might act in an

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[23] Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 J.L. & ECON. 453, 469 (1993) ("I maintain that trust is irrelevant to commercial exchange and that reference to trust in this connection promotes confusion.").

[24] *See id.* at 485 ("'[C]alculated trust' [is] a contradiction in terms . . . .").

[25] Several scholars have taken Williamson to task for his position. *See, e.g.*, Blair & Stout, *supra* note 12, at 1748-50; Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. 591, 603-08 (2001); Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, 24 J. CORP. L. 869, 888-91 (1999); Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 563-64 (2001). Moreover, Robert Frank has recently explored the possibility that nonconscious moral values such as trustworthiness serve important instrumental ends, calling into question the power of the instrumental/noninstrumental dichotomy. ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS (1988).

[26] *See generally* Ernst Fehr & John A. List, *The Hidden Costs and Returns of Incentives—Trust and Trustworthiness Among CEOs*, 2 J. EUR. ECON. ASS'N 743 (2004).

[27] Margaret Blair and Lynn Stout have written:

> Where trust can be harnessed, it can substantially reduce the inefficiencies associated with both agency and team production relationships. Trust permits transactions to go forward on the basis of a handshake rather than a complex formal contract; it reduces the need to expend resources on constant monitoring of employees and business partners; and it avoids the uncertainty and expense associated with trying to enforce formal and informal agreements in the courts. Trust behavior also reduces losses from others' undetectable or unpunishable opportunistic behavior, losses that could discourage the formation of valuable agency and team production relationships in the first place.

Blair & Stout, *supra* note 12, at 1757.

untrustworthy fashion. When these gaps exist, and they almost always do, trust plays a role in parties' interactions. As Russell Hardin writes:

> Giving people very strong incentives seems to move them toward being deterministic actors with respect to the matters at stake. At the other extreme, leaving them with no imputable reasons for action generally makes it impossible to trust them. Trust and trustworthiness (and choice and rationality) are at issue just because we are in the murky in-between land that is neither deterministic nor fully indeterminate.[28]

Note that from this alternative perspective the law and trust can work together in complementary fashion. Put differently, a legal rule can serve the function of giving a person an imputable reason for another's action. So long as the effect of the law is not so overpowering as to make the actor's choice deterministic, trust judgments work in the space between the two extremes described by Hardin to inform the trust assessor's willingness to interact with the target.

Norms also help to provide an imputable reason for a particular action.[29] Social norms are tied to rewards and sanctions that provide their own incentives for behavior. In contrast, internal norms of trustworthiness constrain an actor's willingness to behave opportunistically, even in the face of significant monetary or other temptations.[30] Both social and internal norms (or their absence) thus work together to provide an "imputable reason" why it might be reasonable to predict that an actor will act in a trustworthy (or an untrustworthy) fashion. The difference between the two types of norms, however, is that social norms work like law in that the reason a party abides by them is instrumental. As in the case of law, a strong enough social norm influence could, at least in theory, obviate the trust inquiry. Internal norms of trustworthiness (along with assessments of competence), by contrast, are often the very focus of the trust assessment. Put differently, to the extent that external constraints do not guarantee trustworthy behavior, the assessor must ultimately determine the degree to which the actor is driven by internal norms of trustworthiness. A trustworthy person will be inclined to resist behaving according to her own short-term interests and instead will feel a commitment to do the

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[28] HARDIN, *supra* note 14, at 12.

[29] *See* Jack Knight, *Social Norms and the Rule of Law: Fostering Trust in a Socially Diverse Society*, *in* TRUST IN SOCIETY 354, 359 (Karen S. Cook ed., 2001) ("When the content of the norms dictates cooperative behavior, social actors can use this information to develop expectations about the likelihood that others will cooperate . . . .").

[30] *See* FRANK, *supra* note 25, at 18, 69 (discussing the long-term benefits of this trustworthy behavior, which requires the short-term sacrifice of potential benefits).

right thing, including to keep her promises. Of course, the temptation to behave in an untrustworthy fashion can at some point become so great that the relatively trustworthy person submits to the temptation.[31] But the more trustworthy a person, the greater that temptation must be before the person will deviate from the path of trustworthy behavior.

The fact that law can influence social norms and that the two (law and social norms) together can have powerful influences on individuals who lack internal norms of trustworthiness leads some to question whether law can in fact interfere with the development of trust. For example, Larry Ribstein recently took the position that law always interferes with trust because it has the effect of taking away the very vulnerability that trust requires.[32] From his perspective, the idea that law could ever work to enhance or foster interpersonal trust seems oxymoronic.[33]

I propose a different conception of the relationship between law and trust. Let us label this conception the "safety net assessment." Once we view trust as a cognitive assessment of one's willingness to make oneself vulnerable to another, then it becomes possible to think of the vulnerability in quantitative terms. People differ significantly in their willingness to trust others based on early life experiences.[34] In addition, people trust some more than others, and they trust the same

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[31] *See* Jay B. Barney & Mark H. Hansen, *Trustworthiness as a Source of Competitive Advantage*, 15 STRATEGIC MGMT. J. 175, 179 n.3 (1994) ("In principle, some level of compensation will always exist where strong form trustworthy exchange partners will abandon their values, principles, and standards of behavior, and act in opportunistic ways.").

[32] *See* Ribstein, *supra* note 25, at 580-81 ("[R]egulation decreases the sense of vulnerability that is critical to personal trust.").

[33] *See id.* at 562 ("Law may dispose one party to *rely on* another because the other is subject to legal constraints. But this has nothing to do with the distinct concept of *trust*.").

[34] *See generally* Julian B. Rotter, *A New Scale for the Measurement of Interpersonal Trust*, 35 J. PERSONALITY 651 (1967); Julian B. Rotter, *Generalized Expectancies for Interpersonal Trust*, 26 AM. PSYCHOLOGIST 443 (1971); Julian B. Rotter, *Interpersonal Trust, Trustworthiness and Gullibility*, 35 AM. PSYCHOLOGIST 1 (1980). Those who grew up in privileged, sheltered environments tend to enter the adult world with high levels of trust in others. In contrast, those who were abused and/or severely neglected as children tend to enter the adult world with very low levels of trust in others. HARDIN, *supra* note 14, at 116-19. Because high-trust individuals are more willing to interact with others in meaningful ways than are low-trust individuals, those who place too much trust in others are more likely to receive feedback suggesting that their assessments need to be modified than those who place too little trust in others. *Id.* at 119-24.

people differently in different contexts.[35] Most, but not all, interpersonal relationships start out with relatively little trust simply because the parties lack trust-relevant information about each other. Typically, the parties take small trust steps initially while only gradually increasing the degree to which they are inclined to make themselves vulnerable to one another.[36] Moreover, even in relationships that obtain high trust levels, the parties often also must contend with pockets of distrust.[37] For example, I might trust my friend with my children and my car but distrust the likelihood that she will pay back money or return clothes that she has borrowed. Arenas of trust and distrust differ from relationship to relationship, but the important point here is that both trust and distrust are informed by the experiences that people have with other people in general and the trust target in particular.

With each trust judgment, the evaluator must assess whether she is willing to make herself vulnerable by plunging off a metaphorical cliff. Notice that the degree to which she is willing to make herself vulnerable turns on: (1) her own propensity to trust others; (2) the degree of interpersonal trust in the general environment or society;[38] and (3) her assessment of the other's trustworthiness. Moreover, people seem to make decisions about whether to trust another based on the extent to which the other can be trusted to (1) not act against the assessor's interests, and (2) act with basic competence. If the assessor has complete trust in the other person, she is willing to take a step off the edge of the cliff regardless of the vertical distance between the edge and the ground. In her complete trust, she is confident that before she hits the ground a very thick, sturdy, and soft safety net will cushion her fall. When she trusts completely, she does not perceive a risk that she might be hurt as a consequence of her interaction, even though her vulnerability might be great. In contrast, if she affirmatively distrusts another person, she might feel relatively certain that if she takes a step off the cliff then she will fall a fair distance with no net at all to cushion her fall. At the beginning of a relationship, when the assessor lacks reliable trust information, the assessor must determine the ex-

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[35] *See* Roy J. Lewicki et al., *Trust and Distrust: New Relationships and Realities*, 23 ACAD. MGMT. REV. 438, 442 (1998) ("Within the same relationship we have different encounters in different contexts with different intentions that lead to different outcomes.").

[36] *See* O'Hara & Hill, *supra* note 11 (manuscript at 22-23, 32).

[37] *See* Lewicki et al., *supra* note 35, at 443-44 (noting that parties often compartmentalize their relationships).

[38] *See generally* FUKUYAMA, *supra* note 12.

tent to which she is willing to fall in the event that she mistakenly trusts. The assessor may be willing to take the risk of a fairly short drop—say a step or two down—but she is likely unwilling to make herself vulnerable to falling much farther because she lacks information about the reliability of the safety net.

Under this safety-net conception, the external constraints—law and social norms—are serving to add fortification to the safety net. If legal protections are weak, monitoring difficult, and sanctions hard to impose, then very little is added to the strength of the safety net. If legal and/or social incentives are instead powerful constraints on behavior, then they can provide so thick and sturdy a safety net that the assessor is no longer inclined to worry about the integrity of the actor's net standing alone. In fact, if legal and social sanctions were perfectly effective in influencing behavior, then the actor would have no incentive to invest in fortifying his own net—through reputation, goodwill, or otherwise.[39] Instead, he knows that the assessor will rely solely on the availability of the net built by society.

The assessor must determine whether or not to undertake a vertical drop associated with an interaction. Her willingness to take the plunge turns both on the strength of the net (which is affected by law, social norms, and an assessment of the actor's trustworthiness) and the magnitude of the vertical drop associated with the plunge. If the vulnerability is perceived to be quite small, then the drop is shallow, and the assessor will often be willing to take the plunge regardless of the strength of the safety net. Put differently, small potential risks are often undertaken without any information about legal sanctions or the other's trustworthiness.[40]

To the extent that interactions are lumpy, however, so that the plunge cannot be confined to de minimis vertical falls, then the assessor may be unwilling to take the plunge due to lack of information about the investment of the actor in the strength of the net (his trustworthiness). To the extent that law can work to help fortify the net, the assessor becomes more willing to take the plunge. Social sanctions can have the same effect, at least to the extent that the assessor and the actor can be said to belong to the same group. But in many cases, the plunge will not be taken without the safety net that law provides. And by providing an incentive for the assessor to take the first

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[39] *Cf.* Ribstein, *supra* note 25, at 555 (arguing that mandatory laws can crowd out trust).

[40] Presumably this is the cooperation among strangers observed in many social dilemma game experiments.

plunge, the law can make it possible for the creation of interpersonal trust in that relationship—i.e., discovery that the other party's net is quite safe—that is strong enough to make the parties take greater plunges in the future.[41]

C. *The Truster's Copayment?*

The challenge for policymakers, it seems, is to find a way for the law to help fortify the safety net available to the assessor without removing the incentive of the actor to invest in his own safety-net fortification. That is, the law must aim to encourage the development of internal norms of trustworthiness while at the same time encouraging assessors who lack trust-relevant information to nevertheless take the plunge. The optimal trust-fortification regime might therefore be one under which the government acts as imperfect insurer of trust decisions with legal rules and sanctions, but the assessor is effectively forced into a copay[42] arrangement under which she must incur some, but not all, of the costs of mistakenly trusting. Ideally the copay amount is small enough not to discourage initial interactions, yet large enough so that the assessor is vigilant to act on cues—i.e., reputation—which suggest that distrust is more appropriate. By encouraging continued vigilance by the assessor, the copay arrangement causes the actor to continue to invest in trustworthiness.

Notice that the optimal amount of the trust assessor's copayment turns critically on several factors, including but certainly not limited to the relationship of the parties (which reflects the extent to which their preferences are interdependent), the degree to which the assessor and the actor can be said to belong to the same social group (where social norms also constrain behavior), the ability of the assessor to otherwise obtain information about the actor's reputation for trustworthiness, the likelihood that the actor must make parallel trust assessments about the assessor, and the overall degree of vulnerability that the interaction represents for the parties.[43]

In contrast to arm's-length transactions, fiduciary relationships that are one-sided in trust can cause greater difficulties for the parties

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[41] Ribstein dismisses without explanation this role of law in promoting trust. Ribstein, *supra* note 25, at 564.

[42] I am indebted to Claire Hill for pointing out that the optimal structure here is identical to the medical copay arrangement for patients.

[43] If the relationship is of a type that is characterized as one of mutual high or thick trust, as is the case with family, then the law need not step in as insurer at all.

entering them. For example, once a doctor-patient or a lawyer-client relationship is formed, the client or patient very often places significant trust in the competence and loyalty of the lawyer or doctor. If, however, the patient or the client knows that others have been significantly harmed by trusting the doctor or the lawyer, then the trust necessary to the development of these relationships is eroded. In this context, the law places special duties of loyalty and care on the trusted person to signify the importance of his trustworthiness. Moreover, both the medical and legal fields are regulated and monitored by organizations charged with ensuring the delivery of high-quality services. In these cases, the aim of the law presumably is to keep the copayment low enough so that people feel comfortable entering these relationships of vulnerability.

The challenge, as always, is to avoid making the fiduciary duties so rigorous that professionals are afraid to vigorously advocate for their patients' and clients' well-being. If the duties are too onerous, the professionals practice defensively rather than optimally. On the other hand, once it is determined that the professional has violated his duty, the law should work hard to fully compensate the patient or client for the harm that she suffered as a result of the breach. In any event, *ceteris paribus*, we would tend to expect that the copayment required for each party in a legal relationship will vary inversely with the vertical height of the plunge and the ability (and desirability) of the parties to gather and disseminate their own information about the other party's trustworthiness.

In summary, so long as legal and social sanctions working together are not so powerful that they guarantee full contract performance by each party, then law and trust can work together in complementary fashion. To some extent, however, law and trust function as substitutes in that legal protections can work to decrease (if not eliminate) the extent of vulnerability associated with contracting. To the extent that the law works to decrease rather than eliminate contracting parties' vulnerability, or copayment, legal rules can work to promote interpersonal trust by increasing parties' willingness to initiate a smaller-scale contractual relationship where they would not otherwise be willing to contract. To the extent that these contracting experiments go well, the parties are more willing to embark on longer-term and higher-value contractual relationships. In these circumstances, law and trust begin as substitutes, but overall we might expect the two to end up working in complementary fashion.

II. ONLINE TRUST BY CONSUMER PURCHASERS

This Part argues that consumer trust is essential for online transactions, that consumer trust in some ways is more difficult to obtain by online vendors than by brick-and-mortar vendors, and that unknown vendors are likely to suffer most from problems of consumer trust. If consumers are unwilling to experiment with unknown vendors, then the Internet fails to create competitive pressures that serve to erode online price dispersions between vendors. When competitive pressures are relaxed, consumers pay more for their products, and consumer welfare is thus not maximized. This Part further argues that applicable contract law can help to foster consumer trust in online vendors, but choice-of-law decisions need to help facilitate the incorporation of trust-enhancing rules for online consumer transactions. Parts III and IV, respectively, will explore the content of trust-enhancing contract rules and the difficulties of obtaining them on an international level.

A. *Trust and Contract*

To what extent should contract law be shaped by trust concerns? In distinguishing fiduciary from mere contract relationships, commentators often focus on the fact that fiduciary relationships are trust relationships, whereas contract relationships typically are of the arm's-length, caveat emptor type.[44] From this perspective, one might conclude that contract law itself has nothing to do with trust. I take a different position here, by asserting that fiduciary obligations are just one of the many situations where lawmakers worry about interpersonal trust in relationships.

