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The Common Sense of Contract Formation

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THE COMMON SENSE OF CONTRACT FORMATION

Tess Wilkinson-Ryan* & David A. Hoffman**

What parties know and think they know about contract law affects their obligations under the law and their intuitive obligations toward one another. Drawing on a series of new experimental questionnaire studies, this Article makes two contributions. First, it lays out what information and beliefs ordinary individuals have about how to form contracts with one another. We find that the colloquial understanding of contract law is almost entirely focused on formalization rather than actual assent, though the modern doctrine of contract formation takes the opposite stance. The second Part of the Article tries to get at whether this misunderstanding matters. Is it the case that, and when do, beliefs and misunderstandings about the nature of legal rules affect parties' interactions with each other and with the legal system? We find that, indeed, information that a contract has been legally formed has behavioral effects, enhancing parties' commitments to a deal even when there are no associated formal sanctions. However, we also document a series of situations in which misunderstandings have limited practical repercussions, because even parties who believe that legal obligation is about formalities take seriously the moral obligations associated with informal promises and exchanges. We conclude with brief speculations about the implications of these results for consumer contracts.

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INTRODUCTION

Unlike torts or civil procedure or any area of public law, the laws of promissory exchange only apply to parties who have manifested their assent to be bound. And yet, it is common sense that people sometimes feel bound to exchanges when the law would release them. Norms of promise keeping and reciprocity, interpersonal courtesy, and community reputation have real effects on contract behavior. Although it is perhaps a less exciting claim, it is also the case that the law itself (or, at least, what the parties *believe* the law to be) affects transactional decisionmaking and parties' commitments to their interpersonal obligations.

This Article presents four new experimental studies of commonsense approaches to contract formation in the hopes of making two primary contributions. The first is to survey intuitions about what the law of formation *is*. In a world in which the vast majority of contracts are signed without the advice of counsel, most people have to draw their inferences of formation based on their background knowledge and beliefs. We find that the colloquial understanding of contract law is about formalization of an agreement rather than the agreement itself, a finding with implications for how firms may be able to manipulate mismatches between legal rules and ordinary intuitions in consumer markets.

Our second contribution is to tease out the intuitive relationship between formation and obligation—to ask whether and when it matters if individuals believe a contract exists. The law of contracts is very clear that parties' obligations to one another turn entirely on whether they have mutually manifested assent to be bound. And in fact, we find that behavioral results suggest that legal (or legalistic) formation does enhance commitment to a deal irrespective of its

power to impose sanctions; it seems that the law has freestanding normative force at least in this context. However, we also find that there are cases in which knowing or not knowing the legal rule is essentially irrelevant. In many scenarios, our results suggest that parties' likelihood to perform or breach is influenced by their moral and social preferences—reciprocity, altruism, and promise keeping—rather than the law of contract formation.

Contracts scholars have long debated the doctrinal and economic importance of formation, particularly when parties often invest significant resources in negotiating.¹ From a policy perspective, the subjective experience of formation is often significant because contracts act as reference points.² Parties treat each other, and their obligations, differently pre- and postcontract.³ Once a contract is formed, they take fewer precautions, seeking less information about the market and about one another.⁴ If an ordinary individual thinks she is in a contract with another, but the law treats them as strangers, she can be exploited by her counterparty.⁵ Indeed, the converse vulnerability also exists for parties who think they are still negotiating but are in fact already legally committed.

To date, there has been almost no investigation of when individuals act like contracting parties. This Article undertakes to fill that gap in the literature by relating a series of experiments and studies regarding lay attitudes and behaviors surrounding contract formation.

We proceed as follows: Parts I and II provide context for the empirical project, with a literature review of what we know about lay attitudes about formation, including the law's inconsistent perspective on whether such attitudes matter. Part III reports the methods and results of four original surveys and experiments. Part IV proposes a framework for thinking about these results and their relevance to doctrinal and policy debates in contract.

I. THE LAW OF SUBJECTIVE ASSENT

Like many scholars writing in law and psychology, we adopt a broad view of what it means for particular beliefs and judgments to have “legal implications.” That is, there are various ways that a legal system might take notice of parties' intuitions and beliefs about contracts even when they have no conven-

1. See, e.g., Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 483-84 (1996) [hereinafter Craswell, *Offer, Acceptance, and Efficient Reliance*]; Richard Craswell, *Remedies when Contracts Lack Consent: Autonomy and Institutional Competence*, 33 OSGOODE HALL L.J. 209, 210 (1995).

2. Oliver Hart & John Moore, *Contracts as Reference Points*, 123 Q.J. ECON. 1, 2 (2008).

3. See David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 418 (2013).

4. See Richard Craswell, *Precontractual Investigation as an Optimal Precaution Problem*, 17 J. LEGAL STUD. 401 (1988).

5. Hoffman & Wilkinson-Ryan, *supra* note 3, at 432.

tional doctrinal role.⁶ However, contract formation is a somewhat unusual area in which there are also formal mechanisms to account for parties' subjective beliefs about the legal status of manifestations of assent. In this Part, we take up the doctrinal mechanisms for taking seriously subjective assent, before turning in Part II to the behavioral ramifications of subjective assent or lack thereof.

A. *Subjective Interpretations of Objective Manifestations of Assent*

Courts and contracts professors doggedly intone that contracting parties' private views on the enforceability of their agreements are irrelevant to actual legal enforceability.⁷ The 1907 case of *Embry v. Hargadine, McKittrick Dry Goods Co.* provides a vivid example.⁸ In *Embry*, the plaintiff, a term employee, approached his boss, McKittrick, in December to inquire about the subsequent year's employment.⁹ McKittrick responded, "Go ahead, you're all right. Get your men out, and don't let that worry you."¹⁰ Embry thought they had a deal; McKittrick denied intending to enter into a legally binding relationship.¹¹ The court, as is typical, found a contract.¹² Likewise, in the contracts casebook staple *Lucy v. Zehmer*, defendant Zehmer asserted that he never intended to enter into a contract to sell his land to his neighbor, and was drunk or joking the whole time.¹³ Calling the defense "unusual, if not bizarre," the court enforced Lucy's demand for specific performance, ruling that only the parties' objective manifestations of assent, not their secret reservations, mattered.¹⁴

Cases like *Embry* and *Lucy* present specific examples of a general puzzle: Does contract law care if its subjects are aware of its premises?¹⁵ In some are-

6. Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 354 (2007) ("However contract law is constructed, at the very least, one would expect it to take as its point of departure the players' actual intentions."); cf. Thomas W. Joo, *Common Sense and Contract Law: Fear of a Normative Planet?*, 16 Touro L. REV. 1037, 1042 (2000) ("It is a standard legal argument to support a preferred result on the ground that it reflects normal human behavior and expectations . . ."); Val D. Ricks, *The Death of Offers*, 79 IND. L.J. 667, 690 (2004) (asserting that the death of an offeror, contrary to assumptions otherwise, should not necessarily revoke the offer).

7. See RESTATEMENT (SECOND) OF CONTRACTS § 21 cmt. a (1981) (commenting that it is not fatal to the enforcement of a contract that parties are mistaken as to the legality of the agreement); E. ALLAN FARNSWORTH, CONTRACTS § 3.6, at 115 (4th ed. 2004) ("By the end of the nineteenth century, the objective theory had become ascendant and courts universally accept it today. In the words of a distinguished federal judge, "intent" does not invite a tour through [plaintiff's] cranium, with [plaintiff] as the guide." (alterations in original) (quoting *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987))).

8. 105 S.W. 777 (Mo. Ct. App. 1907).

9. *Id.* at 777.

10. *Id.* (internal quotation marks omitted).

11. *Id.* at 777-78.

12. *Id.* at 779.

13. 84 S.E.2d 516, 519 (Va. 1954).

14. *Id.* at 520, 522.

15. Cf. Tess Wilkinson-Ryan & David A. Hoffman, *Breach Is for Suckers*, 63 VAND. L. REV. 1003, 1012 (2010) (noting some scholars' theories that certain "lay intuitions" about

as, the answer is definitely no.¹⁶ A murderer-for-hire may not recover against his employer by arguing that he was unaware of the proposition that illegal contracts are unenforceable. Nor may a party depending on oral promises argue that a court should enforce them notwithstanding conflicting provisions of a written agreement because she did not know about the parol evidence rule or the statute of frauds. And indeed, Zehmer's belief that manifesting assent in inebriated jest prevented a meeting of the minds was wrong and irrelevant.¹⁷

But in the law of mutual assent, parties' beliefs about contract formation sometimes actually influence case outcomes. In *Embry*, for example, McKittrick's lack of specific intent to form a contract was not relevant, but *Embry's* was: the promisee must actually believe in the existence of the contract he is suing under.¹⁸ It was irrelevant if Zehmer was joking, but had Lucy not "actually believe[d]" in the reality of his contract, he would not have prevailed.¹⁹ Cases like *Embry* and *Lucy* express a principle of "formation estoppel," identified by Larry Solan as the notion that "when both parties agree that a commitment has been made, the promisor is bound, and when neither believes that a promise has been made, the promisor is not bound. Objective considerations are irrelevant."²⁰

That said, examples of such shared-agreement cases addressing formation rather than interpretation are few and far between.²¹ Most of the examples that Solan identifies are ones where interpretation has bled into formation,²² or where the principle of formation estoppel is only implied in dicta.²³ For perhaps obvious reasons, there are relatively few cases where both parties intend to enter into a legally binding relationship but a reasonable person would not,

aspects of contract law are regarded as "ill-formed" and are not sufficient bases for legal rules).

16. See generally FARNSWORTH, *supra* note 7, § 3.7.

17. *Lucy*, 84 S.E.2d at 522 ("Whether the [written agreement] was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.").

