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## RELATIONSHIP AS PRODUCT: TRANSACTIONING IN THE AGE OF LONELINESS

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*Humans have different types of relationships. Behavioral economists and social psychologists distinguish between two main types. The first type is the “exchange relationship,” based on mutual economic benefit and efficiency principles. The second is the “communal relationship,” based on care, kindness, support, and affection.*

*The law has been slow to incorporate this distinction. This is particularly true in the consumer marketplace, where businesses increasingly employ communal tactics to achieve exchange outcomes. Today’s firms are in the business of selling not only products or services, but also “communal” or “social” relationships. We dub this phenomenon “relationship as product.”*

*We conjecture that selling relationship as product generates various negative outcomes. By encouraging consumers to behave emotionally, relationship as product lowers consumers’ defenses. It encourages consumers to overlook their self-interest and invest more money, attention, and time in buying products and services and interacting with firms. At a societal level, relationship as product can damage trust and decrease well-being. It can also contribute to unhealthy perceptions and practices regarding human-to-human relationships. Furthermore, by selling relationship as product, firms may be undermining the solidarity ties that bind communities.*

*This Article marks a first attempt to explore the problematic aspects of relationship as product from a legal and policy perspective. Part II illustrates how firms make relationship a product through the use of “love*

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*promises” and illusions of intimacy and affection. Part III explores the forces that may account for the rise of relationship as product, particularly the deepening loneliness epidemic, which facilitates the exploitation of consumers’ trust and cognitive biases. Part IV explains how relationship as product can be viewed as a defective product that harms individual consumers and society at large. Part V recommends avenues for expanding consumer law and policy to address these challenges.*

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#### I. INTRODUCTION

Relationships constitute a central pillar of our well-being.<sup>1</sup> They can be a source of joy, intimacy, growth, meaning, and pleasure. They can also be dangerous and risky, especially where manipulation and opportunism come to bear. “Bad” relationships can cause regret and sorrow, harming one’s ability to trust and reducing one’s willingness to engage in pro-social behavior.

This Article focuses on relationships between firms and consumers, also known as Business-to-Consumer (B2C) relationships. It argues that businesses

1. See discussion *infra* Section II.B.

frequently pretend that their relationships with individual consumers are more profound, intimate, and abiding than they are.<sup>2</sup> While many B2C relationships are short-lived,<sup>3</sup> companies increasingly sell and market not only products and services but also the promise of long-term relationships and connectedness.<sup>4</sup> This Article explores how consumers and society at large can be harmed by firms' illusory claims of affection and intimacy that are designed to sell not just a product or service, but also a (false) sense of being in relationship with the firm. We dub this phenomenon "relationship as product."<sup>5</sup>

One might assume that parties in B2C relationships are concerned only with the immediate utility gains they derive from transacting, and that the relational aspects of the exchange are of little importance.<sup>6</sup> One might further assume that care, reciprocity, intimacy, and love are irrelevant in B2C relationships, especially with large firms, like banks, insurance, airline, telecommunications, or credit card companies.<sup>7</sup> Our research suggests that such assumptions are mistaken. Firms employ various sophisticated strategies to create the illusion that affective ties are at play within the B2C relationship.<sup>8</sup> Such illusions can be manipulated to attract and retain customers, particularly the many who suffer from loneliness.<sup>9</sup>

At first glance, it may seem absurd that a firm could lead consumers to believe they are engaged in a human-like B2C relationship. It is common knowledge that firms do not actually have the capacity to give "hugs" or "return favors."<sup>10</sup> Likewise, it is understood that interpersonal relationships can only be

2. See discussion *infra* Part II. For an analysis of how some firms are employing relational, "cute" consumer contracts that may create a sense of informality and intimacy see David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1443, 1460 (2018).

3. Cf. LYNN M. LOPUCKI, ELIZABETH WARREN & ROBERT M. LAWLESS, SECURED TRANSACTIONS: A SYSTEMS APPROACH 266 (8th ed., 2015) ("[S]hortly after mating, the black widow spider eats her mate. Sadly, many business banking relationships don't last much longer.").

4. See Josh Barro, *Sorry, but Your Favorite Company Can't Be Your Friend*, N.Y. TIMES (Dec. 11, 2015), <https://www.nytimes.com/2015/12/13/upshot/sorry-but-your-favorite-company-cant-be-your-friend.html> [<https://perma.cc/2EVN-H6VG>].