Duties of care and loyalty are imposed on professionals who enter relationships as fiduciaries. These duties are designed to encourage trust on the part of the nonprofessional while simultaneously encouraging trustworthy behavior on the part of the professional. Fiduciary relationships often cannot work effectively unless the nonprofessional's trust assessments are fundamentally noncalculative. Put differently, in fiduciary relationships one of the parties often must place herself in a position of blind trust regarding the loyalty and competence of the professional. Without unquestioning trust, the nonprofessional might fail to disclose information that is valuable to the con-

[44] *See, e.g.*, Bain v. Champlin Petroleum Co., 692 F.2d 43, 47 (8th Cir. 1982); Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

ferral of high quality professional services.[45] Moreover, at least in the medical field there is some evidence that blind trust works as a placebo to improve the patient's condition even before the doctor renders her aid.[46] If patients and clients are worse off in environments where they consciously process trust-relevant information about the professional during the course of the professional's service provision, then fiduciary duties become one of the law's methods of promoting an environment where blind, or noncalculative, trust follows.[47]

In contrast, nonfiduciary contractual relationships are, by definition, not relationships that policymakers believe need to be fostered by blind or unquestioning trust. Instead, arm's-length relationships are those where the parties are encouraged to scrutinize each other and pay attention to and bargain for those terms that each believes are important to the transaction. In this setting, the law promotes conscious calculations about both the trustworthiness of the other and the duties that each is undertaking. One of the ways that the law promotes conscious calculation is by ensuring that trust assessors are left with a copayment in the event the other party behaves in an untrustworthy fashion. In this sense, one might conclude that contract law does not serve to promote trust.

Nonetheless, contract law in general serves the important safety-net function described in Part I in that it enables strangers to be willing to interact, potentially to their mutual advantage. Without a reliable contract law system, parties are inclined to do business only with family, friends, and close community members.[48] Much of the value of

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[45] *Cf.* Miriam J. Metzger, *Privacy, Trust, and Disclosure: Exploring Barriers to Electronic Commerce*, J. COMPUTER-MEDIATED COMM., July 2004, *at* http://jcmc.indiana.edu/vol9/issue4/metzger.html ("Trust is perhaps the most important influence on information disclosure . . . . [It] is a precondition for self-disclosure because it reduces the perceived risks involved in revealing private information . . . .").

[46] *See* Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 479 (2002) ("[T]he doctor himself is a placebo . . . ."); Erin Ann O'Hara, *Apology and Thick Trust: What Spouse Abusers and Negligent Doctors Might Have in Common*, 79 CHI.-KENT L. REV. 1055, 1080 (2004) ("[T]rust in the physician can have a powerful placebo effect on patients.").

[47] Presumably, physician licensing requirements and medical malpractice liability are the other legal methods for encouraging high levels of patient trust. There are several nonlegal mechanisms that also work to promote patient trust in their doctors. *See* O'Hara, *supra* note 46, at 1081 (noting that doctors' practice behaviors tend to emphasize both the doctors' elevated social status and competence and the patients' vulnerability, which tend to increase patient trust).

[48] *See* Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law,* 10 J. LEGAL STUD. 349, 351 (1981) ("Under conditions of contract uncertainty . . . a rational trader will not indiscriminately enter

a contractual relationship lies in the fact that it enables each of the parties to rely on the contract and to therefore move on to address other concerns for the future. Without contract law, each party must very carefully assess the extent to which the other is reliable, and many possibly advantageous trades therefore would not occur without significant information about the trustworthiness (and reliability) of the other person. An effective contract law system serves the function of providing a safety net that is sufficiently strong so that it makes people willing to contract with acquaintances and strangers—to take the leap of faith—at least for small-value transactions. By expanding the possible trading partners for each person, contract law makes us all wealthier because it provides greater possible gains from exchange.

In addition, contract law to some extent serves the egalitarian function of providing incentives for each person to branch out of her tight-knit, cliquish community to deal with people of different classes, backgrounds, and beliefs. Of course, the law cannot go too far in this direction if we simultaneously wish to satisfy other goals. In particular, the ultimate goal of contract law must be to help fortify, rather than replace, the safety net of the parties. Contract law provides incentives for strangers to be willing to contract with one another, but ultimately we are all better off if people still have incentives to be trustworthy—that is, to be reliable and hardworking. To keep this incentive in place, the law cannot guarantee full compensation for breach of promises, even where we believe that the breacher had a moral obligation to keep the promise.[49]

Consider, for example, a legal system that guaranteed full compensation in the event of a breach of promise. To be effective, that system would have to award plaintiffs enough to compensate them for their attorney and court fees, and for the opportunity costs of their time spent mitigating damages and seeking relief. Moreover, that system would have to insure the promise in the event that the promisor

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into impersonal exchange relations with anonymous traders."); Janet T. Landa & Xiao Tian Wang, *Bounded Rationality of Economic Man: Decision Making Under Ecological, Social, and Institutional Constraints*, 3 J. BIOECON. 217, 227 (2001) (noting that Chinese rubber merchants—who operate under an uncertain contract scheme—tend to choose as trading partners "kinsmen, friends, people from the same place in China and those who speak the same dialect").

[49] Even in Europe, where specific performance is nominally the primary remedy, parties routinely seek and receive money damages for breach of contract. *See generally* HENRIK LANDO & CASPAR ROSE, THE MYTH OF SPECIFIC PERFORMANCE IN CIVIL LAW COUNTRIES (Am. Law & Econ. Ass'n Annual Meetings, Paper No. 15, 2004), *available at* http://law.bepress.com/alea/14th/art15/.

cannot be made to answer in damages for the breach by reason of bankruptcy, lack of funds, inability to attach assets, or inability to locate the promisor. A strong-form guarantee of compensation might well prove expensive for the government, especially as people slowly become indifferent to the trustworthiness of those with whom they contract. The insurance function of the government would increase over time under that system.

With an imperfect safety net, the promisee still has an incentive to pay attention to trust-relevant information about the promisor, and by paying attention to that information, the promisors of the world retain an incentive to perform as they have promised. In the process, the imperfect safety net might also have the effect of biasing people's choices of contract partners in favor of those about whom they believe they have reliable trust-relevant information. We ask our friends, neighbors, colleagues, and churchmates for advice about where to get needed goods and services, and employers often consult trusted recommenders before making hiring decisions. In short, a well-functioning contract law system can encourage significant trade with strangers but will likely fail by itself to produce radical shifts toward egalitarianism.

The adoption of trust-enhancing contract rules, even where potentially valuable, must proceed cautiously, for several reasons. First, to craft doctrines that discourage all untrustworthy (including unreliable) behavior, contract law must abandon formal rules and move toward standards of good faith, reasonableness, and fairness.[50] Otherwise, the safety net would not take the shape necessary to provide optimal incentives. On the other hand, it is generally understood that vague standards create costly uncertainties for contracting parties.[51] The imposition of vague standards might be avoidable in those contract settings where the parties have detailed knowledge of one an-

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[50] For example, the consideration rule for contract modification has been replaced by inquiries into "good faith" and "legitimate commercial reason" under the Uniform Commercial Code, U.C.C. § 2-209 cmt. 2 (2004), and into an inquiry about what is "fair and equitable" and about what "justice requires" under the RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981). Similarly, exclusive dealing requirements now require "best efforts" under the Uniform Commercial Code. U.C.C. § 2-306(2).

[51] *See, e.g.*, Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1227-28 (1982) (noting that standards, as opposed to rules, might "breed uncertainty" and "discourage people from entering into transactions"); Frank H. Easterbrook, *Afterword: On Being a Commercial Court*, 65 CHI.-KENT L. REV. 877, 877 (1989) ("A good commercial judge prefers rules to standards, for even when a rule is flawed people may form contracts against a known background.").

other's reputations and the ability to use social sanctions to induce compliance with appropriate standards of behavior.[52] In any event, the shift from traditional common law contract rules toward standards[53] no doubt reflects the fact that over time more contracting parties found themselves interacting with strangers on the basis of limited information and that the law sought to validate and encourage these relationships.[54] The challenge for courts and legislatures is to use contract law to enhance trust while minimizing where possible its resort to vague standards.

Second, legal reformers must be careful that they not deliver to the protected party a sword along with its shield. Put differently, to the extent that contracting parties cannot know ex ante which one of them is at greater risk of breach, the law must be careful in protecting one party that it not empower that party to use its protection in an untrustworthy fashion.[55] Consider, for example, the parol evidence rule. A court might be concerned that the parol evidence rule enables a party—call him *A*—to make oral representations that cause reliance by the other party—call her *B*—but that ultimately are unenforceable. To enhance the willingness of *B* to enter a contract, the court could relax the parol evidence rule and enable oral evidence to be admitted in court. Once oral evidence is admissible at trial, however, the pro-

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[52] Some commercial parties are effectively able to ignore or avoid governing contract law through private sanctions and/or private dispute resolution. *See, e.g.*, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Regulations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992) (noting that diamond traders "have developed an elaborate, internal set of rules, complete with distinctive institutions and sanctions, to handle disputes among industry members"). The more general point emphasized in the text is that rules might be appropriate for some contractual settings even though standards must be resorted to in others.

[53] *See, e.g.*, E. Allan Farnsworth, *Some Prefatory Remarks: From Rules to Standards*, 67 CORNELL L. REV. 634, 634 (1982) (examining the bases for this shift); Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 260-61 (1995) (documenting the existence of this shift); *see also* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 442 (1999) (questioning whether the shift from rules to standards in contract law will increase the role of the jury).

[54] *Cf.* Lynne G. Zucker, *Production of Trust: Institutional Sources of Economic Structure, 1840-1920*, 8 RES. ORGANIZATIONAL BEHAV. 53, 53 (1986) (suggesting that high rates of immigration, internal migration, and business enterprise instability during the late nineteenth and early twentieth centuries led to a disruption of informal interpersonal trust and to the necessity of providing alternative institutional-based trust measures, including government regulation and legislation regarding transactions).

[55] *See* Ribstein, *supra* note 25, at 576 ("[I]mposing extra duties to reduce the parties' vulnerability to the risk of disappointment may increase their vulnerability to opportunistic litigation.").

tected party, *B*, can bring a false claim of an oral promise to get a better deal than was negotiated. In response to this possibility, *A* now might wish to avoid the transaction. By enabling the introduction of oral promises into court, one party is more inclined to contract but the other may be less inclined. If the effect is severe enough, the law will have failed to encourage enhanced overall trust in the relationship. To the extent that contract rules work in practice in zero-sum fashion, it will not be possible to enhance trust by altering contract law.

Sometimes, however, as in the case of fiduciaries, the parties are not on a symmetrical footing when it comes to trust. If the negotiations or the subject matter of the transaction indicate either that only one party faces significant trust concerns or that the parties' trust concerns significantly differ, then it might be possible to use some of the contract doctrines to enhance the net trust in the relationship. To the extent that asymmetries regarding vulnerability are systematic across contracts within certain types of relationships, it might be possible to craft a contract doctrine that addresses the trust asymmetry in those relationships.[56]

Trust can be enhanced through contract law in at least three ways. First, to the extent that contract law consists of default rules, and those default rules are not designed already to foster maximum trust in the product or service, the drafting party can circumvent the default rule by providing the other party with more protection than the more party-neutral rule provided. In this way, a party that faces an unwilling transactor can draft the contract in a way that signals its trustworthiness. For example, car manufacturers have, in recent years, been falling over themselves to provide the customer with extensive warranties that are more generous than both those required by governing law and those provided as a matter of contract default rules. When the manufacturer provides these extra warranties, it is signaling that it can be trusted to produce a high-quality product.

Second, sometimes contract rules themselves are designed to promote trust, even when they take the form of mere default rules.

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[56] For example, sometimes a party's vulnerability results in part from the fact that she lacks access to information accessible to the other party. In those situations, the law can impose a duty to disclose the information to the party who lacks adequate access to it. For example, duties imposed on sellers of used homes to disclose known hidden or latent defects are justified on this basis. *See* Posner v. Davis, 395 N.E.2d 133, 136-37 (Ill. App. Ct. 1979); Lawson v. Citizens & S. Nat'l Bank of S.C., 193 S.E.2d 124, 126-27 (S.C. 1972); Cushman v. Kirby, 536 A.2d 550, 552 (Vt. 1987); Obde v. Schlemeyer, 353 P.2d 672, 674-75 (Wash. 1960).

For example, the Uniform Commercial Code (U.C.C.) provides that, unless the parties provide otherwise, certain warranties will attach to the contract.[57] Moreover, unless the contract provides otherwise, the nonbreaching party will be entitled to recover specified types of damages.[58] In a sense, these default rules serve to signal to the contracting parties the types of behavior that would be considered trustworthy. In addition to these default contract rules, in some cases, courts use rules of interpretation or other procedural devices to scrutinize contract terms with an eye toward encouraging trustworthiness on the part of the drafter. For example, warranty language in a contract can be read broadly and limitations on the warranty can be scrutinized according to rules requiring that they be conspicuous and/or clear in their effect.[59]

Finally, default drafting and interpretational rules can be supplemented, where necessary, with mandatory rules that encourage trust. Laws against fraud, conspiracy, theft, and unconscionable contract provisions are obvious candidates, as are laws that require information disclosure and laws that impose good-faith and fair-dealing obligations on the parties performing under the contract. Of course, these mandatory rules often are the most contentious, and courts and legislatures must continually struggle with the balance between the policy in favor of private ordering and the need for contract law to enhance trust, or reduce the copayment in the event that the victim's trust was misplaced.

The relationship between trust and both default and mandatory contract rules is an interesting one. A more general systematic trust in the contracting environment can be enhanced with default rules that provide protection against opportunism. Protective default rules can serve to dilute the signaling function of terms specific to an individual contract, however, because adding a protective term to a given contract signals a party's trustworthiness, and that signal is not sent (or at least is less effectively sent) if the term already exists as either a mandatory or a default contract rule. A business wishing to enter into contracts with consumers presumably benefits from both a more trust-

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[57] Under the U.C.C., the merchant provides, unless excluded, an implied warranty of merchantability. U.C.C. § 2-314 (2004). In addition, in some circumstances the merchant warrants the goods as fit for a particular purpose, unless the contract states otherwise. *Id.* § 2-315.

[58] U.C.C. §§ 2-718 to -719 provide for limitation of applicable remedies.

[59] For example, the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (2000), requires, inter alia, that warranty provisions be described in common language. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 361-62 (4th ed. 1995).

ing contracting environment and the ability to signal its own unique trustworthiness relative to its competitors. This suggests that contract rules should be trust-enhancing, but in an optimal rather than either a minimal or maximal sense. Moreover, optimal contract rules might well turn on how much trust consumers have in the contracting environment independent of the law.

B. *Trust and the Internet*

Trust appears to be a significant issue for consumers who consider participating in Internet transactions.[60] "[C]onsumers prefer to do business with Web sites that they perceive to be reliable, honest, consistent, competent, fair, responsible, helpful, and altruistic—key components of trust."[61] "Many believe that lack of customer trust . . . is to be blamed for problems that Internet businesses face with online customers."[62] And the problem of customer trust comes from the fact that in highly uncertain trading environments, parties tend to stick with those they trust the most.[63] Trust, in turn, depends a lot on familiarity, because trust judgments often depend on a firm's reputation and the customer's personal experience with a company.[64] The uncertainties of Internet transactions are exacerbated by the fact that consumers cannot touch or try out merchandise online unless it is digital,[65] and the trust issues are exacerbated by the fact that "[t]he lack of social cues such as greetings, small talk and the like, makes online communications efficient and culturally neutral, but at the same

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[60] *See, e.g.*, Mary J. Culnan & Pamela K. Armstrong, *Information Privacy Concerns, Procedural Fairness, and Impersonal Trust: An Empirical Investigation*, 10 ORGANIZATIONAL SCI. 104, 104 (1999); Sirkka L. Jarvenpaa & Peter A. Todd, *Consumer Reactions to Electronic Shopping on the World Wide Web,* INT'L J. ELECTRONIC COM., Winter 1996-1997, at 59, 64-65; Helen Nissenbaum, *Securing Trust Online: Wisdom or Oxymoron?*, 81 B.U. L. REV. 635, 636 (2001); Venkatesh Shankar et al., *Online Trust: A Stakeholder Perspective, Concepts, Implications, and Future Directions*, 11 J. STRATEGIC INFO. SYS. 325, 325-26 (2002); FAREENA SULTAN ET AL., DETERMINANTS AND ROLE OF TRUST IN E-BUSINESS: A LARGE SCALE EMPIRICAL STUDY 3 (MIT Sloan Sch. of Mgmt., Working Paper No. 4282-02, 2002), *available at* http://ssrn.com/abstract_id=380404 (last visited Mar. 31, 2005).

[61] Metzger, *supra* note 45.

[62] Sirkka L. Jarvenpaa & Emerson H. Tiller, *Customer Trust in Virtual Environments: A Managerial Perspective*, 81 B.U. L. REV. 665, 667 (2001).

[63] *See id.* at 668.