18. *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777, 779 (Mo. Ct. App. 1907) ("[I]f what McKittrick said would have been taken by a reasonable man to be an employment, and *Embry* so understood it, it constituted a valid contract of employment for the ensuing year." (emphasis added)).

19. *Lucy*, 84 S.E.2d at 521 (noting Lucy's good faith). As it turns out, there's a tenable argument that the entire contract was a setup. See Barak Richman & Dennis Schmelzer, *When Money Grew on Trees: Lucy v. Zehmer and Contracting in a Boom Market*, 61 DUKE L.J. 1511, 1552-55 (2012) (describing the Lucy brothers' success in "cruising" for undervalued timber and suggesting that \$50,000 undervalued the property).

20. Solan, *supra* note 6, at 356.

21. See FARNSWORTH, *supra* note 7, § 3.7, at 117 (noting that instances in which a party intends its assent to carry no legal consequences are "unusual"); *cf. id.* § 3.7, at 119 (discussing that courts give weight to family membership when considering whether a party did not intend to be legally bound).

22. See Solan, *supra* note 6, at 365-66.

23. *Id.* at 369-70 (discussing *Newman v. Schiff*, 778 F.2d 460 (8th Cir. 1985)).

and even fewer where a reasonable person would find them to be bound but they mutually understand themselves to be unbound.

B. *Promissory Estoppel*

According to the *Restatement (Second) of Contracts*, the triggering condition for promissory estoppel—which provides for equitable relief where contract formalities are missing and reliance is heavy—is a promise that the “promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance.”²⁴ Of course, which promises we should reasonably expect others to rely on may come down to whether it is reasonable for a counterparty to rely on a noncontractual promise. Indeed, one could read this doctrine to imply that legally unenforceable promises are not ones that the promisor should expect the promisee to rely upon.

For example, in *Hoffman v. Red Owl Stores, Inc.*,²⁵ whether the defendants reasonably expected plaintiff Joseph Hoffmann²⁶ to rely on their promises might have turned on Wisconsin’s then-existing state of the law on formation (which did not yet include promissory estoppel).²⁷ But the court’s opinion makes no mention of limiting promissory estoppel’s application to future cases as a matter of law. Rather, the question of reasonableness was left to the jury, which was asked to opine about the following unclear question: “Ought Joseph Hoffman[n], in the exercise of ordinary care, to have relied on said representations?”²⁸ That is, the question of promissory estoppel’s reasonableness in this classic case turned on ordinary lay intuitions about formation. Would an ordinary individual have believed herself to be justified in relying? And conversely, would an ordinary individual believe herself to be bound?²⁹

24. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

25. 133 N.W.2d 267 (Wis. 1965).

26. See William C. Whitford & Stewart Macaulay, *Hoffman v. Red Owl Stores: The Rest of the Story*, 61 HASTINGS L.J. 801, 804 n.9 (2010) (noting the correct spelling of Hoffmann’s name).

27. See *Hoffman*, 133 N.W.2d at 274-75 (analyzing the idea of promissory estoppel and wondering whether the promise that induced reliance must be sufficient to otherwise constitute consideration for a valid and binding contract); Whitford & Macaulay, *supra* note 26, at 835 (reporting that through its decision in *Hoffman*, the Wisconsin Supreme Court “adopted the doctrine of promissory estoppel as the law of [the state]”).

28. *Hoffman*, 133 N.W.2d at 272.

29. See, e.g., Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 275 (1986) (“[W]hether a person has ‘reasonably’ relied on a promise depends on what most people would (or ought to) do.”); John J. Chung, *Promissory Estoppel and the Protection of Interpersonal Trust*, 56 CLEV. ST. L. REV. 37, 77 (2008) (posing, after presenting a hypothetical, the determination of the reasonableness of reliance in terms of an ex ante analysis of the reasonableness of trust in the other party); Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 853 (2012) (suggesting that evidence shows that people have misconceptions about the terms in a contract to which they are legally bound and citing penalty clauses as a specific example).

Similarly, the understandable ignorance about the doctrine of consideration, for example, permits courts to uphold gift promises, especially when those promises look otherwise highly formal (e.g., *Ricketts v. Scothorn*³⁰ and *Feinberg v. Pfeiffer Co.*³¹). It may be that courts sympathize with plaintiffs who have relied on promises that have the trappings of legal enforceability but are not binding contracts—in other words, that courts are sympathetic to promisees who misunderstand contract law. Indeed, the estoppel doctrine that enforces promises when parties have relied on verbal contracts for exchanges within the statute of frauds suggests that the doctrine is in part about enforcing promises that are easily mistaken for legally binding contracts.

C. Intent to Be Legally Bound

Finally, there is a related set of problems dealing with subjective beliefs about the question of intent to be legally bound.³² For example, consider agreements with crucial open terms. Traditionally such contracts faced judicial hostility. In *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*, for example, Judge Cardozo denied enforcement where the parties had agreed merely to negotiate about price and duration in a supply contract for paper.³³ But under the Uniform Commercial Code, courts are to ask if the parties intended to conclude a contract—that is, did they intend to be legally bound?³⁴ If so, courts will fill gaps in the open terms in accordance with U.C.C. provisions.³⁵

Intent to be bound also plays a crucial role when the parties disagree about whether they were still negotiating or performance of the contract had already begun. Here, too, courts often rely on a reconstruction of the parties' intent.³⁶ The more indefinite the exchanged writings, for example, the less likely a court will be to conclude that the parties intended to be bound.³⁷ Clauses that specifi-

30. 77 N.W. 365 (Neb. 1898).

31. 322 S.W.2d 163 (Mo. Ct. App. 1959).

32. We elide in this Article the question of subjective beliefs about the meaning of words—that is, all interpretation problems. For an interesting recent article on the relationship between lay psychology, reference points, and interpretation, see Yuval Feldman et al., *Reference Points and Contractual Choices: An Experimental Examination*, 10 J. EMPIRICAL LEGAL STUD. 512 (2013).

33. 139 N.E. 470, 472 (N.Y. 1923).

34. See U.C.C. § 2-305(1) (2012) (“The parties *if they so intend* can conclude a contract” (emphasis added)).

35. See generally Nellie Eunsoo Choi, Note, *Contracts with Open or Missing Terms Under the Uniform Commercial Code and the Common Law: A Proposal for Unification*, 103 COLUM. L. REV. 50, 50-54 (2003) (giving an overview of gap-filler provisions in the U.C.C.).

36. For example, courts examine when a contract comes into existence during the course of negotiations. See, e.g., *A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Grp., Inc.*, 873 F.2d 155, 157 (7th Cir. 1989).

37. FARNSWORTH, *supra* note 7, § 3.8, at 122-24.

cally disclaim intent to be bound are typically enforced.³⁸ But the inquiry's focus—what was the relationship between the parties' behavior and their understanding of their legal relationship?—highlights a limited but real role for subjective understandings of formation in contract doctrine.

In sum, a small number of doctrines directly assess a particular party's subjective understanding of assent to contract. The goal of this Article is to see if we can say something more general or more systematic about how people think about contract formation. For that we turn to the psychological literature and then to our own empirical project.

II. THE PSYCHOLOGY OF CONTRACT FORMATION

Our focus in this Article is on the point when a negotiation becomes an agreement, whether that agreement is legally binding or just reflected in the behaviors and preferences of the parties. Although there is relatively little existing research on the psychology of mutual assent to contract, psychologists and behavioral economists have researched and written extensively about other elements of contract formation, including negotiation and drafting.

A. *Negotiation and Drafting*

In the present Article, as in our previous work, we are particularly interested in cases in which parties fail to break a deal when doing so appears to be in their financial self-interest.³⁹ This is in some sense the converse of a more thoroughly documented puzzle that occurs when parties who appear to have compatible preferences (e.g., cases in which there should be gains from trade) fail to arrive at a deal. Psychology has been quite influential in the study of negotiation and drafting. The kinds of anomalous behaviors observed in bargaining and drafting are rooted in the same psychological phenomena we see in the formation context.

The mechanisms that explain bargaining impasses tend to boil down to one underlying psychological phenomenon—namely, that people tend to exaggerate the advantages, material or moral,⁴⁰ of their own positions and fail to see the

38. *Id.* § 3.8, at 123. A classic contracts casebook example is *Spooner v. Reserve Life Insurance Co.*, which upheld a clause stating that a bonus otherwise appearing due was a “voluntary contribution” as signaling an absence of obligation. 287 P.2d 735, 737, 739 (Wash. 1955).

39. See Wilkinson-Ryan & Hoffman, *supra* note 15, at 1013 (noting that individuals prefer performance over fully compensatory money damages when involved in a contract); Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547, 1560-61 (2011) (reporting that even though defaulting on a mortgage may be in an individual's financial self-interest, feelings of moral obligation may prevent one from breaching).

40. Indeed, this plays out not just with material entitlements but also with viewpoints in general. Most people overestimate the fairness of their own position. The idea is that parties have not only a sense of what they want out of a bargain but also a sense of the range of

merit in whatever a counterparty is offering.⁴¹ There is a “stickiness” to initial views and entitlements,⁴² an observation that has been exhaustively borne out in the heuristics and biases literature on the endowment effect.⁴³ In a variety of experimental and real-world contexts, the initial allocation of goods and entitlements has real effects on parties’ willingness to trade.⁴⁴ In the famous Cornell mug experiment, subjects were randomly assigned to receive a mug or to receive nothing.⁴⁵ When the experimenters offered to effect any mutually beneficial trades (that is, to allow any mugless mug lovers to purchase from mug-indifferent mug owners), they found almost none to be made.⁴⁶ The mug owners on average demanded over two times the price to give away a mug than the average would-be buyer was willing to pay.⁴⁷ Though there are various explanations for this phenomenon (and some challenges to its generalizability),⁴⁸ it seems safe to conclude that people often overestimate the value of the status

bargains that are objectively “fair.” Even when an agreement appears materially beneficial to both sides (e.g., superior to available outside options, including not dealing at all), it may be rejected if one or both parties believes that it is objectively unfair. Linda Babcock and George Loewenstein have shown that failure to arrive at a mutually beneficial agreement can also be explained in terms of self-serving biases. Their research demonstrates the bargaining impasse that results from the tendency to “conflate what is fair with what benefits oneself.” Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110 (1997).