5. See discussion *infra* Part IV.

6. Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEORETICAL INQUIRIES L. 457, 480 (2019) ("The value of a typical consumer contract is not the relationship it creates between the consumer and a business, but the welfare gains to each party.").

7. Cf. Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 147 (2017) ("It is one thing to think that my contract with my cabinetmaker is regulated by informal interpersonal or moral norms—but with Comcast? Or Visa? Indeed, though, recent research strongly suggests that the perceived moral obligation of contract is instantiated with formal agreement . . .").

8. Scott Magids, Alan Zorfas & Daniel Leemon, *The New Science of Consumer Emotions*, HARV. BUS. REV. (Nov. 2015), <https://hbr.org/2015/11/the-new-science-of-customer-emotions> [<https://perma.cc/ZGF7-QEXS>].

9. See discussion *infra* Section II.A.

10. See, e.g., E-mail from Everyday Oil to Author (Mar. 19, 2020, 1:20 PM) (on file with authors); see Snapple "Returns the Favor" to Snapple Fans with New Advertising Campaign Featuring . . . Snapple Fans! Integrated Snapple Campaign Marks the Return of Wendy "The Snapple Lady", BEVNET (Jan. 12, 2005, 2:29 PM), [https://www.bevnet.com/news/2005/01-12-2005-snapple\\_wendy.asp](https://www.bevnet.com/news/2005/01-12-2005-snapple_wendy.asp) [<https://perma.cc/A2XZ-EQX2>] (characterizing Snapple's advertising as "returning the favor" to fans).

formed with other human beings.<sup>11</sup> Yet, firms have a strong incentive to blur the boundaries of their emotional capacity to make their wares more appealing and their sales more lucrative.<sup>12</sup> In fact, one of the latest marketing trends is called “emotional” branding, and its central strategy is to humanize and personalize the firm’s “touchpoints” with consumers.<sup>13</sup>

Selling relationship can influence consumers’ perceptions, preferences, attitudes, loyalty, and, of course, purchasing behavior, all of which can yield significant economic benefits for firms.<sup>14</sup> Accordingly, businesses increasingly utilize big data, sophisticated technology, and psychological vulnerabilities to design and tailor highly personalized and emotionally charged messages.<sup>15</sup> Such messages can foster a sense of mutuality, care, compassion, intimacy, love, and affection in consumers.<sup>16</sup>

Throughout this Article, we employ “love promises” as an umbrella term to cover the range of affective claims that firms increasingly make to consumers. It includes firms’ explicit claims of love, such as “use the code WELOVEYOU,”<sup>17</sup> or “[a]re we seriously breaking up!? This sucks! We LOVE you!”<sup>18</sup> It also includes claims of personalized emotional support and care, which can be calibrated to achieve different registers of intimacy and affection: neighbor, community member, friend, parent, protector, as well as a romantic lover or even ex-lover. Examples include, “we consider you a part of our family,”<sup>19</sup> “we are waiting with open doors and open hearts,”<sup>20</sup> “we send you all a big hug, a bear hug,”<sup>21</sup> and “thank you for being part of our community.”<sup>22</sup>

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11. Eric Klinenberg, *Is Loneliness a Health Epidemic?*, N.Y. TIMES (Feb. 9, 2018), <https://www.nytimes.com/2018/02/09/opinion/sunday/loneliness-health.html> [<https://perma.cc/S9TG-QYPN>] (“[W]hen it comes to human relationships, it turns out there’s no substitute for building them the old-fashioned way, in person.”).

12. Magids et al., *supra* note 8.

13. *Id.*

14. See discussion *infra* Part IV. For the impact of personalization on buyers see, for example, *Retail Personalization Index 2021—Thriving in the Next Era of Commerce*, SAILTHRU, <https://www.sailthru.com/personalization-index/> (last visited Aug. 23, 2021) [[perma.cc/Z8PY-Q8QB](https://perma.cc/Z8PY-Q8QB)] (“87% of beauty buyers are impacted by personalized content when making purchase decisions.”).