[64] *See id.*

[65] *See id.* at 668-69; *see also* William R. Swinyard & Scott M. Smith, *Why People (Don't) Shop Online: A Lifestyle Study of the Internet Consumer*, 20 PSYCHOL. & MARKETING 567, 572 (2003) (citing a study which found that fifty-six percent of Internet users reported a reluctance to shop online due to an inability to see and touch the product).

time reduce[s] the ability of parties to manifest trustworthiness."[66] The impersonal nature of the interchange makes it more difficult for the parties to identify cues of similarity, shared values,[67] and routine, reliable business procedures.[68] Moreover, the difficulties of communication make existing trust fragile and more susceptible to erosion than would be the case in face-to-face transactions.[69]

With the rise of the Internet, our purchasing choices have expanded significantly. It is no longer the case that our consumption choices are limited by driving distances and store hours. And because it takes only moments to locate a good and its price at each vendor's site, it is much easier to compare prices and thereby induce price competition among sellers. For example, consumers now can go online to buy rain jackets from Land's End, but within minutes they likely also find that several other retailers are selling rain jackets at prices below the Land's End prices.[70] We cannot be sure of the quality of the substitute products, nor can we be sure of the timing of the delivery, quality of packaging, or the accuracy of either the advertising claims or the merchant's charging behavior.[71] And the physical cues of retailer trustworthiness—as exhibited by their significant investment in bricks and mortar—are easily falsified on the Internet.[72] Put differently, even without communication and other problems that come from trading with little sensory input, online transactions often are risky due to customers' lack of information about the vendor. We

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[66] Jarvenpaa & Tiller, *supra* note 62, at 670.

[67] *Cf.* Nissenbaum, *supra* note 60, at 644-45 (mentioning the roles of shared values and similarity in creating trust).

[68] *See* Sridhar Balasubramanian et al., *Customer Satisfaction in Virtual Environments: A Study of Online Investing*, 49 MGMT. SCI. 871, 874 (2003) (discussing how offline customers take cues of reliability from observed business procedures).

[69] *See* Jarvenpaa & Tiller, *supra* note 62, at 671 n.30.

[70] The search for comparable goods to enable price comparisons has been made easier with the introduction of shopping bots, or specialized search engines offered by such companies as Yahoo!, America Online, Amazon.com, Excite, Go Shopping, mySimon, DealTime, and Bottomdollar. *See* Rajneesh Suri et al., *The Impact of the Internet and Consumer Motivation on Evaluation of Prices*, 56 J. BUS. RES. 379, 380 (2003).

[71] In the Internet retailing context, perceived risk by consumers includes at least three categories: product risk, financial risk, and transactions risk. *See* Dhruv Grewal et al., *The Influence of Internet-Retailing Factors on Price Expectations*, 20 PSYCHOL. & MARKETING 477, 480 (2003). Product risk reflects uncertainty about the quality of the product, financial risk reflects uncertainty about whether the good can be obtained at a cheaper price, and transactions risk reflects the possibility that information is not secured or might be misused by the vendor. *See id.* This Essay focuses primarily on the first risk category.

[72] *See* Ian Goldberg et al., *Trust, Ethics, and Privacy*, 81 B.U. L. REV. 407, 410 (2001); Nissenbaum, *supra* note 60, at 646-48.

do not know where the vendor resides, it does not appear to be a person belonging to our social group, and the customer reviews on its website can be fabricated. The challenge of contract law for Internet transactions is to bring the customer to the point where she is (1) willing to transact on the Internet, and (2) willing to purchase the product from the seller who is providing it at the cheapest possible price, or—at a minimum—where she is willing to purchase the same product from a seller who offers a significantly lower price.[73]

To be sure, millions of customers are overcoming their trust concerns to engage in billions of dollars of trade across the world each year.[74] Internet commerce has been growing rapidly as a mechanism to obtain consumer goods. The contention of this Essay is that contract law, along with other laws and private monitoring mechanisms, has provided an important safety net that encourages Internet transactions. Further protection through contract doctrine modification and statutory enactments could increase customer willingness to transact on the Internet.

In addition, and perhaps more importantly, trust protections can encourage consumers to branch out beyond the companies whose names they recognize to lower-priced competitors selling the same or substantially similar products. Although consumers are much more frequently engaging in online transactions, the rise of the Internet has apparently done little to decrease price dispersion between businesses that supply similar goods.[75] To be sure, there are a few exceptions:

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[73] I do not mean to suggest that we are all better off if customers all purchase from the cheapest vendor available. Some customers want additional services, warranties, or guarantees offered by a higher-priced vendor. In addition, many companies maintain and subsidize brick-and-mortar stores so that consumers can actually try out and/or try on the company's products. If all consumers simply purchased a product from the very cheapest online vendor, then these brick-and-mortar stores might disappear, and some consumers might be worse off in the bargain. As a normative matter, consumers certainly should have the option of paying more for a good that comes with valuable terms and/or services. But any differences in price that obtain over the Internet should be a function of differences in the product or its attached terms and services rather than as a function of the fear that an unknown purveyor cannot be trusted. In the former situation, competition is enhanced to the benefit of the consumer. In the latter, competition is deterred to the impoverishment of the consumer.

[74] *See* Jonathan E. Stern, *The Electronic Signatures in Global and National Commerce Act*, 16 BERKELEY TECH. L.J. 391, 391 (2001) (estimating 2000 revenues from online purchases at $490 billion and predicting $3.2 trillion in Internet sales for 2004); SULTAN ET AL., *supra* note 60, at 1 (estimating total Internet sales for 2002 to be greater than $75 billion).

[75] *See* Michael D. Smith et al., *Understanding Digital Markets: Review and Assessment*, *in* UNDERSTANDING THE DIGITAL ECONOMY: DATA, TOOLS, AND RESEARCH 99, 104-05 (Erik Brynjolfsson & Brian Kahin eds., 2000).

online companies such as Amazon.com have managed to compete effectively, thereby decreasing the prices of books and CDs. The success of Amazon.com is thought to stem in part from the fact that it specializes in the sale of goods that are identical and unlikely to need service or require returns.[76] The markets for most consumer goods have not experienced decreased price dispersion, however, even in those markets where lower-priced goods are available online.[77] Even though a few online-only retailers have become well-known to consumers, the fact remains that the vast majority of online-only merchants remain unknown to consumers,[78] and the fact that they are unfamiliar makes it more difficult for them to compete effectively for consumer dollars.[79]

This Essay will proceed on the assumption that this lack of effective price competition stems at least in part from the fact that consumers are untrusting of unknown but lower-priced online vendors. After all, trust by consumers online has much to do with prior experience with the company, as well as with familiarity with and reputation of the brand name.[80] The promise of online commerce is that it can help to significantly enhance competition between vendors, resulting in greater consumer surplus for purchasers. But these gains can only be realized if consumers are willing to experiment with purchasing from unknown vendors. If consumers can be encouraged to try the lower-priced vendors' products to make possible the establishment of trust, then consumer welfare can be enhanced.

This Essay takes the position that if successfully applied, contract doctrine has the potential to increase consumer welfare by enhancing the willingness of consumers to experiment with unknown online vendors. I do not mean to suggest here that contract doctrine is the only mechanism for increasing consumer trust in unknown vendors.

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[76] *Cf.* Dhruv Grewal et al., *The Internet and the Price-Value-Loyalty Chain*, 56 J. BUS. RES. 391, 394-95 (2003) (discussing factors that affect price competition on the Internet).

[77] *See id.* (noting that the market for books and CDs indicates that prices are lower on the Internet, even though online price dispersion is no different from price dispersion found in conventional markets).

[78] *See* Grewal, *supra* note 71, at 479.

[79] It is important to point out here that a vendor is "known" to the extent that it is identifiable by consumers as a respected vendor for the products in question. A vendor who sells a product with a small niche market can be a known vendor in the sense intended in this Essay when its potential customer base is aware of its existence, even though the vast majority of the population at large is unaware of the vendor's existence.

[80] *See* SULTAN ET AL., *supra* note 60, at 8, 12.

Consumers also care about privacy and security,[81] issues that contract doctrine may not be able to address effectively. In addition, some credit card companies facilitate dispute resolution between vendors and consumers who are dissatisfied with the transaction.[82] When the credit card companies act as advocates for consumers in these negotiations, they may end up encouraging consumers to do business with unknown vendors. Moreover, trust in unknown vendors can be enhanced by third-party seals of approval, such as those issued by the Better Business Bureau,[83] though the BBB seal cannot be obtained during at least the first year of a website's operation.[84] As an alternative, unknown online vendors can sell their products through private intermediaries such as eBay, which are able to gather and make available reputational information about the vendor's reliability from other purchasers. Unfortunately, the vendor typically must pay eBay, along with its recommended PayPal payment system, somewhere between five and ten percent of the value of the sale in order to sell on this site.[85]

Some of the transaction costs associated with private trust enhancement measures could be eliminated if contract doctrine would help to promote consumer trust in these vendors. Moreover, enhanced consumer protections might coexist alongside some of the less expensive private trust-creating mechanisms to further encourage online commerce. So long as online contract rules do not work to significantly increase the cost to vendors of engaging in online sales, a

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[81] *See id.* at 21.

[82] Discover and American Express both have a dispute department that will attempt to get vendors to address consumer concerns, although a consumer refund is not guaranteed. Telephone Interview with Brandy Wilson, Account Manager, Customer Service at Discover (Feb. 24, 2005); Telephone Interview with Lyndsay, Customer Service Representative at American Express (Feb. 24, 2005).

[83] This organization offers to online merchants the BBBOnlineSeal. The merchant who has attained this seal attests that the company owning the site has been in operation at least one year, has agreed to BBB advertising standards, and is a BBB member. Jarvenpaa & Tiller, *supra* note 62, at 682.

[84] *Id.*

[85] Sellers must pay to eBay an insertion fee ranging from $0.25 to $4.80 depending on the starting or reserve price. eBay, *Help: eBay.com Fees*, *at* http://pages.ebay.com/help/sell/fees.html (last visited Mar. 31, 2005). In addition, they must pay to eBay 5.25% on the first $25 of the sales price, 2.75% on the next $975 of the sales price, and 1.5% on any remaining balance in excess of $1000. *Id.* In addition, to ensure buyer trust and protect against buyer fraud, sellers often subscribe to PayPal when they sell on eBay. PayPal charges a standard rate of 2.9% plus $0.30 per payment received. eBay, *Seller Central: Payments*, *at* http://pages.msn.ebay.com/sellercentral/payments.html (last visited Mar. 31, 2005).

contract-law experiment might be warranted. To the extent that countries begin to adopt more stringent laws for consumer transactions, those laws can also serve a signaling or expressive function that further encourages trustworthy behavior by online vendors.[86] Furthermore, because it can take awhile for countries to modify contract laws to achieve this balance, I propose in Part IV that choice-of-law rules applicable to online consumer transactions be used in a manner designed to help fill this temporary void.

At this point it is worth emphasizing that this Essay does not promote a radical shift in contract doctrines that are applied to online consumer contracts. Rather, it suggests that small changes in contract rules might enhance consumer trust in ways that increase the overall welfare of consumers with little or no implementation costs imposed on vendors. Because there are negative externalities associated with consumer distrust in an unknown vendor, some modifications of contract doctrine to promote consumer trust seem warranted. Nevertheless, as mentioned above, the difficulties with using contract law to promote trust are twofold. First, without a copayment on the part of the consumer, the purchaser has too little incentive to process and respond to trust-related information when it is available.[87] Second, and more importantly for the purpose of unknown vendors, the shield—or safety-net protection provided to one party—can sometimes be transformed into a sword to cut away at the safety net provided to the other party. If it is not possible to craft contract doctrine in a manner that discourages the net opportunistic behavior of the two parties, then contract law should not sit alongside private attempts to solve the trust problem. Instead, we must accept the private solutions as the best that we can do to promote trust online.

In the next two Subparts, this Essay will argue that two features of the online trust problem help to minimize the likelihood that carefully crafted trust protections will be used opportunistically by the consumer. These features are present in the standardized-form context, where traditional American contract law has already been modified. In Part III, this Essay elaborates further on how the peculiarities

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[86] In this sense, the law works as a norm-promoter. *See* Sunstein, *supra* note 4, at 925 (describing the role of signaling, through expressive conduct, in creating and maintaining social norms).

[87] Fraud does exist online and the government presumably prefers that consumers remain vigilant to avoid online exploitation. In 2002, for example, "the FBI's Internet Fraud Complaint Center referred 48,252 complaints to law enforcement or regulatory agencies and estimates the total dollar loss from online fraud to be $54 million." Metzger, *supra* note 45.

of the Internet environment add to the desirability of consumer contract protections.

1. Trust by Consumers

This Essay focuses on the problem of consumer trust in Internet transactions. Trust issues no doubt arise in online transactions involving two merchants, but the difficulties for merchants are arguably less significant and the costs of providing extra protections arguably greater. I therefore conclude that the case for modifying contract doctrine to encourage online transactions between merchants is less compelling. The argument needs elaboration.

First, the trust risks associated with dealing with an unknown merchant online are likely perceived to be greater for the consumer than for the merchant. A merchant who encounters a low-cost substitute for a known supplier's product can often more easily experiment with the substitute by purchasing a small amount in order to test both the substitute product's quality and the unknown seller's reliability. In terms of the total amount that the merchant has available to experiment with new product sources, a test purchase more often represents an insignificant amount of money. In contrast, the consumer typically is less willing to take these experimental risks because each purchase represents a larger fraction of the average nonmerchant consumer's budget for expenditures.[88]

The relatively greater reluctance of the consumer to transact with unknown vendors online is exacerbated by the fact that the merchant purchaser is often better able to negotiate for favorable terms than is the consumer purchaser. To the extent that the merchant purchaser can be expected to purchase large quantities of supplies from the vendor in the future, the vendor is more likely to be willing to provide the merchant purchaser with favorable nonprice terms. The merchant purchaser is much more often a repeat player in the context of procuring this supply. It likely is more aware of the types of problems

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[88] The textual assertion also suggests that wealthier nonmerchant consumers would be more willing to take advantage of the price competition available online than would a less wealthy consumer. And yet, the less wealthy consumer stands to gain more utility from saving money on the purchase than would the more wealthy consumer. The textual statement also suggests, however, that the less wealthy purchaser might need more assurance and/or protection before she is willing to take advantage of online price savings. To the extent that the less wealthy consumer is also less educated than the more wealthy consumer, a second justification for contract paternalism arises.

that can arise with the supplied item and with Internet purchases, and therefore it is more likely to pay attention to and more able to bargain for advantageous nonprice terms.[89] In contrast, the consumer purchaser pays much attention to the price offered, pays little attention to the other terms,[90] and is unable with her small purchase to bargain to her own advantage. In short, the seller is both better able and more inclined to signal its trustworthiness to the merchant consumer with reliable performance and advantageous contract terms.

These are standard arguments for why consumers should be treated differently from nonconsumers in contract settings: consumers are harmed more if unprotected and they are less able to protect themselves through bargain. The standard counterargument proffered by more libertarian contracts commentators is that although consumers are small as individuals and passive as contract drafters, competition in the marketplace leads companies to compete over the terms of the contract to the advantage of the consumer. As long as some consumers, even merchant consumers, are paying attention to the terms and voicing their opinions, competitive pressures will produce favorable terms for even passive consumers.[91] Thus, from this perspective it is rational for consumers to remain ignorant. Some scholars have recently questioned the extent to which the conditions necessary to the effectiveness of the counterargument hold.[92]

In any event, I would like to add a third, more powerful argument for why contract law should pay more attention to consumers in the context of online trust: untrustworthy behavior by online vendors has greater negative externalities associated with it in the consumer context than it does in the merchant-purchaser context. To understand this argument it is necessary to return to the position taken in Part I of this Essay that trust is essentially a cognitive phenomenon subject to biases and errors. One effect (and one function) of both trust and distrust is that they are created by, and respond to, motivating emo-

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[89] *See* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 476 (2002).

[90] *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1230 (2003).

[91] *See* George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1347 (1981); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971).