41. To some extent, what we want to know is whether there is a flip side to this: Do parties who have crossed the Rubicon from adversaries to partners then overestimate a partner’s fairness?

42. See Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 651 (2006) (noting that, for reasons other than transaction costs, including the preferences for endowed rules, “parties might choose not to opt out of a legal default even when a better provision can easily be identified” (emphasis omitted)); Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 665-76 (1998) (discussing some implications for his finding that, in marginal cases, individuals prefer status quo default rules over other more economically beneficial rules when forming a contract); see also Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935, 1945 (2008) (citing some difficulties arising in economic analyses when taking into account the “stickiness” of goods and entitlements).

43. See generally Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. LEGAL STUD. 225 (1991); Steffen Huck et al., *Learning to Like What You Have—Explaining the Endowment Effect*, 115 ECON. J. 689 (2005); Guido Ortona & Francesco Scacciati, *New Experiments on the Endowment Effect*, 13 J. ECON. PSYCHOL. 277 (1992).

44. See Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, in ADVANCES IN BEHAVIORAL ECONOMICS 55, 55-56 (Colin F. Camerer et al. eds., 2004) (explaining that empirically observed discrepancies between people’s willingness to pay (buying prices) and willingness to accept (selling prices) for the same items point to a conclusion that entitlements do affect value).

45. For a description of the mug experiment and related trials, see *id.* at 59.

46. *Id.* at 66.

47. *Id.* at 66-67.

48. See generally *id.* at 69-70 (discussing the endowment effect and an alternative explanation that a general bargaining strategy explains the discrepancy in buying and selling prices, and also discussing arguments that the findings of the mug experiment may not be generalizable to all market settings).

quo; and overvaluation of the status quo, in turn, raises the seller's reserve price and decreases the probability of an efficient transaction.

The status quo bias has also been invoked to explain the failure to negotiate terms. Much as the initial entitlements affect the parties' respective reserve prices, initial terms—for example, default terms or forms—largely determine which terms end up in the contract at all. As Russell Korobkin has argued, there is a preference both for terms that are legal defaults, and also for any contract term that the parties perceive as the default position.⁴⁹ He posits an “inertia theory” of contract drafting, in which parties prefer any terms that they can choose without having to do anything—even when there are different, Pareto-superior terms available.⁵⁰ In this Article, we are looking in part at how this kind of inertia or status quo bias is instantiated at the moment of contract formation, an investigation that asks about the perception of that crucial turning point as well as the effects of inertia in the contracting context.

Indeed, we would be remiss if we did not point out that there is one highly salient fact of inertia in contract formation that we know for sure: not only are people not negotiating form contracts, they are not even reading them. Non-readership has been meticulously documented by Florencia Marotta-Wurgler and her coauthors,⁵¹ and has been recently taken up by Omri Ben-Shahar and Carl Schneider in their discussion of failed disclosure regimes.⁵² Nonreadership has been explained as a function of overoptimism (nobody thinks they will need to know all the contingencies),⁵³ limited attentional resources (we can't even stand to read and process all the terms in a given deal, much less take them into account in a multifactorial decision process),⁵⁴ and even overtrust (we think the contract has been vetted, either by the market or the government or possibly the other party).⁵⁵ In many ways, this

49. Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228-29 (2003) (defining the status quo bias).

50. Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1586 (1998).

51. Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 17-22 (2014).

52. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 665, 687, 704-18 (2011) (documenting and explaining the unlikelihood of “disclosees” reading mandated disclosures).

53. See Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059, 1069-72 (explaining how this “irrational optimism” plays a role in the contract setting whereby people “tend[] to believe that the bad things that happen to other people (divorce, cancer, crooked stock brokers) will not happen to them”).

54. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 436 (2002) (“The consumer, engaging in a rough but reasonable cost-benefit analysis of these factors, understands that the costs of reading, interpreting, and comparing standard terms outweigh any benefits of doing so and therefore chooses not to read the form carefully or even at all.”).

55. Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 LAW & HUM. BEHAV.

nonreadership is in sync with the predictions we test here about the focus on the formalities of contracting rather than substantive assent to terms.

B. *Contract Performance as a Function of Formation*

One of the central hypotheses of the research we present below is that perceptions of contract formation affect the quality and likelihood of performance. Although they are not typically grouped in this fashion, there are existing studies from diverse methodologies that can be understood as explorations of the effects of contract formation on the performance of promissory obligations.

First, there is evidence that the perceived fairness of the formation process affects performance. Procedural justice research suggests that the process of reaching a legal decision affects the efficacy of the decision—for example, how likely parties are to approve of the decision, or appeal it; follow its dictates, or avoid them.⁵⁶ In recent work, Zev Eigen has shown that this precept has bite in contract.⁵⁷ Using a real online contracting context, he had some participants participate (minimally) in a negotiation of the terms, and had others play no role in drafting.⁵⁸ Subjects who participated, even in an essentially meaningless way, were more likely to perform and more likely to report that the contract was fair.⁵⁹

Second, we have some evidence that parties will sometimes perform, at a cost to themselves, not because they are formally bound but because they feel morally bound. In the experimental economics literature, contract formation is often represented by a trust game.⁶⁰ In a classic trust game, of course, the parties do not actually manifest assent. Instead, the second-mover (the “trustee”) performs out of a sense of fairness; if the first-mover (the “investor”) has been generous, the trustee performs on her obligation.⁶¹ In these cases, the sense in

293, 295, 305 (2012) (discussing how consumers’ willingness to trust companies may be correlated with failure to read click-through agreements).

56. See Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 *GEO. L.J.* 5, 26-27 (2011) (hypothesizing that “the process of contracting, so long as it is the outcome of free choice, could lead to a deeper commitment to the contracts’ terms”).

57. See Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 *J. LEGAL STUD.* 67 (2012).

58. *See id.* at 70.

59. *Id.* at 87-88.

60. For example, see Joyce Berg et al., *Trust, Reciprocity, and Social History*, 10 *GAMES & ECON. BEHAV.* 122, 124-29 (1995), in which the authors set up an experiment where a random group of participants, Group *A*, was given ten dollars and assigned to a room, Room *A*. Another random group was similarly treated and assigned to Room *B*. The participants in Room *A* were given the option of sending their money into Room *B* whereupon the ten dollars would triple into thirty dollars but the participants in Room *B* were under no obligation to return any of the thirty dollars received, thus creating a situation where the participants in Room *A* could make themselves better off only if they placed trust in Room *B* participants to return a portion of the money they received, tripled, from Room *A*.

61. *Id.* at 125-26.

which a contract is formed is that the trustee feels morally obligated to adhere to the terms of what is essentially an implicit contract. In the behavioral contracts literature, there is evidence that reciprocity norms are implicated in mortgage contracts, in assigned contracts, and even in divorce settlements.⁶²

There are two implications of these literatures for our purposes. The first is that it seems that reciprocity plays a role in whether people understand themselves to be in a morally binding (or at least morally persuasive) agreement. Thus, in the trust game, it is not that trustees believe that they must pass money to a generous investor; it is that they believe that they ought to do so, and so they behave as if the exchange is contractual. The second implication is that reciprocity norms affect how parties behave even when there is *also* a formal contract in place. We test the effects of reciprocity in the specific context of formation in the studies we report below.

C. Formation

Finally, there is some preliminary evidence that the formal fact of contract formation—even when it has no legal consequences—changes how parties behave toward one another. We explored this in the context of contract precautions in our recent article on contracts as a reference point.⁶³ The reference point hypothesis, first articulated by Oliver Hart and John Moore,⁶⁴ essentially posits that evaluations of various costs and benefits depend on comparisons to the reference point; and the reference point is the moment of contract formation. In experimental studies, we found that when parties believe that they are in an ongoing contractual relationship, they appear to be less willing to engage in a variety of self-protective behaviors, including adding terms, purchasing insurance, and continuing to search for a better deal.⁶⁵

What is striking about these findings is that this behavioral shift at the moment of formation was observed in contexts in which it was clear that the costs and benefits of the behavior were identical pre- and postformation. Participants in these studies seemed to really care whether the contract period had started, even when it had no practical effect on the exchange. The natural fol-

62. See Wilkinson-Ryan, *supra* note 39; Tess Wilkinson-Ryan & Jonathan Baron, *The Effect of Conflicting Moral and Legal Rules on Bargaining Behavior: The Case of No-Fault Divorce*, 37 J. LEGAL STUD. 315 (2008); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405 (2009); Tess Wilkinson-Ryan, *Transferring Trust: Reciprocity Norms and Assignment of Contract*, 9 J. EMPIRICAL LEGAL STUD. 511 (2012).

63. Hoffman & Wilkinson-Ryan, *supra* note 3, at 418; *cf.* Barbara H. Fried, *But Seriously, Folks, What Do People Want?*, 65 STAN. L. REV. 1249 (2013) (commenting on Hoffman & Wilkinson-Ryan, *supra* note 3).

64. See Hart & Moore, *supra* note 2.

65. Hoffman & Wilkinson-Ryan, *supra* note 3; *cf.* Eigen, *supra* note 57 (concluding that legalized formation approaches were less likely to lead to obligation than was moral framing).

low-up question is when people think a contract has been formed, in the event that it is not laid out explicitly.

III. EXPERIMENTAL METHOD AND RESULTS

In the four studies reported below, we are trying to fill a gap in the existing literature by exploring how ordinary consumers understand contract formation and how, in turn, their intuitions about contract formation affect their contractual choices.

A. *Study 1: Believing a Contract Exists Matters*

Our first study asks whether the fact of legal contract formation affects behavior, even when it has no bearing on any practical outcomes for the parties. Does it matter when parties think a formal contract exists? This study is a replication, and to some extent a reminder, of a result we reported in a previous article.⁶⁶

We surveyed 296 respondents on Amazon Mechanical Turk who were paid one dollar to complete a short questionnaire. 62.2% of respondents were female. Ages ranged from 19 to 85, with a median age of 29.⁶⁷

Subjects in this study were randomly assigned to one of two conditions, the Contract condition or the No Contract condition. They read the following short scenario in one or the other of the conditions before answering questions about their judgment of the contract:

Please imagine that you are in the market for car insurance. There are a number of reputable small insurance agencies in your town, and you prefer to deal with a local firm. You find a insurance agent, Tom Anderson. He is backed by

66. Hoffman & Wilkinson-Ryan, *supra* note 3, at 416-18. The study reported above improves the one previously published in two ways: (1) the earlier sample, law students, may have provoked concerns; and (2) the earlier context involved a car lease, which may have created confounding effects surrounding individuals' experiences with particular dealers.

67. There is a debate in the literature on the generalizability of Turk samples. On one side, psychologists have replicated major findings from previous work using Turk samples, and many leading psychologists today routinely use online surveys. The best-known work on Turk—replicating Kahneman and Tversky's framing effect experiments—is Gabriele Paolacci et al., *Running Experiments on Amazon Mechanical Turk*, 5 *JUDGMENT & DECISION MAKING* 411 (2010). At the same time, researchers in the political science tradition have published work showing significant demographic differences in Turk samples—and consequently that Turk samples produce biased views on political questions. See Yanna Krupnikov & Adam Seth Levine, *Cross-Sample Comparisons and External Validity*, 1 *J. EXPERIMENTAL POL. SCI.* 59, 65 (2014). Dan Kahan has recently, and relatedly, suggested that Turk samples may be biased because they are not naive. See Dan Kahan, *Foiled Twice, Shame on Who? Problems with Mechanical Turk Study Samples, Part 2*, *CULTURAL COGNITION PROJECT AT YALE L. SCH. BLOG* (July 10, 2013, 9:30 AM), <http://www.culturalcognition.net/blog/2013/7/10/foiled-twice-shame-on-who-problems-with-mechanical-turk-stud.html>; see also Jesse Chandler et al., *Nonnaïveté Among Amazon Mechanical Turk Workers: Consequences and Solutions for Behavioral Researchers*, 46 *BEHAV. RES. METHODS* 112 (2014) (recommending the use of prequalification to screen workers).

a good national insurance company, and he gives you a very reasonable quote of \$77 per month to insure your 2011 Toyota Camry.

Contract condition:

You go to Tom Anderson's office and sign the standard one-year insurance contract, which includes a three-day cancellation clause—if you decide within three days of signing that you do not want to use Anderson's agency, you can call and cancel the coverage, no questions asked, for no fee. In other words, you have an insurance contract, and insurance coverage as soon as you sign, but you have three days to cancel with no legal or financial consequences. You sign and drive home.

Remember: You are under contract with Tom Anderson's insurance agency, but you can walk away without consequences.

No Contract condition:

You go to Tom Anderson's office and he gives you the standard one-year insurance contract. He tells you that his agency uses a three day waiting period with all new contracts. If you decide within three days of meeting that you do not want to use Anderson's agency, you can call and cancel the coverage, no questions asked, for no fee. In other words, you have insurance coverage as soon as you sign, but your one-year contract does not go into effect for three days, during which you can call and terminate coverage with no legal or financial consequences. You agree and drive home.

Remember: You are not under contract.

Questions:

1. One day after you meet with Tom Anderson, you see an ad in the paper from Showalter Insurance, offering discounts for the 2014 year. What is the likelihood you would call Showalter Insurance to get a quote? (1-7, where 1 is very unlikely, 4 is undecided, and 7 is very likely)
2. Now please imagine that the newspaper ad lists some sample rates, including the kind of basic coverage you are looking for, and they are charging \$70/month. What is the likelihood that you would decide to terminate your coverage with Anderson and go with Showalter Insurance instead? (1-7, where 1 is very unlikely, 4 is undecided, and 7 is very likely)
3. What is the highest monthly payment that Showalter could charge at which you would decide to terminate coverage with Anderson and go with Showalter Insurance instead?

TABLE 1
Summary of Results, Study 1, Effect of Contract on Willingness to Cancel

	Contract	No Contract
Call to Inquire (Likelihood 1-7)	4.2	5.1
Cancel for \$7 Savings (Likelihood 1-7)	3.9	4.5
Low Price to Switch Agents	\$64.16	\$66.92

Overall, subjects were more willing to shop around for a new deal in the No Contract condition. They were more likely to call to inquire about the new car insurance, more likely to be willing to cancel for a \$7 savings, and willing to switch agents for a lower overall savings. The Call variable differs significantly by condition ($t = 4.15$, $df = 289.57$, $p < .001$), as does the Cancel variable ($t = 2.79$, $df = 293.77$, $p = .006$).⁶⁸ The effect of contract on the Price variable is less clear,⁶⁹ but our main analysis suggests that among subjects who understood the question, those in the Contract condition required a significantly lower price in order to switch agents ($t = 2.40$, $df = 231.29$, $p = .017$).

As in our 2013 article,⁷⁰ we see here, using a different context (car insurance rather than a car lease), that a fairly technical or semantic fact about contract formation—whether the contract is in place but can be canceled as opposed to a contract period that has not started—has real effects on how individuals make judgments and decisions about their participation in the market.

The remainder of this Article builds on this point, and asks how individuals behave when they are reliant on their own assumptions and intuitions in order to understand their contractual obligations.

68. The results of Studies 1, 2, 3, and 4 are reported as mean differences. The statistical significance of the mean differences was analyzed with t-tests. We report the t-value (t), the degrees of freedom (df), and the p-value (p)—the probability of finding such a result randomly if no actual difference exists—for each significance test.

69. This variable produced a fair amount of noise or confusion. 10.5% of subjects gave a number higher than 77—which is to say, they indicated that they would switch to the other insurance agency even if that insurance agency were charging higher premiums. There are no significant differences between conditions on this item if we use the raw data. The numbers in this Table include only subjects who gave a number of 77 or below. We get similar results if we code all of the high responses as 77 (mean without contract: \$67.88 vs. mean with contract: \$65.62; $t = 2.04$, $df = 264.30$, $p = .04$). Given this level of confusion, however, this result is less robust than the result for the Likert items.

70. See Hoffman & Wilkinson-Ryan, *supra* note 3, at 416.

B. *Study 2: What Do People Know About Contract Formation?*

Our second study surveys the basic landscape of lay intuitions about formation. The study includes four scenarios that will be familiar to anyone who has taken a contracts course and reasonably easy to follow for a general adult subject pool. Study 2 is not experimental; it is a survey. In each scenario, we described a series of events that happen around the formation of a contract. Subjects read the entire scenario and were then asked to pinpoint which of the actions described constitutes the formation of a binding contract.

Subjects in this study were 100 participants recruited on Amazon Mechanical Turk.⁷¹ Sixty subjects were male. Ages ranged from 19 to 69, with a median age of 32. In this study, subjects were paid one dollar for completing the five-minute task and offered an additional \$0.25 for every question they answered correctly, meaning a possible bonus of an additional dollar. They were instructed to answer based on their own knowledge and not to do research online or otherwise. No subject took longer than seven minutes to complete the survey, suggesting that they complied with this admonition.

We present these items roughly in order of complexity. The first scenario involves an advertisement followed by an offer and acceptance. The second introduces the complexity of a private, formal manifestation of assent that precedes an informally communicated acceptance. The third follows a typical mailbox rule fact pattern. And the fourth introduces terms that follow the initial manifestations of assent. In each of these cases, subjects were asked, “What is the first point in this timeline when the American legal system would find an enforceable contract between the parties?”

The goal of these surveys was twofold. First, we hoped to get a preliminary sense of the match or mismatch between intuitions about contract formation and the existing contract doctrine. Second, we were trying to infer what kinds of intuitions were driving subjects’ responses, to generate hypotheses that we could then test experimentally.