[92] Informed consumers can only discipline merchants' use of standard-form contract terms if (1) the informed consumers are not separated out by the merchant for more favorable treatment, and (2) the merchants are not following a short-term business strategy. *See* Hillman & Rachlinski, *supra* note 89, at 442, 444.

tions.[93] Put differently, psychologists are beginning to understand that an important kind of information used for all judgments is the information gleaned from our own feelings.[94] And in turn, particular appraisals of situations automatically trigger a biochemical reaction that is experienced as a feeling.[95] The positive emotions associated with a trust assessment serve the function of motivating the assessor to interact with the object of her trust. The negative emotions associated with distrust also serve a motivating function, although the behavior that distrust motivates—affirmative aversion—is drastically different. In both of these cases—those of judgments that affirmative trust or distrust (as opposed to carefully calculated experimentation) is warranted—the associated emotions cause the assessor to proceed forward with little regard to the gathering of further available trust-relevant information.[96]

In order for these emotions to motivate effectively, it can be, and often is the case, that the feelings of trust or distrust overshoot their mark. Put differently, emotions can influence more behavior than their cause, and they can affect one's assessment of more than just the object, situation, or actions that created the emotion. In the context of the Internet, a consumer's feelings of distrust for one online vendor might have the effect of influencing her trust assessment of other unknown online vendors. After all, her distrust emotions serve the function of causing her to avoid the cause of her harm, but she does not know for sure how far that aversion should extend. To be safe, she might decide to adopt a practice of avoiding unknown online vendors.[97] When this happens, the assessor can end up engaging in

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[93] *See* O'Hara & Hill, *supra* note 11 (manuscript at 13-15).

[94] *See* Gerald L. Clore et al., *Affective Feelings as Feedback: Some Cognitive Consequences*, *in* THEORIES OF MOOD AND COGNITION: A USER'S HANDBOOK 27, 27 (Leonard L. Martin & Gerald L. Clore eds., 2001).

[95] *See id.* at 33.

[96] *See* O'Hara & Hill, *supra* note 11 (manuscript at 5-6).

[97] This is an example of error management theory (EMT). *See generally* Martie G. Haselton & David M. Buss, *Error Management Theory: A New Perspective on Biases in Cross-Sex Mind Reading*, 78 J. PERSONALITY & SOC. PSYCHOL. 81 (2000); Martie G. Haselton & David M. Buss, *Biases in Social Judgment: Design Flaws or Design Features?*, *in* SOCIAL JUDGMENTS: IMPLICIT AND EXPLICIT PROCESSES 23 (Joseph P. Forgas et al. eds., 2003). According to EMT, people respond to uncertainty with biased judgments, or rules of decision, that will minimize the costs of error in incorrect judgments over time. Applied to the trust context, once a consumer determines that trade with an unknown vendor was harmful, she may decide to avoid all unknown vendors in the future. In fact, because it might be perceived as less costly to stick with known vendors in the first instance, many consumers will display an aversion to transacting with unknown vendors even without actual experimentation with the unknown vendor.

less trust than a more carefully reasoning person would conclude appropriate.

Consider, for example, what happens when a consumer who has taken a risk finds herself engaged in a transaction that has gone wrong. Her credit card information was lost, or her name was given to other vendors, or the delivery of the product was unreasonably delayed, or the product arrived broken or scarred or missing components, or she was charged an amount that seems excessive given the advertised price. If these snafus spark feelings of distrust in the consumer, her negative emotions could well end up extending to all unknown Internet vendors. The less extensive her online purchasing experience, the more likely her distrust feelings will interfere with her willingness to proceed.[98] Rather than concluding that this particular vendor cannot be trusted to be competent, reliable, and loyal, she might instead conclude that unknown online vendors as a class cannot be trusted—that they attempt to take advantage of their anonymity by providing shoddy products, terms, and service.

If in fact consumers respond to distrust by avoiding unknown vendors, then the marketplace as a whole suffers from consumer distrust, and no individual online vendor has an incentive or the ability to fix this problem on its own. To be sure, the online vendor has an incentive to perform well in a particular transaction to the extent that it anticipates possible future sales from the particular consumer, but it does not have an incentive to work so hard to perform well that the consumer chooses to try other online vendors. In other words, all unknown online vendors stand to suffer with the chosen vendor's shoddy performance, but the vendor does not take these losses into account when making its performance decisions. Instead, it likely calculates only the costs and benefits to its own business of satisfying this particular customer.

A merchant purchaser is much less likely to be plagued by this cognitive error or bias in favor of distrust. Psychological studies indicate that emotions and other affective feelings such as moods, attitudes, and temperaments all can have the effect of biasing our assessments, but the influence of those emotions diminishes to insignificance when the judgment is one involving detailed knowledge or extensive experience. For example, moods seem to affect individ-

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[98] *See* SULTAN ET AL., *supra* note 60, at 21 (discussing empirical study finding that trust in any given online merchant was significantly affected by the subject's past experience with online purchases).

ual car-buying decisions for relatively inexperienced consumers, but they do not seem to affect car-buying decisions among people who are knowledgeable about cars.[99] Similarly, mood does not seem to affect the political judgments of individuals who are highly knowledgeable about politics, even though it does have an effect on others.[100] Having expertise apparently involves having relevant and highly specific conceptual information that is readily accessible to the evaluator. When that information is both salient to the decision and readily accessible to the decision maker, it apparently can beat out at least some emotional factors as a basis for forming a judgment.[101] Thus, we would expect the merchant purchaser—who on average has considerably more experience with the goods, their associated contracts, and the online transacting environment—to be less inclined to allow her feelings of distrust of one online vendor to significantly affect her willingness to transact with other online vendors. In short, the negative externalities of merchant-purchaser disappointment likely are smaller than those associated with consumer disappointment.

2. Consumers as Purchasers

The last Subpart explained why consumers might have trust concerns with online transactions that might productively be addressed through the modification of contract doctrine. This Subpart briefly explains why the trust issue is influenced by the fact that the consumer is almost always on the purchasing side in these transactions. First, when the consumer transacts online she often seeks convenience.[102] She does not wish to leave her house,[103] to negotiate the terms, or, in many cases, to even read the terms. Her desire to engage in an online transaction is an all-or-nothing enterprise in that she is unlikely to bring her concerns to the attention of the vendor. As Jarvenpaa and Tiller point out, "[a] trusting customer will seek to resolve the issue with the merchant; an untrusting customer will defect."[104] When placed in this passive consumer role, it is unlikely that the consumer will call on her protections unless she feels sufficiently burned so that

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[99] *See* Clore et al., *supra* note 94, at 56 (citing study).

[100] *See id.* (citing study).

[101] *See id.*

[102] *See* Rolph E. Anderson & Srini S. Srinivasan, *E-Satisfaction and E-Loyalty: A Contingency Framework*, 20 PSYCHOL. & MARKETING 123, 126 (2003).

[103] Survey data indicate that sixty percent of Internet consumers make their purchases while wearing their pajamas. *Id.*

[104] Jarvenpaa & Tiller, *supra* note 60, at 669.

retributive actions seem appropriate. Instead, she is more likely to avoid online transactions with stranger vendors—an outcome that this Essay seeks to avoid.

This passive consumer role is all the more significant when the consumer also occupies the role of the purchaser because the purchaser need do no more than pay for the good purchased. While it is possible to purchase high-value goods online that require financing or long-term payment schemes, most Internet transactions involve the consumer paying the total price of the good and any applicable taxes and shipping charges at the time of placing her order. Moreover, the purchaser typically provides credit card information and the payment is approved before the transaction is completed, or at least before the vendor begins performance.[105] In this commercial arena, the trust issues are predominantly one-sided because typically only the vendor's performance is still forthcoming.[106] Although we must always worry that contract doctrine intended to promote trust by one party is likely to promote distrust by the other, consumer contracts associated with the online purchase of goods look decidedly like fiduciary relationships, at least with regard to their unbalanced trust concerns. This same trust imbalance exists in the context of standardized terms found in standard-form contracts. Let me suggest here, though, that while the imbalance is similar, the trust concerns online are greater. This Essay now turns to a brief discussion of what trust-enhancing contract doctrine might look like.

C. *Summary of the Case for Online Consumer Protection*

A summary of the case for online consumer protection seems in order. Enhanced consumer contract protections might work to facilitate consumer trust in unknown online vendors, and the protections can work in two different ways. First, they can facilitate trustworthy vendor behaviors that serve to enhance consumer trust in the general

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[105] The argument presented in the text above is intended to point out that trust issues arise more frequently for the purchaser than for the seller online. I do not mean to suggest that sellers never concern themselves with purchaser trustworthiness. For example, online purchases represented five percent of all credit card transactions and fifty percent of all credit card fraud in the year 2000. Because the card is not present for Internet transactions, disputed charges result in the seller suffering the loss more often than for offline sales. Josh Boyd, *The Rhetorical Construction of Trust Online*, 13 COMM. THEORY 392, 395-96 (2003).

[106] *Cf.* Ribstein, *supra* note 25, at 585 ("It is notably harder for consumers to rely on merchants when they must give up a credit card number and wait for delivery, than when they walk into a brick-and-mortar store and walk out with their goods.").

online contracting environment. Second, the laws themselves (as opposed to the behaviors that the laws create) can signal to consumers that it is safe to contract online. One might reasonably question the extent to which consumers are aware of governing contract law, but even in the event of consumer ignorance, enhanced protections could, at least in theory, serve a useful function.[107]

Furthermore, the fact that the online environment appears to be one where trust is lacking indicates that default and mandatory rules should perhaps be adjusted to increase generalized trust in the online environment. Trust is an apparent concern for online consumers for two distinct reasons. First, the environment is relatively unfamiliar to consumers, and as discussed in Part III, the online environment lacks many of the social cues that typically enable consumers to trust in their vendors. Second, social norms are often lacking or misunderstood in online environments. Moreover, the legal protections that exist to protect parties are often more costly to enforce on average because online transactions are much more likely to involve interjurisdictional disputes. With legal protections that are more expensive to utilize and reduced social norms online, consumers demand sturdier safety nets. And yet, because trust perceptions online are weaker, the safety net will be perceived to be weaker. The basic argument in favor of enhanced consumer protections for online transactions is therefore that consumers' need for trust as a prerequisite to transacting is greater online, while their actual trust is lower.

The arguments against enhanced consumer contract protections are twofold. First, the protections given to one party can encourage opportunistic behavior by the protected party. Put differently, government measures often fail to promote net trust because enhancing trust by one party often comes at the price of destroying trust on the part of the other party. In the context of online consumer transactions, however, this concern is dampened because there is a trust asymmetry between consumers and vendors. Consumer performance typically precedes vendor performance, and consumer performance can often be verified prior to the vendor's performance. The point is not that consumer opportunism is never an issue; in fact, the next Part discusses at least one context where concerns for consumer opportunism might affect the formulation of consumer protections. Rather, because of this trust asymmetry, it makes sense to at least explore the

[107] If consumer knowledge were thought to significantly enhance the effectiveness of consumer protections, the government could launch an ad campaign designed to spread the word.

possibility that consumer protections could enhance the net trust in the online transaction.

The second concern identified in this Essay regarding trust-enhancing legal protections is that too much protection can dampen consumer attention to trust-relevant information about vendors. To encourage parties to collect and process information about the trustworthiness of others, each should be forced to incur a copayment in the event of breach by the other party. It might be true that the larger the copayment, the more vigilant (or paranoid) parties will be about their possible contracting parties. However, where parties have no mechanisms for gathering information about the other prior to contracting, it might make sense to reduce the copayment. To the extent that consumers have less access to trust-relevant information online than they might have otherwise, the copayment for online transactions should be reduced.

Assuming that the value of enhanced consumer protections is greater online than in other contexts and that the potential costs of the protections are also lower, it then becomes worthwhile to explore the extent to which the contract law applied to online consumer transactions should be modified. This Essay now turns to a brief discussion of what optimal trust-enhancing contract doctrine might look like.

III. TRUST-ENHANCING CONTRACT DOCTRINE

This Part considers the extent to which contract statutes and court doctrines should be modified to enhance consumer trust in online transactions. When addressing this issue on a symposium panel dedicated to international jurisdiction, one is naturally inclined to ask: "modifications compared to what law?" Subpart A briefly discusses some ways in which U.S. and European jurisdictions give special treatment to contracts formed by consumers offline. Because these consumer protections can help enhance consumer trust, this Subpart argues that these protections, so long as they are not onerous to the vendor, should apply in online transactions whenever conflicts principles can lead us to the application of the consumer-protection laws.

Subpart B will discuss possible ways that consumer-protection laws can be (and in some cases, apparently have been) modified to account for special problems with online transactions. The section is not intended to be an exhaustive list of the ways that contract law should treat online transactions. Moreover, some of the suggestions are offered tentatively and may prove problematic in practice. Never-

theless, Subpart B is designed to challenge the reader to think critically about how to maximize both consumer trust in online transactions and the volume of trade that occurs online. Where there is an apparent conflict between these two aspirations, we should keep in mind that consumer trust in this Essay serves the single-minded goal of facilitating price and other forms of competition online. Consumer trust is not an end to itself that justifies reduced sales, competition or welfare. If typical consumer protections create negative side effects, then it might be better to instead maintain our private mechanisms for trust enhancement. This Essay will explore that possibility at the end of Part IV.

A. *Offline Consumer Contracts*

The law regarding contracts in many countries already contains a variety of both implicit and explicit differential treatments of consumer and nonconsumer contracts. Although this Essay cannot begin to do justice to the variety of ways that states handle consumer contracts, especially given that this author is not a comparative law expert, a few examples closer to home are provided in this Subpart. For example, European codes routinely treat consumer contracts differently from other contracts.[108] In contrast, American contract law developed through the common law's uniform treatment of all contracts. Nevertheless, even American courts have found subtle ways to differentially apply contract doctrines like the parol evidence rule in consumer contract cases.[109] More recently, new American contract doctrines have formed for the purpose of policing consumer contracts; these are the doctrines related to standard-form contracts and to unconscionability.[110] Specific consumer protections have been enacted through stat-

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[108] *See* Aristides N. Hatzis, *Having the Cake and Eating It Too: Efficient Penalty Clauses in Common and Civil Contract Law*, 22 INT'L REV. L. & ECON. 381, 402 (2003) (noting the "disparate treatment of commercial and consumer contracts" in European legal systems); *see also* Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29.

[109] *See, e.g.*, Weitzel v. Barnes, 691 S.W.2d 598, 599-600 (Tex. 1985) (holding that the parol evidence rule is inapplicable to consumer action under Texas's Deceptive Trade Practices Act).

[110] The E.U. Unfair Terms Directive similarly requires member states to regulate standard-form contracts in consumer contexts. *See* James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT'L L. 109, 133-34 (2003). For a discussion of judicial and administrative regulation of standard-form contracts in the United Kingdom, Germany, Sweden, and Israel, see Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1, 46-90 (2002). Statutory treatment of standard-form

utes such as deceptive trade practices acts[111] and a federal statute that entitles consumers to retain unsolicited merchandise received in the mail.[112]

Furthermore, the Uniform Commercial Code has, with its recent amendments, expanded the contexts where consumer contracts are expressly to be given separate treatment. For example, the 2001 Amendments to Article 1 limit the effectiveness of choice-of-law provisions in consumer contracts.[113] The 2003 Amendments to Article 2 also pay more attention to consumer contracts. Section 2-102 states that the U.C.C. does not impair or repeal any statute regulating sales to consumers,[114] and the newly amended Article 2 bolsters this provision by adding that transactions subject to Article 2 are also subject to any applicable rule of law that sets forth a different rule for consumer contracts.[115] In addition, section 2-316 places special requirements on the drafting of warranty limitations in consumer contracts.[116] Consumer buyers who breach their contracts are not liable for consequential damages.[117] Limitation of damages for personal injury in con-

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consumer contracts in Japan can be found at http://www.ciroap.org/apcl/statutes_content.php?cid=42&id=35 (last visited Mar. 31, 2005) (providing an English translation of Japan's Consumer Contract Act). South Korea's statutes on the subject can be found at http://ciroap.org/apcl/statutes_content.php?cid=16&id=43 (last visited Mar. 31, 2005) (providing an English translation of South Korea's Adhesion Contract Act).