1. *Offer and acceptance*

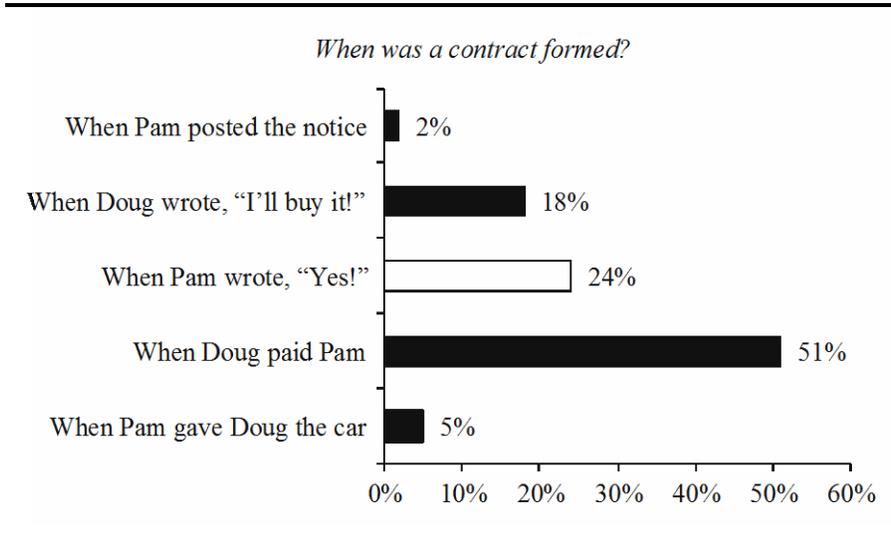
We asked subjects to identify when the parties entered a “binding contract” in the following circumstance:

Pam is buying a new car and wants to sell her old one. She decides that the first thing she’ll do is see if anyone she knows wants to buy it. She posts on her Facebook page, “I’ve got a 1999 Toyota Camry that I’m looking to sell. I’m hoping for \$2,000 but it’s negotiable. If you or anyone you know is interested, send me an email.” Her friend Doug sends her an email. It reads, “I’ll

71. In an earlier draft of this Article, we reported very similar results using an identical questionnaire study with a sample of subjects from Qualtrics, though in that case we did not pay subjects bonuses for correct answers. The study reported here replicates those results using Turk subjects, in this case paying for correct answers. Similar patterns of results across subject pools may help increase our confidence in the reliability of these findings.

buy it! Can I drop the check off tomorrow and pick up the car? \$2,000 is fine by me.” Pam replies, “Yes! I’ll see you tomorrow.” Doug brings Pam the check the following day and picks up the car. (Please assume that in this state, contracts can be formed via email.)

FIGURE 1
Judgments About Contract Formation in Advertisement, Offer, Acceptance,
and Performance Scenario



This scenario was in some ways the most straightforward procession of a contract: an advertisement from the seller, followed by an offer from the buyer and then an acceptance from the seller, and then, with the contract formed, performance by each party in turn. The general rule is that an offer to conclude a bilateral contract is accepted when the acceptance is communicated.⁷² (We have designated this doctrinal moment of acceptance in white.) Indeed, if we wanted to identify the doctrinal ambiguity, it would be whether the advertisement could constitute an offer that in turn rendered the buyer’s reply an acceptance.

Surprisingly, that is not what we see here, even though subjects were explicitly informed that a contract could be formed via e-mail. The majority of subjects did not think that a contract had been made until payment, meaning that the clear mutual manifestations of assent were not deemed adequate to bind the parties under the law. We further discuss and explore the reluctance to credit informal communications with legal import in the remaining studies.

72. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 94 (6th ed. 2009).

2. Formality

In the next scenario, we included both verbal communication of assent as well as private written assent:

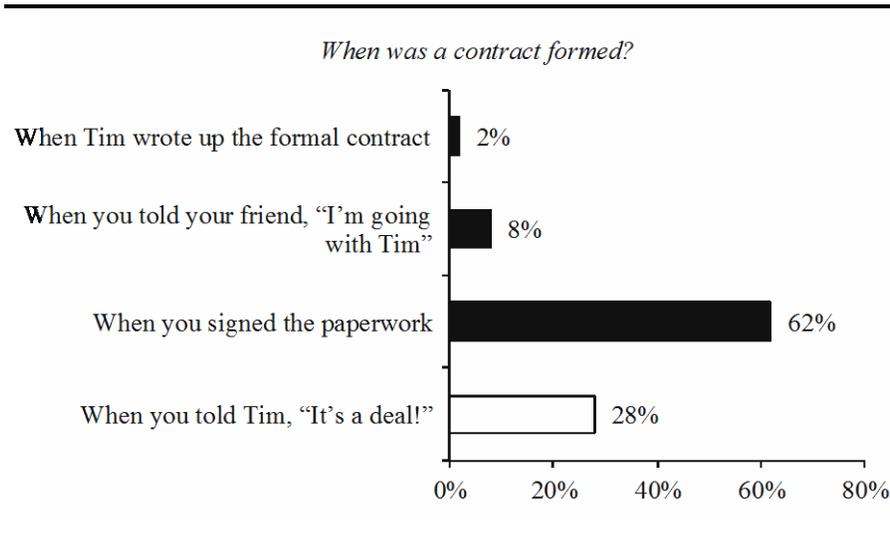
Please imagine that you are meeting with general contractors because you are planning to build a small addition to your house. The contractor you like the best, Tim Burnell, goes through the details of your planned renovation point by point and writes them out along with his price of \$11,000. You tell him that he's your top pick, but you need a night to think it through before you can commit. He points to the paperwork and says, "This is my offer. Call me at my office to accept, and we'll get this show on the road. I hope we get to work together."

That night, you invite a friend over who works in the construction industry. The two of you discuss your project and Tim's proposal. At the end of the discussion, you say, "All in all, this is a great deal. I've made up my mind. I'm going with Tim."

After your friend has left, you sign the paperwork that Tim left with you and go to bed.

The next morning, you call Tim and tell him, "It's a deal. I'm in."

FIGURE 2
Judgments of Contract Formation in Private Signature and Verbal Manifestation of Assent Scenario



This scenario included three key moments in formation. The first is the decision to enter a contract; the second is the signing of a contract; and the third is communication of acceptance to the offeror. We disaggregated these actions in order to force subjects to choose the definitive factor. From a doctrinal perspective, the contract is formed upon communication of acceptance—marked,

again, in white.⁷³ And indeed, one-third of subjects identified that as the moment of formation. But most subjects thought that the contract was formed by the signature, even though the contract was signed privately. Because so few subjects identified the first announcement of the decision (telling your friend you're "going with Tim") as dispositive, we can infer that it is the signature itself, not the fact of the decision or the first objective indication of assent. The next scenario takes up this same issue in the context of delayed communication—a mailbox rule fact pattern.

3. *Mailbox rule*

The mailbox rule, a minor exception to the conventional doctrine regarding acceptance, holds acceptance good after it is out of the offeree's possession and on the way to the offeror in some reasonable medium.⁷⁴ Although the mailbox rule is arguably becoming obsolete in the world of e-mail, text messages, and autonomous software agents, it provides an interesting case study precisely because none of the possible moments of formation are squarely in line with a prototypical assent.

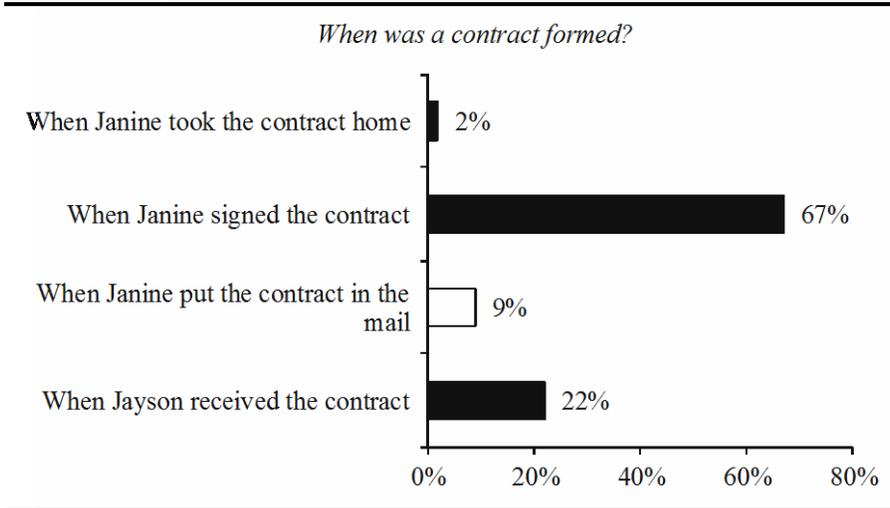
Subjects read the following scenario and indicated the moment of binding contract:

Janine is looking to hire a general contractor to rehab her house. She interviews Jayson, who makes a good impression. He gives her a standard form contract, which he has signed, that lays out the terms and conditions of the job. She decides to take it home to think over the deal. At home, she signs the form. The next day, she puts it in the mail. Two days later, he receives it.

73. See RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 24, 35, 50, 56 (1981) (explaining that a contract is formed upon mutual assent, which generally occurs upon communication of acceptance of an offer); see also *Hous. Dairy, Inc. v. John Hancock Mut. Life Ins. Co.*, 643 F.2d 1185, 1186 (5th Cir. Unit A May 1981) ("It is fundamental that a contract is formed only upon acceptance of an offer.").

74. See *Adams v. Lindsell*, (1818) 106 Eng. Rep. 250 (K.B.); RESTATEMENT (SECOND) OF CONTRACTS § 63.

FIGURE 3
Judgments of Contract Formation in Mailbox Rule Scenario



This scenario further disaggregates the assent process by introducing a lag between the sending and receiving of the signal of assent. This contract is legally binding when the offeree puts the contract in the mail; this is a classic mailbox rule problem. The results suggest that the mailbox rule is deeply unintuitive; that moment is hardly a more popular choice than the offeree taking the contract home to think about it. As between sending and receipt, subjects clearly prefer receipt. However, what is perhaps more surprising is how many subjects again identify the signing of the contract—the private signing—as the moment of formation. In Study 3, we focus on this question.

4. *Terms that follow*

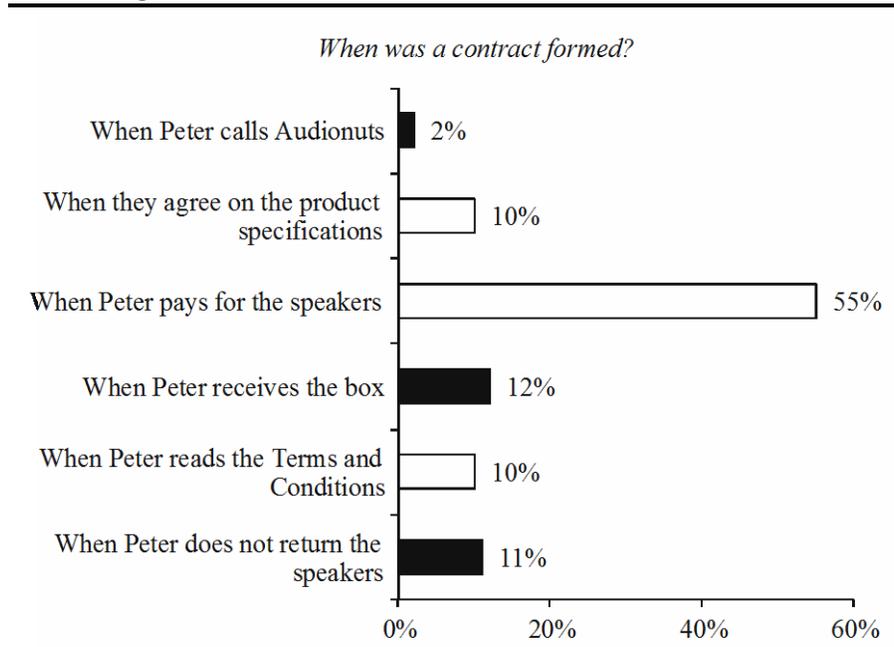
The final scenario is the only scenario subject to real doctrinal debate. Like the mailbox rule example, this scenario includes a lag that essentially bifurcates the manifestation of assent. Here, however, what is bifurcated is communication of the terms. The primary terms of exchange are communicated before acceptance and payment, and other terms are communicated after acceptance and payment. Law students will be familiar with this fact pattern from *Hill v. Gateway 2000, Inc.*⁷⁵:

Peter is ordering new custom speakers from Audionuts, a mail-order sound system retailer. Peter calls the company and speaks at length to a customer service representative, hashing out the details of his order, which include speakers for his main media unit (TV and stereo system) as well as his portable devices (phone and iPad). Peter and the customer service representative arrive at a final product specification, including a price and delivery date. Peter

75. 105 F.3d 1147 (7th Cir. 1997).

gives the rep his credit card number, and the charge is immediately posted to his account. Eight days later, Peter receives his speakers in the mail. Inside the box is a piece of paper headed “Terms and Conditions.” The Terms and Conditions sheet includes information about the duration of the warranty (90 days), the dispute resolution process (mandatory arbitration) and the return policy (return within 14 days for full refund for any reason). The Terms and Conditions sheet states at the bottom, “If you do not agree to these terms and conditions, please return the product within 14 days for a full refund.” Peter uses the speakers with no problems for two months.

FIGURE 4
Judgments of Contract Formation in Terms that Follow Scenario



The salient moment of formation here is clearly payment. Much like academic commentators in the area, lay subjects appear to be confused about how to handle terms that follow. As we've noted in the Figure, the precise legal moment of formation is contested.⁷⁶

76. Compare Roger C. Bern, “Terms Later” Contracting: *Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641 (2004) (criticizing “terms later” contracting), with Eric A. Posner, *ProCD v Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1194 (2010) (praising *ProCD* as a “masterpiece of realist judging”). Indeed, for this item, we paid the \$0.25 bonus to every subject, reasoning that this is a sufficiently unclear case to justify multiple possible responses, which in turn renders it confusing enough to justify compensating subjects for any response at all. This disclaimer, of course, in no way has preclusive effect for our future exam grading on this topic.

Our preliminary inference from Study 2 is that when assent is relatively simple, intuitions about contract formation are more or less in line with contract doctrine. When the facts of assent are more complex or ambiguous, there is more confusion. At least some subjects seem to resolve this confusion by resorting to what we might think of as formation heuristics—moments that fit neatly into a typical contract schema.⁷⁷ Signing a document, for example, is a key part of a contract schema. Performance, including payment, also typically feels like the conclusion of a transaction.

Study 2 asked subjects to think about what the law is—for those who did not know the legal rule, to make their best guess for what kinds of acts complete a contract. Studies 3 and 4 start by assuming that formalities are highly salient, and then tease out some of the behavioral implications of those formalities.

C. *Study 3: Do Parties Need to Know the Law to Make Binding Contracts?*

Studies 1 and 2 are explicitly about the moment of legal formation; Study 3 takes up cases in which beliefs and knowledge about legal contract formation are less important than parties' own informal moral preferences. This study has something of the same setup as Study 2, but the dependent variable is different. Rather than asking whether there is a contract at each point, we are instead asking subjects to report on the extent to which they feel bound at each point. We do this by asking whether they would be willing to cancel their contract.

Study 3 compares how subjects think about backing out of a potential deal across various points on the continuum of contract formation. This study uses a between-subjects experimental design, meaning that each subject is asked to consider only a single point on the continuum. With this design, we can apprehend subjects' intuitions about each contractual situation without explicitly invoking their intuitions about the comparative "bindingness" of each point.

Furthermore, the dependent variable in this particular context requires a study design feature that may seem odd for a study about when a contract is binding: namely, each of these scenarios, in each condition, stipulates that the contract is not binding on the consumer until some kind of cancellation or waiting period has passed. The reason for this is to test subjects' behavioral and/or moral intuitions without implicating their misunderstandings of actual contract penalties and remedies, or their concerns about the transaction costs entailed by breach of contract. It also permits us to compare how subjects feel about their

77. A schema is a mental model for a concept, one that often draws on a prototype. See, e.g., Robert Axelrod, *Schema Theory: An Information Processing Model of Perception and Cognition*, 67 AM. POL. SCI. REV. 1248, 1248 (1973). Robert Axelrod describes the way people use schemas as follows: "When new information becomes available, a person tries to fit the new information into the pattern which he has used in the past to interpret information about the same situation." *Id.* at 1248.

commitments to contract before and after legal formation in a setting in which the actual consequences of backing out are the same in either case.

This study was conducted using Amazon Mechanical Turk, with the same subject pool as Study 2. Each subject read the following scenario. Subjects were randomly assigned to see the scenario in one of four conditions—Possible Offer, Offer, Acceptance, or Performance:

Please imagine that you are interested in buying a used car. You are looking for a recent-model Mazda sedan, and you have been browsing the listings on an online auto retailer. You see a Mazda sedan being sold in your area. It is listed as having been driven only by the employees of the dealership. It has 25,000 miles on it. The asking price is \$15,500. This appears to be about \$300 under Kelley Blue Book value. It has a five-year warranty.

The dealership has a Free Trial Period policy with their used cars. The buyer can return the car for a full refund anytime within the first three days after signing the sales agreement.

Possible Offer condition:

You leave a message on the voicemail of the local dealer saying you saw a car online that interested you, and could he please call you back to discuss.

Offer condition:

You email the dealership that owns the vehicle and offer \$15,000 for it.

Acceptance condition:

You email the dealership that owns the vehicle and offer \$15,000 for it. The dealer responds by phone and agrees to the sale.

Performance condition:

You email the dealership that owns the vehicle and offer \$15,000 for it. The dealer responds by phone and agrees to the sale. You go to the dealership that afternoon, sign the sales contract, pay, and agree to pick up the car the next day so that the dealer can have it cleaned and vacuumed for you.

After [this interaction with the dealership] you get an email alert that the site sends automatically when it finds something within your parameters. A competing dealership is selling the same car (same make, model and year), with 26,500 miles on it, also with a five-year warranty.⁷⁸

Questions:

1. Assume the competing dealership is selling the car for \$14,750 (firm). Would you buy the car from the competing dealership for \$14,750?
2. To what extent do you think it would be morally wrong to not buy the car from the original dealership?⁷⁹

78. The mileage was changed to increase external validity; it would be odd, after all, to have two cars with precisely the same mileage being sold.

79. Measured on a Likert 1-7 scale.

TABLE 2
Summary of Results, Study 3, Effect of Level of Contract Formation on
Willingness to Cancel

Formation Level	Willing to Cancel ⁸⁰	Immorality of Cancellation
Possible Offer	88.3%	1.5
Offer	80.8%	2.0
Acceptance	60.8%	2.1
Performance	42.8%	2.9

We analyzed these results in two ways. First, we tested the overall effect of formation level (the four “levels” of increasing transactional commitment in the left-hand column) on willingness to cancel.⁸¹ Second, we tested for differences of each level against the adjacent levels.

Overall, formation level has a highly significant effect on willingness to cancel ($F[1, 292] = 47.8, p < .0001$). Willingness to cancel is not significantly different as between the Possible Offer and Offer levels ($t = 1.26, df = 139.07, p = .21$). Subjects are significantly less willing to cancel when there is both an offer and an acceptance as opposed to an offer alone ($t = 2.72, df = 139.51, p = .007$), and, in turn, less willing to cancel when there is some performance as compared to offer and acceptance without performance ($t = 2.18, df = 141.31, p = .03$).

The analysis of the immorality variable is similar. Formation level overall has a highly significant effect on Immorality of Cancellation ($F[1, 293] = 34.0, p < .0001$). We see significant differences between Possible Offer and Offer ($t = 2.47, df = 136.81, p = .015$) and again between Acceptance and Performance ($t = 2.75, df = 135.88, p = .007$), but not between Offer and Acceptance ($t = .70, df = 141.19, p = .48$). Oddly, the biggest jump in willingness to cancel, between offer and acceptance, is not reflected in the Immorality of Cancellation variable.

These results suggest two things. First, many people are unwilling to break a deal even if the deal can be canceled without penalty, and, in some cases, even if the deal is not yet made. Indeed, only about half of subjects were *sure* that they would break the deal to save \$250 in the Possible Offer and Offer conditions.