[111] *E.g.*, KAN. STAT. ANN. §§ 50-623 to -644 (1994 & Supp. 2004); LA. REV. STAT. ANN. §§ 51:1401-1424 (West 2003 & Supp. 2005); MASS. ANN. LAWS ch. 93A, §§ 1-11 (Law. Co-op. 1994); MICH. COMP. LAWS ANN. §§ 445.901-922 (West 2002 & Supp. 2004); NEV. REV. STAT. ANN. §§ 598.0903 to .990 (Michie 2004); N.H. REV. STAT. ANN. § 358-A:1 to :13 (1995); N.J. STAT. ANN. §§ 56:8-1 to -135 (West 2001 & Supp. 2004); 73 PA. CONS. STAT. ANN. §§ 201-1 to -9.3 (West 1993 & Supp. 2004); TENN. CODE ANN. §§ 47-18-101 to -125 (2003); TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon 2002 & Supp. 2004-2005); VA. CODE ANN. §§ 59.1-196 to -207 (Michie 2004); WASH. REV. CODE ANN. § 19.86.010-920 (West 1999). For discussions of unfair and deceptive trade practices acts, see Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521 (1980); Anthony Paul Dunbar, Comment, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984).

[112] 39 U.S.C. § 3009 (2000).

[113] U.C.C. § 1-301(e) (2004).

[114] *Id.* § 2-102.

[115] *Id.* § 2-108(1)(b).

[116] *Id.* § 2-316.

[117] *Id.* § 2-710(3).

sumer goods contracts is not permitted.[118] Finally, the applicable statute of limitations may not be reduced in consumer contracts.[119]

Consumers are further protected when laws omitting these rules state that they do not apply to consumer contracts. For example, the United Nations Convention on Contracts for the International Sale of Goods (CISG), which applies in U.S. courts for all nonconsumer contracts for the international sale of goods, states explicitly that it does not govern consumer contracts for the international sale of goods.[120] In the latter case, the exclusion of consumer contracts is important because the CISG Convention consists only of default rules that can be replaced by the parties' contract.[121] Nothing in the CISG Convention provides any guaranteed protection to either of the parties. Moreover, the CISG Convention provides that the seller can bring suit in the courts of its place of business.[122] These provisions are no doubt appropriate for business entities who can negotiate their own agreements, but as already mentioned, the consumer contracting context differs significantly from that of nonconsumers. Consumers who must travel far to have a court resolve their disputes will often forgo asserting their rights altogether. And, default rules are easily undermined in consumer contracts with standard boilerplate language.

In general, differential treatment of consumer contracts takes two different forms: process protections and substantive protections. In the context of standard-form contracts, for example, some provisions must be conspicuous, clear as to their effect, and/or separately signed in order to be enforceable.[123] These consumer protections are intended to improve the process by which the terms become part of the contract by attempting to increase the chance that the consumer has in fact read and consented to the provisions. The difficulty with the

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[118] *Id.* § 2-719(3). This provision was included in the previous version of Article 2.

[119] *Id.* § 2-725(1).

[120] *See* Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 2, S. TREATY DOC. No. 98-9, 1489 U.N.T.S. 3, 60 (stating that the Convention "does not apply to sales . . . [o]f goods bought for personal, family or household use" unless the seller did not and should not have known goods were purchased for these uses).

[121] *See id.* art. 6, 1489 U.N.T.S. at 60 ("The parties may exclude the application of this Convention, or, subject to article 12 [dealing with the Statute of Frauds], derogate from or vary the effect of any of its provisions."); *cf.* Franco Ferrari, *'Forum Shopping' Despite International Uniform Contract Law Conventions*, 51 INT'L & COMP. L.Q. 689, 692 (2002) (noting that the CISG Convention sets "the place of performance of the obligation to pay the purchase price" only "in the absence of an agreement between between both parties").

[122] Ferrari, *supra* note 121, at 692.

[123] *See* E. ALLEN FARNSWORTH, CONTRACTS § 4.26 (3d ed. 1999).

process by which consumers enter into standard-form arrangements stems from the fact that the vendor invests substantially in the incorporation of standard terms and then presents those terms in a take-it-or-leave it fashion to the consumer who is in a hurry to complete the transaction.[124] The consumer rarely actually reads the form and has no control over its contents.[125] The standard forms carry with them significant efficiency advantages enjoyed by both the drafter and the consumer,[126] but the drafter, if left completely unregulated, might have an incentive to slip in unfairly one-sided terms.[127] After the fact, it can be difficult for courts to tell whether a term is efficient or otherwise reasonable,[128] but the courts can provide some protection to the consumer by enhancing the likelihood that the consumer is at least aware of a provision before signing the standard form. Under the U.C.C., for example, limitations on the implied warranty of merchantability in a consumer contract must be in a record, must be conspicuous, and must contain particular language regarding its effect in order to be enforceable.[129] Limitations on the implied warranties of fitness are subject to similar limitations.[130]

In addition, the U.C.C. and common law duties of good faith and fair dealing can and often do work to ensure that merchants negotiate and perform their contracts in an appropriate manner.[131] Finally,

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[124] *See id.*; Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995); Hillman & Rachlinski, *supra* note 89, at 435-36; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176 (1983).

[125] *See* Eisenberg, *supra* note 124, at 240-48; Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1264 (1993) (noting that the difficulties with form contracts "have been attributed . . . to the 'take-it-or-leave-it' basis of the transaction, and to the fact that inevitably most terms remain unread"); W. David Slawson, *Standard From Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) ("[I]n the usual case, the consumer never even reads the form . . . .").

[126] *See* Richard L. Hasen, *Efficiency Under Informational Asymmetry: The Effect of Framing on Legal Rules*, 38 UCLA L. REV. 391, 426 (1990).

[127] *See* Meyerson, *supra* note 125, at 1306-08.

[128] *See generally* Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983) (discussing difficulties inherent in determining whether and to what extent consumer contract terms should be regulated).

[129] U.C.C. § 2-316(2) (2004).

[130] *Id.*

[131] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (imposing duties of good faith and fair dealing on all parties regarding the performance and enforcement of the contract); U.C.C. § 1-201(b)(20) (defining "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing"); *see also* Nanakuli Paving

some states give consumers a period of time during which they are entitled to disaffirm contracts entered into with door-to-door or telephone salesmen who solicit the customer in her home.[132] Although the literature on contracts does not discuss this, each of these protections can have the effect of enhancing consumer trust in the vendors with whom they choose to deal[133]—or, to put the point more precisely, of decreasing the vulnerability, and hence the degree of trust, that the consumer needs in order to be willing to enter into the transaction.

Consumer vulnerability-reducing provisions sometimes take the form of substantive limitations on the permissible content of consumer contracts. For example, merchants often are not entitled to price-gouge, even in a state of emergency.[134] Lenders are often subject to caps on the interest rates that they are permitted to charge consumers.[135] Some provisions in insurance contracts are deemed unen-

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& Rock Co. v. Shell Oil Co., 664 F.2d 772, 805-06 (9th Cir. 1981); J. Moreria, Lda. v. Rio Rio, Inc., No. 91 CIV. 2462 (LJF), 1992 WL 395577, at *6 (S.D.N.Y. Dec. 15, 1992); Clark Oil Trading Co. v. J. Aron & Co., 659 N.Y.S.2d 426, 432 (App. Div. 1997); Palmer v. Safe Auto Sales, Inc., 452 N.Y.S.2d 995, 997 (Civ. Ct. 1982).

[132] *See, e.g.*, IOWA CODE ANN. § 555A.2 (West 2001) (giving consumers three business days to avoid such contracts); KAN. STAT. ANN. § 50-640 (2003) (same); NEV. REV. STAT. ANN. 598.230 (Michie 2004) (same); 73 PA. CONS. STAT. ANN. § 201-7(a) (West Supp. 2004) (same); *see also* FARNSWORTH, *supra* note 123, § 4.29 n.4 (discussing the cooling-off period provided in cases of home solicitations by federal and state statutes); Louis E. Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 IOWA L. REV. 797, 802 n.19 (1988) (same).

[133] I distinguish these forms of consumer protections from disclosure requirements, which have the effect of warning the untrusting consumer of the types of terms that she needs to scrutinize. For a discussion of consumer disclosure requirements, see FARNSWORTH, *supra* note 123, § 4.29.

[134] *See, e.g.*, ARK. CODE ANN. § 4-88-303 (Michie Supp. 2003) (prohibiting merchants, upon proclamation of a state of emergency, from selling consumer food items, goods, or services for a price more than ten percent above the price charged immediately prior to the proclamation of an emergency); LA. REV. STAT. ANN. § 29:732 (West Supp. 2005) ("During a state of emergency . . . the value received for goods and services . . . may not exceed the prices ordinarily charged for comparable goods and services . . . ."); N.Y. GEN. BUS. LAW § 396-r (McKinney Supp. 2004) (prohibiting any party within the chain of distribution of consumer goods or services from selling such goods at an "unconscionably excessive price" during any "abnormal disruption of the market"). Similarly, a party is not entitled to utilize the other party's emergency situation to engage in economic duress to force a modification of a preexisting contract. *See* FARNSWORTH, *supra* note 123, § 4.25 ("[T]here remain the restraints imposed by the rules on duress and undue influence, along with the duty to act in good faith."). In this latter case, it is the process of bargaining, rather than the fairness of the terms themselves, that is thought to be tainted. I refer to price gouging as a restriction on the substantive terms of the contract because it works as a limit on the price that a merchant can charge customers for goods in an emergency.

[135] *See* FARNSWORTH, *supra* note 123, § 4.29 & n.7.

forceable while others are mandatory.[136] In at least one state each, even dance studios and dating bureaus have been subject to requirements that they include certain terms in their consumer contracts.[137] Moreover, states occasionally limit the maximum rates and/or warranty limitations that can be included in the contracts.[138] The U.C.C. does not permit contracts for the sale of goods to limit damages for personal injury.[139] Choice-of-law provisions are unenforceable to the extent that the application of the foreign law would violate a fundamental public policy of the state whose law would otherwise apply.[140] Furthermore, according to the newly enacted U.C.C., choice-of-law provisions may not work to circumvent consumer protections in the state where the consumer resides or in the state where the contract was formed and performed.[141] Whether imposed as a public policy limitation on contract or as a violation of unconscionability doctrine, these limitations enable a consumer to rest assured that there is a limit to the harm that the vendor can impose on the consumer. At the same time, these restrictions lighten the duty—and the incentive—of the consumer to read the contract and to be wary of the terms that are in the document. Outside of the Internet context, these restrictions can at times seem overly paternalistic.[142] But that paternalism can have beneficial effects in those commercial contexts, like the Internet, where consumers are irrationally risk-averse in their contracting choices.

B. *Online Consumer Protections*

To what extent, if at all, should the treatment of consumer transactions conducted over the Internet differ from the treatment of consumer contracts formed offline? The purpose of this Essay is to explore the ways that the law, including choice of law, related to contracts can help to bolster consumer trust in unknown vendors on

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[136] *See* JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENT 712 (8th ed. 2003); FARNSWORTH, *supra* note 123, § 4.29.

[137] *See* statutes listed in FARNSWORTH, *supra* note 123, § 4.29 n.6.

[138] *See* DAWSON ET AL., *supra* note 136, at 712-13; FARNSWORTH, *supra* note 123, § 4.29.

[139] U.C.C. § 2-719(3) (2004).

[140] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (1971).

[141] U.C.C. § 1-301(e).

[142] *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 315 (1975); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1054-55 (1977).

the Internet. If the law is to work at all to increase the willingness of consumers to take the plunge, it must work primarily to provide strong incentives for vendors to behave in a trustworthy manner, and secondarily to fully compensate those consumers who are harmed as a result of an Internet transaction. How can we ensure that vendors take the requisite care with the consumer's willingness to trust? First and foremost, Internet transactions warrant explicit differential treatment of consumer contracts. Subtle and unspoken differences in the application of general contracts doctrine likely will not send a clear enough message to vendors that special rules apply to the consumers with whom they deal. Moreover, unofficial distinctions in the application of contracts doctrine become discretionary in their use by judges, further diminishing the influence of the differential treatment of consumer contracts on vendor behavior. At a minimum, courts and/or legislatures should clearly state that standard consumer protections apply in online consumer transactions.

Before we can evaluate the desirability of further application of consumer-protection rules to online transactions, however, we must first explore the justifications for providing consumers with special contract protections in the offline world. Only then will we have an appreciation for the extent to which those traditional justifications and concerns still apply. Part II explored the justification from the perspective of trust, but others have explored the issue of online consumer protections from a somewhat different perspective. Specifically, Robert Hillman and Jeffrey Rachlinski have identified three difficulties with offline consumer contracting decisions that together cause courts to question whether consumers understand and assent to the terms in the contracts that they sign.[143] Put together, they might justify at least standard-form contract regulation. First, for a variety of reasons, consumers often rationally choose not to read the terms of their contracts. Standard-form contract terms can be both difficult to read and hard to understand, consumers are often in a hurry when they sign the forms, most of the terms relate to contingencies that are unlikely to arise, the agent of the other party typically lacks authority to change the terms, customers expect that the terms are standard in the industry, and customers expect courts to strike down unreasonable terms.[144]

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[143] Hillman & Rachlinski, *supra* note 89, at 445-54.

[144] *See* authorities cited *id.* at 446-47.

Second, social forces offline cause the consumer to feel pressured into signing standard forms without reading their terms.[145] Businesses often present the contract while the customer is waiting in line where other customers and the agent presenting the form make clear that everyone is in a hurry.[146] To make matters worse, customers often feel that their reading the form and asking questions about it seems overly confrontational and untrusting. Finally, the agent typically presents the contract after giving the customer price concessions or other "special deals," triggering the norm of reciprocity[147] that works to make the customer feel that it is her turn to accommodate the agent.

Third, cognitive limitations make the consumer poorly situated to assess the risks associated with her contract. Even when the consumer reads and is capable of understanding the terms of the writing, consumers "cannot evaluate the many situations covered by the terms in standard-form contracts. Instead, they focus their attention on a small number of aspects of a contract, such as price and quantity."[148] Furthermore, consumers are likely to fall prey to irrational optimism regarding the desirability of their contract terms. "Because consumers usually encounter standard terms after they have decided to purchase the good or service, they will process the terms in the boilerplate in a way that supports their desire to complete the transaction."[149]

Hillman and Rachlinski then explore the extent to which online contracting affects these concerns. First they explore the extent to which competitive pressures increase or decrease the chances that companies will provide desirable contract terms. On the one hand, companies that plan to compete long-term on the Internet have a greater incentive to provide customers with more favorable contract terms because customers have greater ability to compare terms online and because the companies that can capture a larger share of the Internet business while it is growing rapidly stand to reap significant profits.[150] On the other hand, consumers often are not paying attention to the nonprice terms of the contract, technological advances can make it easier for vendors to provide more favorable terms to knowl-

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[145] *See id.* at 447-50.

[146] *See id.* at 449-50.

[147] *See* Vandenbergh, *supra* note 9, at 108-12.

[148] Hillman & Rachlinski, *supra* note 89, at 452 (citation omitted); *see also* Korobkin, *supra* note 90, at 1206 (arguing that consumers are only capable of taking into account a few attributes of a purchase, and that the list of attributes typically does not include contract terms).

[149] Hillman & Rachlinski, *supra* note 89, at 453 (emphasis and citations omitted).

[150] *See id.* at 469.

edgeable customers,[151] and fly-by-night vendors (who can succeed more easily on the Internet) have no incentive to provide contract terms favorable to the consumer.

In terms of the factors that plague the offline use of standard-form contracts, Hillman and Rachlinski conclude that the online contracting environment ambiguously affects the likelihood that a consumer will actually read boilerplate terms. Consumers are better able to shop at their leisure online, and the social pressures that cause them to sign unread documents in the offline world are not present online. On the other hand, consumers confront terms on a computer screen that often are harder to read than are terms on paper, and webpage designers can strategically place the terms so that they are unlikely to be read or carefully scrutinized. In addition, online consumers are on average younger and are therefore more likely to be impatient. Finally, Hillman and Rachlinski take the position that the cognitive challenges that exist for consumers offline are unaffected by the transition to online transactions. They ultimately conclude that the factors that weigh in favor of increased reading of the online terms are unlikely to provide consumers with real additional protection. The remaining difficulties with online standard forms must be weighed against the fact that electronic boilerplate is, if anything, even more essential to online businesses because a critical efficiency of online contracting comes from the fact that it can be conducted without the use of human agents.[152] At bottom, they suggest that courts continue to scrutinize electronic boilerplate in a fashion similar to the scrutiny that they give to offline consumer contracts.

Although the Hillman and Rachlinski analysis is sophisticated and persuasive, it leaves out the important problem of facilitating consumer trust in unknown online vendors. How does this issue affect the analysis of consumer protections in online contracting? First, consumer distrust of unknown vendors might enhance the likelihood that consumers will read their electronic boilerplate. In the world of face-to-face transactions, consumers scrutinize the physical aspects of a business and the conduct and demeanor of the business's employees to assess whether it seems appropriate to trust the vendor. The seeming trustworthiness and general affability of a sales clerk can have significant influence on a consumer's willingness to transact and to sign

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[151] *See id.* at 471-72.

[152] *See id.* at 475-76.

a standard-form contract.[153] This trust assessment of the company's agent is to some extent misplaced, in that the agent has little or nothing to do with whether the company will ultimately stand by its product or service. Likely the consumer's assessment of the agent is a product of the evolution of our brains,[154] which occurred long before both standard-form contracts and the widespread use of agents. In that world, a person had to decide whether to make herself vulnerable to another by trusting the other, and she had to make that determination based on the reputation of the other person as well as the other person's demeanor, eye contact, seeming intelligence and competence, etc. If our brains evolved to make trust judgments based at least in part on these very personal characteristics, then consumers might be poorly suited to make reliable trust assessments of companies today. Instead, as in all situations where humans are poorly suited to handle the complications of our modern environment, individuals are likely to fall back on heuristics and stereotypes.[155] In this context, the stereotypic thinking seems to be one in which the attributes of the individual being assessed are attributed to the group, or here institution, to which the individual is a member.[156]

In one sense, online transactions by their very nature can help to protect the consumer because the attention of the consumer is no longer on the seeming trustworthiness of the agent. Of course, the problem of online trust stems from the very fact that because there is no agent to assist the customer, the customer is less willing to transact in the first place. In the offline world, in contrast, consumers are more trusting of the agents that they transact with, and hence the companies that the agents represent, but trust in the agent replaced careful scrutiny of the boilerplate language. After all, among the other cognitive limitations that we confront, the untrained human

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[153] Janice Nadler notes the difficulty that lawyers and others can have when they attempt to transact their business solely through e-mail. The lack of social cues that work to help parties to develop interpersonal rapport make the participants more likely to negatively interpret the communications that they receive from each other. Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-Mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 225 (2004).

[154] Hill & O'Hara, *supra* note 11 (manuscript at 24-25).

[155] *See generally* Gerd Gigerenzer & Peter M. Todd, *Fast and Frugal Heuristics: The Adaptive Toolbox*, *in* SIMPLE HEURISTICS THAT MAKE US SMART (Gerd Gigerenzer et al. eds., 1999).

[156] In fact, the stereotypic or heuristic thinking likely is exacerbated by the positive emotions generated by affirmative trust and the negative emotions generated by affirmative distrust. *See generally* Clore et al., *supra* note 94.

brain is poorly suited to read and evaluate these technical terms.[157] In the online world, however, the consumer has no choice but to base her trust assessment on what is available—third-party seals, customer ratings, and the terms of the boilerplate.

Moreover, psychologists are discovering that some negative emotions cause the evaluator to pay closer attention to new relevant information.[158] Positive emotions instead cause the evaluator to stop carefully processing new information.[159] The positive emotions can cause the evaluator to find ways to confirm a choice already made,[160] a phenomenon that Hillman and Rachlinski call "motivated reasoning."[161] Because the online customer's judgment is not clouded by her instinctive and often unconscious determination that the agent in front of her is trustworthy, her lack of trust might well cause her to be better situated to carefully evaluate the import of the terms offered by the company.

In short, the boilerplate is more likely to be read and understood in online transactions. And in this world, I suggest that the terms of the boilerplate, if favorable to the consumer, are more likely to affect the customer's willingness to enter into the transaction in the first place. Of course, even if the reader is convinced that the online consumer is more likely to read boilerplate than is the offline consumer, we still do not know the marginal effect of the lack of social cues and diminished trust of the consumer on the likelihood that she will actually read the terms. But, added to the fact that the social pressures not to read the form are also lifted offline, there is some hope that online consumers will scrutinize the standard-form terms.[162]

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[157] *See* Korobkin, *supra* note 90, at 1227-29 (discussing studies demonstrating the inability of most people to process more than a few salient attributes of the subject matter of a transaction); *see also* Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309 (1986) (arguing that consumers often do not understand terms of standard-form contracts).

[158] *See* Clore et al., *supra* note 94, at 43-49; *see also* Gerald L. Clore, *Why Emotions Are Felt*, *in* THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 103, 110 (Paul Ekman & Richard J. Davidson eds., 1994) ("Subjects experiencing sad affect are more likely to engage in systematic processing, to be analytical, and to focus more on the presented details.").

[159] *See* Clore et al., *supra* note 94, at 43-49.

[160] *See id.*

[161] Hillman & Rachlinski, *supra* note 89, at 45. *See generally* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990) (providing a psychological approach to motivated reasoning).

[162] Presumably many consumers will neglect to read or to carefully process the terms of the vendor's forms. This suggests that the law should place more emphasis on the development of trust-enhancing mandatory and/or default rules than on the abil-

Assuming that it is in theory possible for the boilerplate terms to influence the online consumer's willingness to purchase, the critical question is whether the site sponsors provide the consumer with the terms of the contract before or after she is likely to have made a purchase decision. If terms are available to customers only after the customer has gotten far into the purchase phase on the site, then skeptical consumers will likely never seriously consider purchasing an item from an unknown vendor. If instead the unknown vendor's terms are readily accessible to the consumer before effectively making a decision to purchase an item, then the consumer can peruse the terms to make sure that they appear to be favorable to the consumer. Terms that can be accessed from the vendor's home page enable the untrusting consumer to make an informed purchase decision. But when the terms can, but need not, be clicked on prior to the conclusion of the purchase, the consumer who entered into the transaction with sufficient trust so that she did not choose to read the terms will lose protection. Thus, a dual requirement seems justified: vendors should be required to construct their websites so that the terms are accessible from the home page,[163] and they should be required to set up the terms so that they must be affirmatively approved by the purchaser.[164]

When vendor sites require the consumer to affirmatively accept boilerplate terms as a prerequisite to contract performance, the practice is known as a "clickwrap" requirement.[165] Courts that have confronted agreements in the purchase of online products and services

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ity of vendors to signal their trustworthiness via offering consumers special terms. If some consumers pay attention to some contract terms, however, then the law might appropriately preserve a role for both trust-enhancing mechanisms.

[163] This Essay advocates that terms be made accessible from the home page but stops short of advocating that they be placed on the home page itself. The terms might well be relevant to some customers, but the company should be enabled to reserve its primary pages to the conveyance of those attributes of the transaction deemed most salient to consumers. If too much information must be provided on the primary access page, consumers might experience information overload. There is some evidence that in those cases consumers will switch to heuristic processing mechanisms, in which case they will see high prices as signifying greater quality. *See* Suri et al., *supra* note 70, at 381, 388. If this reasoning process governs consumer choices, their price dispersion will not likely shrink.

[164] Of course, trust in the unknown vendor requires more than an awareness that the boilerplate terms are friendly. Written terms mean little to the defrauded consumer. To the extent that the vendor provides promises to the customers, however, its liability for failing to perform as promised increases. In that world, the consumer is also provided protections for substandard performance short of fraud.

[165] *Cf.* Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 528 n.29 (2003) (discussing the distinction between clickwrap licenses, where the parties to be bound expressly assent to their terms, and browsewrap licenses, where they are not).

have frowned on the enforcement of terms that are not made reasonably available to the purchaser.[166] In addition, some courts have frowned on enforcement of terms that are made reasonably available but do not require the purchaser's affirmative consent by clicking on an icon at the bottom of the presentation of terms.[167] However, some courts have signaled their willingness to enforce online agreements even when the site sponsor is attempting to enforce these "browsewrap" agreements, which do not require affirmative assent.[168] Because the clickwrap agreement helps to protect the trusting consumer, and placement on the home page helps to inform the untrusting consumer, this Essay advocates that both be required. Consequently, browsewrap agreements should be found insufficient for enforcement, unless those terms are included in the box of the good purchased and the purchaser is given a cost-free way to return the product for a full refund within thirty days of receipt of the product.[169] In this latter case, the terms in the box must clearly and conspicuously state the consumer's right of return if dissatisfied with the accompanying terms.[170] In no case should the vendor be allowed to enforce terms that differ from those provided on the website, unless the terms accompanying the product are more favorable to the consumer.

There are other procedural protections that can work to facilitate consumer trust. For example, the European Union has enacted a distance selling directive that, inter alia, requires that prior to concluding a contract, the consumers must be provided with information in a

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[166] *See, e.g.*, Specht v. Netscape Communications Corp., 306 F.3d 17, 30-32 (2d Cir. 2002); Ticketmaster Corp. v. Tickets.Com, Inc., No. 99CV7654, 2000 WL 1887522, at *2, *5 (C.D. Cal. Aug. 10, 2000). *But see* DeJohn v. TV Corp. Int'l, 245 F. Supp. 2d 913, 918-19 (C.D. Ill. 2003) (upholding contract terms which were only available when the party clicked on a hyperlink).

[167] *See, e.g.*, Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002); Ticketmaster Corp. v. Tickets.Com, Inc., No. CV 99-7654 HLH(BQRX), 2000 WL 525390, at *3 (C.D. Cal. Mar. 27, 2000) (stating a preference for clickwrap licenses); Westcode, Inc. v. RBE Elecs., Inc., No. CIV.A.99-3004, 2000 WL 124566, at *6 (E.D. Pa. Feb. 1, 2000).

[168] *See, e.g.*, Ticketmaster Corp. v. Tickets.Com, Inc., No. CV997654HLHVBKX, 2003 WL 21406289, at *2 (C.D. Cal. Mar. 7, 2003) (indicating that plainly visible notice of license terms might be sufficient); Defontes v. Dell Computers Corp., No. C.A. PC 03-2636, 2004 WL 253560, at *6-7 (R.I. Super. Ct. Jan. 29, 2004) (indicating that a browsewrap agreement, coupled with terms provided in the box and an opportunity to return, might be sufficient if the purchaser is clearly informed of her right to return the product).

[169] *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148-50 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450-53 (7th Cir. 1996).

[170] *See Defontes*, 2004 WL 253560, at *6-7.

clear and comprehensible form that includes, in addition to the terms of the contract, basic details about the seller.[171] At least one Canadian province has enacted similar regulation.[172] In a similar vein, Congress has been considering passing a law that requires every Internet cite that takes prescription drug purchase orders to provide:

(1) the name, address of principal place of business, and telephone number of the dispenser;
(2) disclosure of each state in which the person is authorized by law to dispense prescription drugs; and
(3) the name of each individual who serves as a pharmacist for the site and each state where she is authorized to dispense prescription drugs.[173]

The proposed law is no doubt designed to both increase consumer trust in Internet prescription sales and to make it easier for regulators to locate prescription drug sellers and to monitor their activities. Outside this arena, however, Congress seems uninterested in requiring online vendors to provide the customer with basic offline identification and contact information. That information can prove very helpful for the consumer, however, who feels more secure in her ability to contact the vendor, or the Better Business Bureau or an attorney general's office, in the event that the transaction goes sour. Contract law in the United States should be modified to conform with the E.U. requirement to provide basic contact information for all online vendors.

In the E.U. Electronic Commerce Directive,[174] further requirements are laid out that are designed to make clear to the consumer

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[171] RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS § 8.11 (2d ed. 2001). In addition, the E.U. Electronic Commerce Directive requires that electronic service providers (ESPs) "make 'easily, directly, and permanently available' certain information such as . . . name, physical address, email address, a[] VAT or similar registrations, and any supervisory or regulatory bodies to which [they are] subject," as well as pricing information, which must be provided in a "clear and unambiguous" manner. *Id.* § 8.13.

[172] In Manitoba province, the online seller must disclose identity, business address, and phone number, as it must specify applicable warranties, shipping charges, delivery dates, and refund policies. The information must be accessible to the consumer prior to the purchase. Consumer Protection Act, C.C.S.M., ch. C200, § 129 (2005) (Can.) (unofficial version available at http://web2.gov.mb.ca/laws/statutes/ccsm/c200e.php (last modified Mar. 31, 2005)).

[173] Internet Pharmacy Consumer Protection Act, H.R. 3880, 108th Cong. § 2(a) (2d Sess. 2004); *see also* Ludmila Bussiki Silva Clifton, *Internet Drug Sales: Is It Time to Welcome 'Big Brother' into Your Medicine Cabinet?*, 20 J. CONTEMP. HEALTH L. & POL'Y 541, 566-67 (2004) (discussing the proposed law).

that she is receiving a commercial solicitation and to make clear the basic conditions of the offer. It provides that "advertising, direct marketing, and similar communications must be clearly identified as 'commercial communications' and identified as to their origin, and any conditions attached to promotional offers must be clearly identifiable and easily accessible."[175]

In addition to enhancing the effectiveness of spam filters, these requirements are similar to the conspicuousness and clarity requirements that some U.S. courts impose as prerequisites to the enforceability of standard-form agreements. These requirements should carry over to the online context and be more broadly applicable because they enable the untrusting consumer to better read and understand the terms offered to her. Moreover, they, at relatively low cost to the vendor, make it more likely that the trusting consumer also will have read the applicable terms of the agreement. By making it more likely that contract terms are seen, read, and understood, these requirements help foster competition among vendors with respect to nonprice terms. The E.U. directive goes beyond U.S. court regulation of boilerplate terms, however, because it seems to envision state requirements that the websites themselves prominently display any conditions that are attached to promotional offers. Ideally, consumers should be protected both by the website information and by conspicuousness and clarity requirements for presentation of the boilerplate terms.

The E.U. Distance Selling Directive[176] further directs the member countries to pass laws giving the consumer a seven-day period during which the consumer can withdraw or cancel most contracts with the vendor for any reason.[177] From a trust perspective, the cooling-off period provided in the E.U. directive is less necessary in online transactions than it might be for offline transactions. Presumably, the cooling-off period for in-home solicitations stems from the fact that some consumers are more likely to agree to purchase from a salesman who has invaded their personal space. The social pressures to accommo-

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[174] Council Directive 2001/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1.

[175] FOLSOM ET AL., *supra* note 171, § 8.13.

[176] Council Directive 1997/7/EC of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, art. 6(1), 1997 O.J. (L 144) 19, 22.

[177] FOLSOM ET AL., *supra* note 171, § 8.11.

date are probably greater in one's home.[178] Moreover, the sense of familiarity that can develop quickly in one's home can make the consumer more easily choose to trust the vendor. Neither the pressure nor the enhanced trust is likely to infect an online transaction, however.

Of course, there might be other reasons for giving the consumer a chance to cancel a contract. For example, many consumers will trustingly purchase goods over the Internet without reading the seller's terms at the time of the purchase. Consumers are more likely to do this when they purchase a product from a known vendor. In those cases, it might be worthwhile to give the customer a chance to read the terms *after receiving* the product and to decide whether she wishes to keep the product given the accompanying terms. In some standard form contract cases, the courts have been more inclined to enforce the terms when the customer is given a period in which to return a purchased item.[179] Moreover, as mentioned earlier, in the case of browsewrap agreements entered into online, the thirty-day return provision might be essential to its enforceability.

Even nontrusting consumers who have read the sellers' terms would be assisted by a policy that goods purchased can be returned for some period of time *after* their receipt. If, for example, the goods are of a poor quality, the ability to return them after scrutinizing them might make consumers more willing to make the purchase in the first place. Put differently, the vulnerability that the consumer faces when making the purchase is lessened with a cancellation period.[180] This latter right to cancel, though, should be left to the company to determine as a matter of its discretionary policy. Some companies will (and do) wish to signal their high quality by enabling customers to return items purchased online. But the policy can turn out to be costly when customers decide to return goods as a matter of convenience rather than dissatisfaction. Here the potential for consumer opportunism probably favors leaving return rights to the discretion of individual

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[178] *See* Hillman & Rachlinski, *supra* note 89, at 450 n.114 ("Social pressures can be offensive enough to provoke protective legislation, at least when the sales promotion is in the form user's home.").

[179] *See, e.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996).