80. This includes both Yes or Not Sure answers.

81. Subjects could choose Yes, No, or Not Sure. We report our results with Yes and Not Sure responses as a single category. The trends and the significance tests do not change if we analyze the results by dropping the Not Sure responses.

Second, each step that brings the parties closer together matters, not just the moment of legal formation. One interpretation of this sort of spectrum of formation is that the parties' commitment to the deal increases incrementally in a way that is not entirely or even primarily driven by an understanding of what it means to be legally bound. Whether parties are getting the law right or not may be irrelevant where they prefer to make choices that align with their underlying moral preferences, reflecting courtesy, altruism, and reciprocity. The final study reported below tests this hypothesis with a more targeted manipulation, asking how the norm of reciprocity affects decisionmaking in contract.

D. *Study 4: Bargaining in the Shadow of Reciprocity Norms*

As is clear at this point, one of the central hypotheses of this research is that contractual interactions involve multiple, distinct moral and social norms, some of which are doctrinally irrelevant. In contracts as in other contexts, people have many other-regarding preferences. All else equal, we might prefer to not disappoint another person, to reciprocate generous behavior, to keep our promises, *and* to obey the law. Each of these preferences is implicated in contractual exchange in ways not captured by the law. In this final experiment, we consider a particular case in which we conjecture that knowing the legal rule has limited effects on behavior when individuals have strong personal commitments to particular values or goals.

To test our supposition that reciprocity norms play a distinct role in the moral psychology of contract, we used a scenario involving precontractual reliance. This is a case in which there is an expectation of contract but no promise. Our hypothesis was that even before contract, one party's investment in the deal would create moral incentives for the other party to proceed with the agreement. This is in line with existing experimental research showing that people often make choices, even choices that are costly to themselves, to fulfill reciprocity norms.⁸²

Of course, in the normal course of commerce, there are good reasons to choose a counterparty who invests more in the deal. It sends signals about that party's commitment and trustworthiness, provides more information about the value of the deal, and may even add value to the contract. In the scenarios below, we are trying to minimize some of these rational justifications by comparing a party who relies in response to a particular hope of offer of purchase to a party who makes the same investments in the deal but not in response to one potential buyer in particular.

One hundred one subjects participated via Amazon Mechanical Turk. Subjects were paid one dollar to complete a five-minute questionnaire. 61.8% of

82. See, e.g., Ernst Fehr & Simon Gächter, *Strong Reciprocity, Human Cooperation, and the Enforcement of Social Norms*, 13 *HUM. NATURE* 1 (2002) (reporting experimental evidence that players in an exchange game are willing to reward cooperation with cooperation and to punish selfishness even when punishment is optional and costly).

the subjects were female. Ages ranged from 18 to 70, with a median age of 28. Participants who had also completed previous studies in this series were removed from the sample prior to data analysis. Subjects were randomly assigned to read the following scenario in either the Reliance or the No Reliance condition:

Reliance condition:

Please imagine that you are looking to buy a used car, preferably something inexpensive but moderately reliable. You find a listing for a 1998 Toyota Camry in the local newspaper's Sunday classified section. The seller is asking \$2,300 or best offer. You call the seller to say that you would pay \$2,300 for the car as long as it's clean and drives reasonably well. He keeps it parked at the end of his driveway, near the road, with a For Sale sign in the window. He only drives it around the block once a week to check that everything is working.

The seller lives about an hour away from you, in the opposite direction of your commute to work, so you agree that you'll come check out the car the following weekend.

In the meantime, the seller takes the For Sale sign out of the window of the car and gets it detailed.

No Reliance condition:

Please imagine that you are looking to buy a used car, preferably something inexpensive but moderately reliable. You find a listing for a 1998 Toyota Camry in the local newspaper's Sunday classified section, published once a week. The seller is asking \$2,300 or best offer. You call the seller to say that you would pay \$2,300 for the car as long as it's clean and drives reasonably well. The seller says that he had it detailed before posting the advertisement, so it is quite clean. He has it parked in his garage and only drives it around the block once a week to check that everything is working.

The seller lives about an hour away from you, in the opposite direction of your commute to work, so you agree that you'll come check out the car the following weekend.

Questions:

1. Before you go for the test drive, you pass a used car lot on your way home from work. The lot has clearly gotten a big delivery of used Camrys recently. Assume you see a similar car—identical for practical purposes—on the lot to the one you agreed to buy from the seller from the classified listing. The car on the lot is being offered for \$2,000. Would you cancel your deal with the original seller and buy the car from the lot?
2. What is the highest amount that the lot could be asking for the Camry such that you would cancel your deal with the original seller and buy the car from the lot?

TABLE 3
Summary of Results, Study 4, Effect of Counterparty's Reliance on
Willingness to Cancel

	No Reliance	Reliance
Cancel for \$300 Savings	84.3%	70.0%
Median Savings to Cancel	\$200	\$100
Mean Willingness to Accept (WTA)	\$2140.16	\$2063.25

In the No Reliance condition, 84.3% of subjects said they would cancel for a \$300 savings. In the Reliance condition, 70% of subjects responded that they would take the \$2000 car. This difference is marginally significant in a two-tailed test ($t = 1.719$, $df = 93.32$, $p = .089$). The free-response result is less equivocal; those in the Reliance condition gave a significantly lower Willingness to Accept (WTA) value than those in the No Reliance condition. The mean value cited to induce cancellation was \$2140.16 in the No Reliance condition and \$2063.25 in the Reliance condition (one "0" response was omitted as an outlier). A comparison of medians is also helpful, with No Reliance subjects requiring a median of \$100 savings to cancel (WTA of \$2200) and Reliance subjects requiring a median of \$200 savings to cancel (WTA of \$2100) ($W = 1576.5$, $p = .023$).

A counterparty's investment in, or reliance on, the deal affected whether the second-moving party was willing to perform. This is true even though we were comparing two relatively similar acts—one seller who improves the good in anticipation of *a* sale, and another who improves the good in anticipation of *this* sale. The norm of reciprocating one trusting and generous act with trustworthiness and generosity makes the latter a particularly important element in the timeline of contract.

IV. DISCUSSION

In the last two decades, a small cottage industry has grown up trying to excavate individuals' intuitions about what the law is.⁸³ In some cases, evidence

83. See, e.g., NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (1995); Jonathan Baron & Ilana Ritov, *Intuitions About Penalties and Compensation in the Context of Tort Law*, 7 J. RISK & UNCERTAINTY 17 (1993); Jeremy A. Blumenthal et al., *The Multiple Dimensions of Privacy: Testing Lay "Expectations of Privacy"*, 11 U. PA. J. CONST. L. 331, 341 (2009); Ira Mark Ellman & Sanford L. Braver, *Lay Intuitions About Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209 (2012); Ori Friedman, *First Possession: An Assumption Guiding Inferences About Who Owns What*, 15

of intuitions that diverge from doctrine is framed as a challenge to existing doctrine, on grounds that it may delegitimize law, or at least reduce compliance.⁸⁴ In this Article we have also set out to document lay intuitions about the content of law, but our project remains largely descriptive.

As with any descriptive empirical project, our analysis is limited by our methodological choices. The results we have presented here are based exclusively on scenario studies. As such, there are serious impediments to generalizability and limits to external validity. In these studies, subjects have no extrinsic incentives to respond truthfully, and may feel motivated to make themselves look more moral or savvy than their real-world choices would reflect, or they simply may not be able to imagine how they would really feel if they were actually party to one of the contracts described here. Furthermore, our sample is by definition limited to individuals willing to fill out Internet surveys for small amounts of money.

We take this Article to be a first step, partly creating hypotheses for future research. With that said, insofar as what we are interested in is in large part beliefs and intuitions, asking people about contract law directly (as in Study 2) or indirectly, by manipulating the details of the contract in question (as in Studies 1, 3, and 4), is a method reasonably well calibrated to our particular research agenda. In the remainder of this Part, we lay out a summary of the results and some possible implications of those results to help frame future research.

A. *Overview of Results*

Taken together, responses to these questionnaires begin to map a psychology of contract formation. In particular, we note the following results:

- The most common understanding of contract formation involves signing a written document.
- In at least some cases, what parties know and think they know about the legal rule has limited practical repercussions, because even parties who believe that legal obligation is about formalities take seriously the moral obligations associated with making promises and participating in reciprocal exchange relationships.

The primary goal of this Article is simply to describe how ordinary understandings of contract formation converge with and diverge from the legal rules. We anticipate that these descriptive results will inform contracts scholarship, which to date has lacked a firm understanding of what we might call “folk formation.”

PSYCHONOMIC BULL. & REV. 290 (2008); Mark Kelman, *Intuitions*, 65 STAN. L. REV. 1291 (2013); Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261 (2014); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

84. Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 STAN. L. REV. 77, 101-08 (2013) (“[T]he relationship between compliance and satisfaction with the substance of the criminal law is complicated and difficult to predict . . .”).

But we also want to offer a framework in which to think of these results, because they present a potentially puzzling juxtaposition.

On the one hand, we see in the first two studies a startling level of interest in contract formalities, including, in Study 2, an almost rigid refusal to acknowledge verbal agreements. On the other hand, in the last two studies, we see a real sensitivity to informal norms that clearly do not implicate legal formation. For example, in both Studies 3 and 4, we see subjects indicating that they would feel more committed to a contract when the counterparty has already started to perform. Why do subjects sometimes behave like nineteenth-century legal formalists, and other times like realists from the Wisconsin school of relational contract theory?