[180] A study of online purchase decisions indicated that money-back guarantees decrease perceptions of risk for consumers when vendors are unknown to consumers, but not when vendors are known to consumers. Grewal et al., *supra* note 71, at 489. In the latter case, trust in the company apparently stems from familiarity alone. *See id.* at 489-90.

vendors. In short, although cancellation periods should be encouraged in online transactions, and the enforceability of standard-form contracts is reasonably affected by the ability of the customer to cancel her purchase, mandating a cancellation period seems unnecessary and potentially harmful to online commerce, at least where the vendor has provided a clickwrap agreement to the consumer.

Moreover, in order for price competition to work more effectively online, the vendors of the products must perceive that the fairness of their terms is scrutinized by both consumers and courts or other law enforcers. Put differently, if vendors believe that certain terms will not be enforced, they are likely to draft contracts with more consumer-friendly terms. U.S. courts limit the substantive terms of contracts with public policy[181] and unconscionability[182] doctrines. As regards unconscionability, consumer contracts formed on the Internet deserve at least as much protection as those formed offline, but the argument for why this is so requires some elaboration.

Normally, unconscionability requires both procedural and substantive unconscionability.[183] Typically, procedural unconscionability is determined by such factors as a lack of meaningful choice and the weaker party's ignorance, lack of sophistication, or general naïveté.[184] In general, these procedural factors will not be present in Internet transactions, where alternative purchasing opportunities are expanded and online consumers are often relatively sophisticated. If we think beyond the traditional application of unconscionability, however, it is possible to view the historically identified procedural concerns as simply reflecting a set of bargaining contexts in which the law, for one reason or another, thinks that more careful scrutiny of substantive terms is warranted. From that perspective, we can easily make the case that the substantive provisions of online transactions should be more carefully scrutinized to promote online trust. In

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[181] *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 95 (N.J. 1960); RESTATEMENT (SECOND) OF CONTRACTS §§ 178-179 (1981) (setting out public policy grounds for nonenforcement).

[182] *See, e.g.*, Martin v. Joseph Harris Co., 767 F.2d 296, 298 (6th Cir. 1985); Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 447 (D.C. Cir. 1965); Gianni Sport, Ltd. v. Gantos, Inc., 391 N.W.2d 760, 761 (Mich. Ct. App. 1986); RESTATEMENT (SECOND) OF CONTRACTS § 208 (stating that a court may refuse to enforce an unconscionable contract); U.C.C. § 2-302 (2004) (same).

[183] *See, e.g.*, Gillman v. Chase Manhattan Bank, N.A., 534 N.E.2d 824, 828 (N.Y. 1988).

[184] *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.40 (5th ed. 2003).

short, because consumer trust is harder to foster online and online transactions are consequently hindered, and because more trustworthy behavior by unknown vendors as a class can enhance consumer trust, the online transacting context is one where more careful scrutiny of substantive terms generates benefits. If so, then substantive unconscionability of online contracts should concern courts even in the absence of procedural unconscionability as historically conceived.

In any event, some courts today do not require procedural unconscionability as a prerequisite to striking down contract terms. For example, at least one court reviewing an online transaction bypassed the procedural unconscionability component altogether to find contract terms substantively unconscionable. In *Brower v. Gateway 2000, Inc.*,[185] the agreement accompanying consumers' purchases of computers and software required that consumers submit all of their disputes to arbitration in accordance with the arbitration rules of the International Chamber of Commerce.[186] Each plaintiff would be required to pay an arbitration fee so high that it typically exceeded the total amount paid for the product as well as the amount in dispute; the arbitration clause therefore effectively deprived the plaintiffs of a forum in which to bring their claims. Even if the fees were reasonable, however, arbitration clauses have the effect of depriving plaintiffs of the opportunity to bring class actions.[187] Given that online consumer purchases and their resulting harms, if any, are likely to be small, and that class actions are designed to enable multiple plaintiffs with small claims to obtain compensation for wrongs,[188] arbitration provisions should be viewed very suspiciously by courts reviewing the terms of online transactions.[189]

Other terms, such as limitations of warranties and damages, should also be carefully scrutinized under the unconscionability doctrine or its equivalent in other nations' laws. Warranty provisions are difficult to analyze, however, because some consumers might wish to purchase cheaper products that lack extensive warranties. The value of Internet transactions in promoting competition lies both in its abil-

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[185] 676 N.Y.S.2d 569 (Sup. Ct. 1998).

[186] *Id.* at 570.

[187] *Id.* at 571.

[188] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985); O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 318 (C.D. Cal. 1998).

[189] Even more broadly, the E.U. Unfair Terms Directive directs member states to scrutinize as unfair any contract term in a consumer contract that requires "arbitration not covered by legal provisions." Maxeiner, *supra* note 110, at 136 (quoting the directive).

ity to promote price competition and in its ability to promote the sale of heterogeneous goods and contract terms. Nevertheless, very basic warranties—such as a warranty of fitness for a use advertised—should be nondisclaimable. Other implicit warranties should be disclaimable only in the manner provided in the U.C.C.

Finally, damages recoverable in online transactions that result in breach should be relatively generous. In both the offline and online worlds, we want people to be vigilant and to process trust-relevant information. In the online world, however, trust-relevant information is less readily available and consumers are therefore relatively more reluctant to transact. Given this difference, the online consumer's copayment in the event of the seller's breach should probably be lower in the online context than it is for offline transactions. Moreover, to encourage trustworthy behavior by vendors, punitive or treble damages should be available to consumers who are victimized by fraud or other deceptive trade practices.

In summary, it appears that the law applicable to contracts online should include procedural rules designed to foster consumer trust and to further consumer awareness of competing vendors' contract terms. To that end, vendors should be required to both post the terms of the agreement on the site's homepage and provide clickwrap assent to the agreement's terms prior to the completion of the transaction. Those online sales that are completed with only browsewrap assent should not be deemed effective unless the consumer is clearly notified at the time of delivery that she has some period of time, perhaps thirty days, in which to return the product for a full refund. Vendors should also be required to provide basic identity, contact, and location information that is easily accessible on their websites. Rules of conspicuousness and clarity imposed by some U.S. courts on contract terms should apply more broadly to online transactions. Moreover, damages rules should be generous and reasonable extracompensatory damages should be available in cases of fraud or unfair trade practices.

Monitoring of substantive terms should ensure basic fairness in online contracts. Arbitration clauses and broad warranty exclusions should be viewed with suspicion. Substantive unconscionability in general should police online contracts to the same extent that the doctrine is used to police offline contracts. Beyond that, however, courts and legislatures should proceed cautiously. As always, courts should be sensitive to the fact that heterogeneous contract terms are a desirable byproduct of Internet transactions, so long as those terms

are not oppressive. Moreover, excessive policing can inhibit online sales by newcomer vendors as much as can a lack of trust by consumers. As a general rule, contract rules should work to maximize both net trust between the parties and net Internet transactions.

IV. CHOICE OF LAW AND TRUST-PROMOTING CONTRACTS

This Essay proposes relatively small modifications to the contract doctrine, as it applies to online transactions, in order to promote consumer trust of unknown online vendors. Currently, unknown online vendors must either forgo profitable sales or pay a significant share of their revenues to trusted middleman organizations that can (1) gather reliable reputational information about the vendor, (2) provide trusted payment systems to customers who are leery of sharing their credit card information online, and (3) provide consumers with limited insurance against nondelivery of goods ordered.[190] These expenses are either completely or largely avoided by known online vendors who rely on their own sites and payment systems to do business. In the absence of effective legal protections, the trust middlemen serve a valuable function for unknown vendors. To the extent that the law can serve as a substitute, or even a complementary, promoter of consumer trust in these vendors, however, the costs to unknown vendors of competing with the known vendors goes down. At least in theory, effective legal mechanisms should enable the unknown vendors to eliminate some or all of their expenditures on trust middlemen and/or should contribute to the elimination of price disparities. In either case, unknown vendors would capture a larger market share and consumer welfare should increase. Part III began an exploration of what Internet trust-promoting law might look like. This Part explores the question of how, if at all, law can work to promote trust when transactions often span jurisdictional borders. Subpart A, unsurprisingly, advocates the international harmonization of trust-promoting rules and briefly explores some of the political dynamics that might result from a harmonization effort. Subpart B discusses choice-of-law rules that courts should use in the absence of harmonization. I leave for Part V a discussion of the ultimate feasibility of modifying contract law to promote trust online.

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[190] Some credit card companies will not charge for goods that have not been delivered due to theft or fraud. *See* sources cited *supra* note 82.

A. *International Harmonization*

If legal protections can enhance online trust, they must work by way of their effects on the behavior of online merchants. Consumers rarely pay attention to the governing laws of their own jurisdictions, let alone the governing laws of other jurisdictions.[191] Online vendors, by contrast, are much more likely to pay attention to the laws that affect the ways in which they do business. The more states that sign on to the recommended consumer protections, the greater the law's influence on merchant behavior, and the sooner the costly middlemen can be replaced. If instead enhanced consumer protections are provided in only a few jurisdictions with small populations, then the law will govern only a very small fraction of the worldwide online market, and the law will likely fail to enhance online trust overall.

As always, international harmonization is the most effective means to achieve the normative objective—here, to utilize consumer-protection laws to promote online trust. Ideally, then, we simply need the countries and/or regions that represent the vast bulk of consumers and vendors to sign on to a treaty providing for all of the consumer protections advocated in Part III above. Unlike many other suggestions for harmonization, there actually is some chance that these proposals could be the subject of successful international treaty efforts over the next few years. The United Nations has expressed an interest in fostering international efforts to more effectively promote and regulate Internet transactions, and it has recently embarked on efforts to harmonize the world's law regarding electronic signatures.[192] Perhaps the United Nations could next undertake harmonization efforts regarding the regulation of consumer contracts.

If such a harmonization effort were undertaken, both known and unknown vendors would likely be represented in the process. It is now well-understood that when a group writes a model law or treaty proposal, the proposed laws will reflect the interest groups represented at the table.[193] There are three basic groups that have a stake in the state of consumer trust in online transactions: (1) known, or well-established, vendors; (2) unknown vendors, or less-established

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[191] *See* EJAN MACKAAY, ECONOMICS OF INFORMATION AND LAW 194 (1982) (stating that consumers tend to be ignorant of consumer protection laws).

[192] *See generally* UNITED NATIONS, UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT 2001 (2002), *available at* http://www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf (last visited Mar. 31, 2005).

[193] *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 640 n.98 (1995).

newcomers to the market; and (3) consumers. Known vendors are likely to be well-represented in international negotiation efforts because they have relatively significant political clout. They are more powerful than unknown vendors in that known vendors are typically financially stable, long-term members of the community that a politician represents. Moreover, known vendor representatives can make a credible claim that they have a great deal at stake in the success of the Internet as a means by which to conduct commerce. Given that known vendors have had much to do with the sharp rise in Internet commerce in recent years, they will be presumed to have useful ideas about how to build consumer trust. At the international level, unknown vendors also are likely to be well-represented. Many unknown vendors who sell products on the Internet are in fact well known in the communities or states where they are located. Often they have conducted successful brick-and-mortar businesses in these communities and then joined other online merchants in an effort to expand their businesses. Local customers might well know and trust these businesses, and they are therefore happy to transact with these businesses online. But customers in other states may be less familiar with them. Put differently, at the international level, many of the business constituencies that are well-represented in their own nations' political processes are unknown vendors to some of the other nations' consumers. At the international level, vendors known in their home states would support reforms that better enable them to break into new markets, and they are likely to communicate these preferences to their political representatives. To the extent that the vendor's home nation is represented at the drafting and/or negotiation stage, therefore, the "unknown vendor" likely is also represented.

Known and unknown vendors often have conflicting interests regarding the laws of a given jurisdiction. To illustrate, a vendor who is well-known to the consumers in the United States is not likely to favor the adoption of U.S. laws that serve to enhance consumer trust online. Today, consumers seem pretty comfortable transacting online with known vendors, whereas unknown vendors attempting to break into the online sales market are forced to pay the additional transaction costs associated with establishing their trustworthiness through third-party intermediaries. Unknown vendors would prefer to reap the benefits of enhanced trust without paying the intermediaries, but no single vendor can act unilaterally to promote consumer trust given the spillover effects of consumer distrust of unknown vendors. To circumvent the intermediaries, the unknown vendors must coordinate

their efforts to provide consumer protections, and law becomes one mechanism by which their coordination is possible.[194] Because these additional transaction costs decrease the competitive threat of unknown vendors, however, known vendors are likely to vigorously oppose any one jurisdiction's efforts to pass laws designed to promote consumer trust in the unknown vendors.

In international negotiation, however, known and unknown vendors might both end up endorsing trust-promoting reforms. After all, at the international level, most known vendors are unknown in some major markets, and worldwide trust-promotion would help them break into new markets. To the extent that a vendor is known and trusted worldwide, or to the extent that a vendor does not perceive that further sales expansion would be profitable, that vendor likely would not side with the unknown vendors in law-reform efforts. Nevertheless, the point remains that the proportion of known to unknown vendors effectively shrinks with the geographic scope of proposed regulation. The larger the consumer market area covered by regulation, the more likely that any given vendor is unknown over some portion of that market, and this fact makes it more likely that vendors as a group would endorse trust-promoting reforms. Thus, if possible, the United Nations should undertake efforts to harmonize the substantive law applied to consumer transactions conducted online, and the substance of that law should accord, as closely as possible, with the proposals presented in Part III.

B. *Choice of Law*

Despite the foregoing analysis, in practice international harmonization efforts often fail and, even more often, never get off the ground. Even if successful, the proposed harmonization likely would take several years to achieve, and it would take yet a few more years for new laws to change consumers' reluctance to buy from unknown vendors. What, if anything, can the choice-of-law rules do in the meantime to assist in efforts to promote consumer trust? This Essay considers two possible uses of choice-of-law rules to promote trust-enhancing contract law: (1) rules designed to lead to the application of the most consumer-protective, or the most trust-enhancing, laws; and (2) rules designed to incentivize legislatures to adopt trust-enhancing laws.

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[194] *See* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1651 (2000) ("[L]aw provides a focal point around which individuals can coordinate their behavior.").

1. Protection-Maximizing Choice-of-Law Methods

Choice-of-law rules can work in two ways to influence the extent of protections made available to consumers. Courts that hear disputes between consumers and vendors can use either the law of the jurisdiction providing the *greatest* consumer protections, or, if maximum consumer protection proves suboptimal, the law of the jurisdiction providing the most *trust-enhancing* consumer protections. To achieve this result, the method that the court uses in choosing the governing law must remain flexible. When states' substantive laws governing a legal problem differ, applicable choice-of-law rules can be broken into two types: (1) those that consist of rules based on the location of the parties or the events involved in the dispute; and (2) those that consist of standards designed to help promote policies that underlie one or more of the competing jurisdictions' laws.

In order to consistently apply the more consumer-favoring or more trust-enhancing law, the choice-of-law method must enable a court to incorporate trust-enhancing policies into its analysis. In the United States, several modern approaches to choice of law are flexible enough to achieve this result. The *Second Restatement* is the most flexible, of course, in that it instructs the court to consider a number of factors in choosing the governing law, including the needs of the interstate and international systems; the relevant policies and relative interests of the interested states, including the forum; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability, and uniformity of result; and the ease of determining and applying the applicable law.[195] Moreover, in considering these factors, the court can end up applying the law of the place of contracting; the place of contract negotiation; the place of performance; the location of the subject matter of the contract; or the domicile, residence, nationality, place of incorporation, or place of business of either of the parties.[196] No doubt this approach would give courts sufficient latitude to apply the law of a jurisdiction with relatively greater consumer-trust-enhancing provisions.

There are other routes to this result under modern conflicts principles applied in the United States. For example, a few U.S. states[197]

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[195] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

[196] *Id.* § 188(2).

[197] *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 1997*, 46 AM. J. COMP. L. 233, 253 & n.107 (1998) (stating that, in 1997, Arkansas, Minnesota, New

have adopted Robert Leflar's approach to conflict of laws,[198] under which they in effect apply the better rule of law to the dispute at hand. Under such an approach, a court motivated to incorporate trust-enhancing rules into the legal landscape could surely determine that trust-enhancing rules are the "better" rules to apply to disputes involving online consumer transactions. Moreover, a subsidiary consideration under Leflar's approach is the maintenance of interstate and international order,[199] and one of Leflar's recognized goals for this factor is the facilitation of the interstate and international movement of goods.[200] A trust-enhancing choice-of-law rule, if effective, should work to make consumers more willing to transact with unknown vendors; and this might well have the effect of increasing the interjurisdictional movement of goods.

As an alternative, the courts could either apply some form of government interest analysis[201] or, where constitutionally permissible, simply apply forum law[202] to create a bias in favor of the application of forum law.[203] If the forum substantive law is favorable to plaintiffs, then these choice-of-law methods will have the effect of attracting consumer plaintiffs to their fora for litigation.[204] As plaintiff forum shopping for plaintiff-favoring substantive laws increases, more disputes will be resolved through the application of consumer-protective laws. An individual plaintiff might be reluctant to incur the added expense of litigating in a foreign forum, but to the extent that she can bring a class action to represent similarly aggrieved consumers, she presumably would prefer a state with consumer-favoring contract law and forum-favoring choice of law.

Hampshire, Rhode Island, and Wisconsin followed the "Better Law" approach advocated by Robert Leflar).

[198] Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 271 (1966).

[199] *Id.* at 285.

[200] *See id.* at 286 ("The free and unpenalized movement of people and goods from state to state, and freedom in commercial intercouse, are essential to the success of our federal system . . . ." (footnote omitted)).

[201] *See* Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1315-17 (1989) (discussing the heavy bias of interest analysis in forum law).

[202] *See* Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 569-79 (2002) (discussing three states' adoption of the *lex fori* approach to choice of law).

[203] For discussions of how interest analysis generates forum-biased choice-of-law decisions, see Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 398 (1980); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 68-74 (1989).

[204] *See* Solimine, *supra* note 203, at 68-74.

2. Legislation-Influencing Choice-of-Law Methods

A second way that choice-of-law principles can work to influence substantive law is in the adoption of a choice-of-law rule that somehow changes the political incentives for substantive lawmaking. If a state applies the law of the forum in conflicts cases, for example, that state might be more inclined to enact plaintiff-favoring laws in order to attract nationwide litigation into the state courts.[205] Without a rule in favor of forum law, potential plaintiffs and potential defendants might have bargained themselves to a certain set of substantive laws. With a choice-of-law rule that favors the application of forum law, however, the potential plaintiff population grows significantly, as does the profitability to in-state plaintiff lawyers of increased plaintiff-favoring laws. Forum-favoring laws thus might work effectively to push states toward more consumer-protective rules for online transactions.

My concern with adopting a forum-favoring law approach, however, is that it might prove too effective in encouraging consumer-favoring contract rules. Recall that the optimal contract rules in any setting are those that maximize the trust between the parties. If states adopt rules that are too consumer-favoring in an attempt to provide a location for consumer class actions against online vendors, then consumers (and their lawyers) are given a sword that can erode vendor trust in consumers. In addition, the costs of consumer products may rise to the point where overall consumer welfare is not enhanced by consumer protections. The possibility of excessive consumer-protection law stems from the fact that forum-based choice-of-law approaches make plaintiffs' lawyers a separate but powerful interest group in the bargaining over substantive laws. Of course, there is no guarantee that the plaintiffs' lawyers will be successful in their lobbying endeavor. Companies that are able to forecast future class actions in the state might lobby forcefully against the excessively consumer-favoring law. The point here, however, is that the possibility of excessive consumer protections seems significant enough to seek a better choice-of-law solution.

There is a second reason why the forum-law rule as well as the other modern U.S. approaches to choice of law might prove disadvantageous. Under those approaches, the governing legal standard for any given transaction turns on the forum where a resulting dispute is ultimately litigated. Thus, it is often difficult for merchants to know

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[205] *See* Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 349 (2004).

ex ante which set of substantive laws will likely apply to future disputes with consumers. To the extent that there is uncertainty in the governing legal rules, merchants will not be uniformly required to abide by a set of trust-enhancing contracts principles, and the behavioral effect of legal reforms will therefore be muted. One goal of consumer-protecting contract rules is to provide effective redress to consumers injured in their online transactions with vendors, and these modern approaches might help to increase the likelihood that consumers can obtain effective redress. But recall that the primary justification for enhanced consumer protections was to influence the behavior of unknown vendors and eliminate their need to rely on expensive third-party intermediaries. That primary goal cannot be achieved unless it is clear to the vendors which law will govern their transactions. Forum-favoring rules do promote forum-shopping and thereby increase the likelihood that those forum laws will govern future disputes, but consumers who do not or cannot utilize the class action device are unlikely to stray far from home to litigate. Thus, we would expect some heterogeneity in the governing law of a given transaction under a forum-law rule.

The challenge, then, is to identify a choice-of-law approach that will provide optimal incentives for each jurisdiction to enact reasonable consumer-protective laws for online transactions while at the same time providing some sense of predictability to merchants regarding the laws that will govern their transactions. The approach best designed to serve these dual functions is a consumer-residence or place-of-shipment rule. Let us now turn to an exploration of this solution.

a. *Consumer-residence/place-of-shipment rule*

A consumer-residence or place-of-shipment rule would provide some incentive for states to adopt consumer-protective laws to govern online transactions. Unlike the international bargaining setting, unknown vendors are likely poorly represented in the legislatures and courts of an individual jurisdiction, for at least two reasons. First, unknown vendors are unknown in a given jurisdiction because they are small, they are nonexistent, or they are outsiders. In each of these cases, the unknown vendor is not likely to have much political influence, especially relative to the known vendors in that state. Second, even if an unknown vendor were able to wield some influence in the jurisdiction, it is not likely that trust-enhancing rules in that jurisdiction would significantly affect worldwide consumer trust in unknown vendors. On the other hand, it might be possible to fashion laws that

can enhance the trust of consumers in a particular jurisdiction. If that jurisdiction is sufficiently large, it might be possible to find a national online market with smaller price disparities and increased consumer welfare.[206] To promote consumer trust in a single jurisdiction, the courts should apply the law of the consumer's residence, or the law of the place of shipment, to any disputes that arise out of the transaction.

The last paragraph suggested that unknown vendors are likely to be relatively underrepresented in the state relative to known vendors. Given this imbalance, plaintiff-protecting rules would be applied to online transactions only if the governing choice rule provides an incentive for consumers to advocate for the reforms in their jurisdictions. One way to provide an incentive for them to advocate for the reforms is to assure consumer groups that local consumers will have the protection of the local laws, and a consumer-residence rule would provide that result. Moreover, a consumer-residence rule would also help those consumers with low-value claims bring their litigation in in-state courts. Furthermore, a consumer-residence rule would diminish the likelihood that plaintiffs' lawyers from across the country will use the state legislature as a staging ground for future profit-making. Consumer advocacy groups thus have some—but not too much—incentive to lobby for protections. Known vendors might have some incentive to lobby against online contract law reforms, but to the extent that the law applies only to local consumers, its lobbying incentives would be dampened relative to those associated with legal reforms in states with forum-law rules. In short, while somewhat speculative, the consumer-residence rule may be the rule most likely to result in optimal consumer-protection rules.

Further analysis of this topic seems warranted, but if it turns out that a consumer-residence rule provides the best legislative incentives, then the courts should consider also the adoption of a place-of-shipment rule. Consumer goods are most often delivered to the consumer's residence, so a place-of-shipment rule would provide substantially similar political incentives. However, this rule would enhance predictability for merchants more so than a consumer-residence rule. The place-of-shipment rule would enable vendors who find a jurisdiction's laws onerous to avoid transacting with its consumers. Where goods are shipped to consumers, a place-of-shipment rule would en-

[206] At this Symposium, for example, Peter Swire noted that Americans do very little business online with foreign companies. To the extent that an online market can be isolated to a particular jurisdiction, the trust-enhancing benefits can be produced in that jurisdiction by changing that state's consumer-protection laws.

able dissatisfied merchants to adopt policies against shipping their products to places where the governing laws are overbearing. Where online purchases do not involve shipment, a vendor could request that consumers state their place of residence and similarly refuse to transact with consumers reporting that they are residents of overly regulatory jurisdictions. These merchant refusals to transact with a state's residents would provide their own disciplining force against the promulgation of trust-reducing reforms. Thus, although not guaranteed to work perfectly, the best choice-of-law rule for encouraging consumer trust in online vendors might well be a place-of-shipment rule.

Interestingly, many jurisdictions have gravitated toward both the consumer-residence and place-of-shipment rules. The E.U. Distance Selling Directive, for example, provides that local consumer-protection laws apply to contracts concluded at a distance.[207] Furthermore, the 2001 Amendments to Article 1 of the U.C.C. provide that, notwithstanding the choice-of-law rules otherwise applied in a State's courts, no law can be applied to a consumer transaction if it works to deprive the consumer of the protection of a mandatory consumer-protection rule, either where the consumer resides or where the consumer both makes a contract and takes delivery of the goods (when that place differs from the place of residence).[208] The above analysis suggests that these trends are advisable, at least to the extent that they apply to online transactions.

b. *Contractual choice of law*

To what extent, if at all, should parties transacting online be able to circumvent the governing laws with choice-of-law clauses in their agreements? In nonconsumer contracts, parties should be free to contract for the governing law that best suits their needs.[209] If the law of some jurisdictions is insufficiently attentive to the parties' concerns, they can choose the law that best suits their relationship. Moreover, if one party discovers that the other party does not trust her, then the untrusted party can ease the concerns of the untrusting party by contracting for a protective law or forum for dispute resolution. In non-

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[207] Council Directive 97/7/EC, *supra* note 176.

[208] *See* U.C.C. § 1-301 cmt. (2004) (providing a "[s]ummary of changes from former law").

[209] For a discussion of this issue, see Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1186-87 (2000).

consumer contracts, Article 1 of the U.C.C. provides that the parties can choose any governing law that they wish, regardless of whether the contract or its parties bear any relation to the place of the chosen law, so long as application of the law chosen would not violate a fundamental public policy of the state whose law would otherwise apply.[210]

These same concerns might lead one to conclude that contractual choice of law should be freely enforced in consumer contracts as well. Unfortunately, however, the consumer often is unaware of the effect of a choice-of-law provision, because the consumer is rarely aware of the law in her own jurisdiction, let alone the differences between the substantive laws across jurisdictions. It seems possible, at least in theory, that a contractual provision could explain the effect of the choice-of-law provision to the consumer, but this explanation would be part of the standard-form agreement that consumers are already highly unlikely to read.[211] Moreover, if online merchants can avoid the overly oppressive law of a given jurisdiction with a choice-of-law clause rather than refusing to do business in that state, then the political constraints on the passage of excessive consumer-protection laws are dampened.[212] The only way for the consumer-residence or place-of-shipment rule to constrain excessive consumer protections is for it to be costly to evade the protective laws. And, more fundamentally, the fact that consumer-protection laws cannot be easily evaded with a choice-of-law clause is what makes it worthwhile for consumer groups to lobby for the protections in the first place.[213] Here, too, the newly amended U.C.C. provision on choice-of-law-clause enforcement limits the use of the clause in consumer contracts.[214] First, the chosen state's law is inapplicable unless the transaction bears a reasonable relation to that state. Second, the choice-of-law clause will not work to circumvent mandatory consumer-protection rules that would otherwise apply.[215] The latter restriction disables the merchant from circumventing the mandatory contract rules, such as those related to

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[210] U.C.C. § 1-301.

[211] *See* Hillman & Rachlinski, *supra* note 89, at 435-36 (discussing the fact that consumers rarely read and process the terms on standard-form agreements).

[212] *See* Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1580 (2000).

[213] *See id.*

[214] U.C.C. § 1-301(e) (2004).

[215] *Id.* Similarly, choice-of-law clauses cannot work to defeat consumer protections under Malaysian law. Consumer Protection Act 1999 (Act 599) (Malay.) (English translation available at http://www.ciroap.org/apcl/statutes_content.php?cid=28&id=37).

unconscionability. The former restriction limits the circumstances under which the merchant can circumvent default rules that would otherwise apply to the contract. Overall these restrictions—so long as confined to consumer contracts—make sense, because they help to reinforce the applicability of the law of the place of the consumer's residence, or the law of the place of shipment.

V. SHOULD STATES ENACT TRUST-PROMOTING LAWS?

Consumer trust in vendors is widely recognized as a significant impediment to the growth of online purchasing. Trust consultants abound, full of advice for online vendors, and private trust-substituting and trust-promoting entities are helping to encourage consumers to purchase goods online. An important question left largely unexplored is what role, if any, can contract law serve in increasing consumer confidence in online transactions. This Essay seeks to help fill that void.

Contract law plays an important role in encouraging strangers to transact with one another. While, during the twentieth century, social norms and reputational concerns proved less powerful in ensuring that parties conducted their business in a trustworthy fashion, contract law was modified to help fortify the safety nets of contracting parties. If contract law proved flexible enough to respond to the growth of a heterogeneous population and the rise of large businesses and standard-form contracts, perhaps it can be used as a tool to help address the special trust concerns that arise in business-to-consumer ("B2C") contracts online. No doubt, the contract law that developed prior to the rise of the Internet does help to encourage online trust, but the question addressed here is what shape it should take to create optimal incentives for consumers to transact with unknown vendors.

The best argument to be made in favor of using consumer protections to facilitate consumer trust online seems to be that unknown vendors have a stake in increasing generalized consumer trust in the online environment. Vendors may be able to take steps to increase consumer trust, but consumers who distrust the online environment may nevertheless avoid unknown vendors. Consumer-protection laws can signal to consumers that the online trading environment deserves their trust either directly, by telling them they enjoy contract law protections, or, more likely, indirectly, by promoting trustworthy vendor behaviors that over time work to show consumers that the online transacting environment is worthy of more trust.

Part III began to explore the question of what trust-enhancing contract laws might look like. Most of the rules advocated in this Essay are at best marginal changes to existing contract law, and each individual proposal arguably already exists in the law of at least one jurisdiction. The proposals are necessarily quite modest because laws that protect one party to a contract can give that protected party an ability to use the protection opportunistically. Although, as discussed in Part II, there are trust asymmetries in the online consumer transaction context that ameliorate these concerns, at best those asymmetries counsel modest changes in contract doctrine.

Unfortunately, modest changes in contract doctrine likely do little to increase consumer trust. Assuming that consumers are generally ignorant of these governing legal doctrines, contract law works only to the extent that it changes vendor behaviors. Subtle changes in legal rules may produce little or no change in vendor behaviors, and this, in turn, may produce imperceptible changes in consumer attitudes toward unknown vendors.

The difficulties of using contract law to influence consumer trust in the online transacting environment are exacerbated by the fact that the online trading environment often does not align itself well with geographic boundaries. Trust in this cross-jurisdictional trading environment might require harmonization of trust-enhancing contract law and/or the use of choice-of-law principles that enhance the production and application of trust-enhancing law. Because these measures are difficult to coordinate, it may prove nearly impossible to use contract laws to significantly enhance consumer trust in online transactions.

On the other hand, it remains possible, in theory, to enhance consumer trust with contract doctrine modifications, and, so long as these modifications are carefully cabined so as not to either create incentives for opportunism or end up increasing the cost of consumer products, experimentation might prove worthwhile. Moreover, to the extent that the proposed modifications represent sensible means for resolving online consumer contract disputes, the rules should be adopted without regard to whether they can be empirically proven to enhance consumer trust. At best, then, an uneasy case can be made for addressing online consumer trust issues with contract doctrine modifications.

CONCLUSION

Consumers' lack of trust in unknown online merchants causes them to pay more for products from known vendors. These trust problems also cause online merchants to pay significant amounts of money to third-party trust middlemen to conduct their online businesses. This Essay calls for an exploration of what influence, if any, the law applicable to online contracts can have on consumer willingness to experiment with unknown vendors. Additional legal protections might make consumers more likely to experiment with unknown vendors, and, if these experiments go well, consumers will be more likely to transact with those vendors in the future. If carefully limited, some consumer protections can actually work to increase online transactions and lower the prices that consumers pay for their products. This Essay also calls for international harmonization through a U.N. convention. In the meantime, a continued trend toward application of the law of the residence of the consumer or place of delivery can help to promote further adoption of these efficiency-enhancing consumer-protection laws. The efforts might do little in the end to promote consumer trust, but if carefully constrained they should be fairly costless to obtain and maintain. Overall, experimentation with trust-promoting online consumer protections seems worthwhile. But at best, the case for legal reform is an uneasy one.