Our tentative conclusion is that subjects *themselves* draw a distinction between legal and moral obligations. They view their legal obligations as heavily dependent on formal manifestation of assent via signature. But their moral obligations are attendant both to legal formalism (as in Studies 2 and 3) and also to more fine-grained moral norms. This is an interesting case in which we see some evidence of a legal context, contract, in which moral norms are not entirely determined by legal norms.

B. *Formalism*

A consistent theme in the experiments is that individuals privilege particular behavioral moments—signature, payment, and possession—above the verbal communication of assent. Our intuition is that we are looking at something like a contract schema. This is a particularly interesting finding, and one that we can only speculate about at this point. We surmise that the prototypical contract implicates the vernacular of “doing the paperwork,” “getting it in writing,” and “signing on the dotted line.”

The normative implications of this kind of formal bias are potentially complex. For both the general rule about communication of acceptance and the mailbox exception, our results in Study 1 are provoking. They suggest that individuals do not believe that communicating acceptance makes a contract. Rather, signatures before communication and payment after communication are the modal psychological moments of formation. Lay views about acceptance appear to diverge from the legal rule.

As a practical starting point, we might consider the psychologically outsized role that signature plays in contract. Signing one’s name has long been used as a technique to persuade the signee toward an unconsidered action.⁸⁵ However, we are the first to show that individuals believe signature to be a key moment of contractual formation, even if that signature occurs when no one

85. Robert B. Cialdini, *Harnessing the Science of Persuasion*, HARV. BUS. REV., Oct. 2001, at 72, 76 (explaining experiment findings that those who first costlessly signed a petition for a particular cause were far more likely, on a later date, to donate money to the same cause compared to those in a similar control group who were not asked to sign the petition).

can see it. For many parties, signing *is* contracting. A key normative implication of this work is that signatures on contracts that permit easy and free returns may cause individuals to be significantly less likely to behave self-protectively than they would if they did not sign. This implies, in turn, that the regulation of cooling off periods has wrongly assumed that the formation process by which the original purchase or contract occurred is largely irrelevant to how willing individuals are to change their mind about a bad purchase.

Of course, simply because individuals reach conclusions in conflict with the legal approach does not mean that the legal rule is clearly problematic. Contract law implicates a number of moral norms that people are quite accustomed to navigating in both a nonlegal social space (social promises, for example) as well as a legal space (actual contracts). This is an area in which we would need further research to discover exactly where and to what extent the divergences between contract and morality are truly dissonant to individuals. In many cases, we may discover that people find the legal rule surprising but reasonable.

Indeed, we wonder whether our signature findings translate perfectly outside of the traditional pen-and-paper context. It is possible that individuals who click “I agree” believe that it has the same connotation as signing a piece of paper, though we doubt it. Rather, we would speculate that signature online does not activate the same schema as signature offline: individuals do not identify clicking a button as defining commitment. Testing this hypothesis is one way we hope to move this research agenda forward.

C. *Spectrum of Obligation*

The second thematic strand of this research concerns the general approach that individuals have to obligation (as opposed to “legal formation”). In the common law tradition, formation is generally an event. We find that intuitive obligation is an iterative process, heavily influenced by a growing sense of reciprocal ties. Even at the beginning of the relationship, when all that is on the table is an offer, individuals begin to constrain themselves. Over time, as the relationship deepens, they act more like contracting parties and less like strangers.

That individuals experience contracting as a process and not a moment provides support for reform proposals that would permit liability for pre-contract reliance under certain circumstances.⁸⁶ The proposition has been explored in the context of failed negotiations, in which an award of reliance damages may have not only economic benefits⁸⁷ but also intuitive appeal. It also

86. *E.g.*, Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1838 (2004) (proposing a “no-retraction regime,” where “a party who manifests a willingness to enter into a contract with some given terms should not be able to retract freely from her representation” even though the contract has not yet been formed under the traditional mutual assent framework (emphasis omitted)).

87. Craswell, *Offer, Acceptance, and Efficient Reliance*, *supra* note 1, at 501-06.

tends to make more easily defensible promissory estoppel recovery when there is subjective—but not objectively reasonable—reliance.

D. *Consumer Contracts: The Relationship Between Subjective Assent and Self-Protection*

Given that individuals' ideas about formation do not actually track doctrine, there is room for exploitative behavior in the market, as well as interventions to ameliorate such conduct. As Study 1 shows, when individuals are induced to believe that they are in a contract, they lower their defenses to their counterparties. One such defense, as we have discussed in previous work, is information.⁸⁸ The terms-that-follow study in particular illustrates that individuals often believe that their rolling contracts are complete on payment, even though in many courts they would not be until the terms had been received. Believing themselves to be in deals, consumers may be even less likely to read (and protect themselves) than they would otherwise be.

But this is probably a trivial problem, as reading terms is an extraordinarily rare form of self-protection, even in the absence of behavioral exploitation.⁸⁹ A more practically relevant concern might note the market dominance of one-click payment for electronic commerce. Traditionally, one-click ordering has been explained as a method to ease commercial transactions. Individuals are more likely to buy if it is easy to do so; the fewer clicks, the easier the purchase becomes.⁹⁰ These results make us wonder about one-click cases in which cru-

88. Hoffman & Wilkinson-Ryan, *supra* note 3, at 418.

89. See Bakos, Marotta-Wurgler & Trossen, *supra* note 51, at 19.

90. See, e.g., Stephen Hunter, *I Click, Therefore I Amazon*, WASH. POST (July 29, 2007), <http://wapo.st/1MCDPad> ("The way one-click works, if you're from Mars, a Luddite or have a fear-of-machine issue, is too simple. You preload your credit card number and shipping address into the Amazon system—similar systems can be found on other shopping sites—trusting them not to sell it to pornographers or Democrats, and they arrange things so that by sliding your mouse to the one-click icon, it then just takes the merest half-inch, one-ounce pressure to purchase, that is, to service your desire. It takes no strength, no wisdom, no forethought, nothing but the raw human impulse to spontaneously acquire. You want, you get, not instantly but within a time frame where memory of impulse lingers, so that when it arrives three days later you won't be thinking 'Why the hell did I buy that?' so much as 'At last!'—three days being pretty 'at last' in our modern age. They are so smart in the way they cater to human weakness, bad judgment, poor taste."); Dylan Tweney, *One-Click Buying Makes Online World Spin a Little Faster*, DYLAN TWENEY (July 12, 1999), <http://Dylan.tweney.com/prophet/990712prophet.htm> (explaining how Amazon's one-click purchase option encourages customers to complete purchases rather than abandon purchases at the last moment); see also *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 73 F. Supp. 2d 1228, 1236 (W.D. Wash. 1999) (explaining Amazon's one-click system and quoting expert testimony that "Amazon.com's 1-Click® purchasing was a major innovation in on-line retailing that allows for purchasing without disrupting the consumer's shopping experience; and by eliminating additional confirmation requirements, recasts the default in a way that both maximizes the likelihood that consumers will complete their purchases and minimizes consumer anxiety over real or perceived issues of internet security"), *vacated*, 239 F.3d 1343 (Fed. Cir. 2001).

cial terms like delivery method and the price of delivery remain unknown. Some individuals may *believe* that the click to pay is the same as payment, and that payment is the contract.⁹¹ Once in a contract, consumers may discount information that makes their decision seem less optimal, such as a high delivery price. Thus, one-click ordering leverages individuals' views that payment equals contract to permit the possibility of exploitation.

Indeed, Richard Craswell has argued that selecting the right counterparty is one way that parties take precautions in contract.⁹² Craswell's analysis identifies search—"[t]his gathering of information about potential contracting partners"—as a key problem for scholars worried about inefficient investments and precautions in contract, particularly when the parties have incomplete or uneven information.⁹³ The studies here reconceptualize search as something that happens both before and after the deal is signed. Many contractual relationships are characterized by surprisingly weak constraints on exit, whether because they include cancellation clauses or because they are essentially at-will arrangements.⁹⁴ Such weakly policed contracts essentially prolong the period of investigation, or render the idea of "precontractuality" meaningless in any sense that has serious purchase. Our suggestion, though, is that many consumers continue to behave as though once the deal is formally signed, they no longer need to worry about the state of the competition or their information about the deal's profitability. To the extent that the timing of formalities is in the control of one of the parties, usually the drafter, it is conceivably susceptible to manipulation to the unwitting disadvantage of the nondrafting party.

CONCLUSION

In these studies, we found not only that subjects' intuitions about contract formation diverge from the legal rules, but that commitment to promissory obligations is more deeply entrenched than mere legal enforceability. The picture that emerges from the studies suggests that intuitions in this area are actually quite nuanced. Most people have a sense that the law of contracts is one of formality. On the other hand, their own behavior appears quite sensitive to social and moral dimensions of promise and disappointment, such that they are reluctant to even revoke an offer, much less break a deal.

Our approach here is largely descriptive, focusing on the respective, and interactive, normative weights of informal norms and legal rules. Irrespective of the legal status of an agreement, parties to a multistep transaction generally grow to trust each other slowly over time, building relationships organically.

91. For more on how the structure of e-commerce can influence behavior, see generally M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 NOTRE DAME L. REV. 1027 (2012).

92. Craswell, *supra* note 4, at 403-04.

93. *Id.*

94. For more on the increasing phenomenon of "no contract" clauses, see generally Oren Bar-Gill & Omri Ben-Shahar, *Exit from Contract*, 6 J. LEGAL ANALYSIS 151 (2014).

But this does not mean that the legal moment of contracting is irrelevant; in fact, it seems to cause a noticeable shift toward commitment even when there are no additional social or moral cues, and even when the legal fact is practically irrelevant. In a sense, being told that you are in a contract makes it so. With these findings, our goal for this and future research is to draw analytic attention to the distinct contents and consequences of legal and moral obligations.