15. As one related example, researchers note the use of big data in the context of loyalty programs, which may raise various societal concerns when coupled with the reliance on “psychological mechanisms.” See Valeria Stourm et al., *Refocusing Loyalty Programs in the Era of Big Data: A Societal Lens Paradigm*, 31 MKTG. LETTERS 405, 406 (2020) (“The inter-related growth in LPs and big data applications increases the importance of the societal consequences that accompany the many benefits of this virtuous circle.”); see also *Urban Outfitters Advertisement*, TECHSMITH SCREENCAST (May 21, 2014), <https://www.screencast.com/t/Rs2lv5zbtis> [<https://perma.cc/8KHS-CH45>]; E-mail from Farmgirl Flowers to Customer (Mar. 19, 2020) (on file with authors) (“A huge thank you from Christina [the CEO] [with heart emoji] . . . we couldn’t do any of this without you and I’m so grateful that you’ve stuck with us for nearly a decade, and *especially* in these past few weeks.” [E-mail ended with an apparently handwritten signature]).

16. Barro, *supra* note 4.

17. E-mail from Everyday Oil to Author, *supra* note 10.

18. *Urban Outfitters Advertisement*, *supra* note 15.

19. E-mail from United Airlines to Author (Mar. 6, 2020, 10:44 AM) (on file with authors).

20. *Coronavirus Update: Marriott International Issues Statement on Hotel Stays and Travel*, W. VA. PRESS (Mar. 15, 2020), <https://wvpress.org/breaking-news/coronavirus-update-marriott-international-issues-statement-on-hotel-stays-and-travel/> [<https://perma.cc/5PKA-K9SP>].

21. E-mail from Everyday Oil to Author, *supra* note 10.

22. E-mail from Rent the Runway to Author (Mar. 14, 2020, 1:00 PM) (on file with authors).

Even a brief survey of e-mails from companies to consumers reveals that firms use friendly language and make love promises all the time. Consider the following illustrations, drawn from a plethora of examples collected by the authors. A company sends an e-mail titled “A Love Note from Everyday Oil,” greeting its customers with “[h]ello to this beautiful community of people we love!”<sup>23</sup> A telecom company greets a customer returning from a trip overseas with an unsolicited text message that says, “[w]elcome home! We hope you had a safe trip.”<sup>24</sup> A popular footwear retailer emails its customer, saying “[w]e’re just going to come out and say it: Let’s be email friends! ❤️❤️.”<sup>25</sup> An oil and gas company e-mails a customer, congratulating him on being “a great customer” and informing him that “we thought we’d return the favor” by offering a few cents discount on fuel.<sup>26</sup> A bank emails a client, saying “friendly note: [Name of client,] We want to reward you with an up to \$500 offer.”<sup>27</sup> When New York City stores shut down because of the coronavirus, a retailer posted a sign in one of its windows reading, “[w]e’re in this together, XOXO,” next to a second sign, visible from another window, announcing, “[n]ew Ways to Shop With Us,” followed by the company’s website information.<sup>28</sup>

Each of these examples shows how firms strategically use the language and cues of interpersonal relationship to shape and fuel B2C interactions. This practice is intended to stimulate consumers’ relational and emotional—as opposed to transactional and rational—responses.<sup>29</sup> Importantly, the emotions that firms seek to spark by selling relationship as product are not related to the product or service being sold.<sup>30</sup> They are also not related to the feelings that consumers may experience as a result of their purchase (e.g., a “Happy Meal”).<sup>31</sup> Rather, firms that sell relationship as product want to relate to consumers, and for consumers to relate with them, as if *both* parties to the transaction were human, sharing the same range of social, affective, and emotional capabilities.<sup>32</sup> Thus, with relationship as product, firms pretend to be capable of experiencing human emotions like gratitude or kinship, care, and love. This novel piece—firms’ pretense of humanness to create the illusion of intimacy, and thus to influence consumer expectations and behaviors—is the focus of this Article.

The technological and societal contexts of relationship as product are keys to its success. Technologically, and particularly within the digital consumer mar-

23. E-mail from Everyday Oil to Author, *supra* note 10.

24. Text Message from Spark New Zealand Ltd. to Author (Mar. 9, 2020) (on file with authors).

25. E-mail from Payless to Author (Oct. 16, 2020, 8:33 AM) (on file with authors).

26. E-mail from BP P.L.C. to Author (Mar. 28, 2020) (on file with authors). The word “favor”—a strange word to describe a discount—was presumably chosen to stimulate the types of positive emotions one associates with friendly interpersonal relationships.

27. E-mail from JPMorgan Chase to Customer (July 1, 2020) (on file with authors).

28. Sarah Dadush, Photograph of Kendra Scott Window (2020) (on file with authors).

29. Magids, et al., *supra* note 8.

30. See, e.g., McDonald’s, *Happy Kid Happy Parent*, YOUTUBE (Mar. 21, 2020), <https://www.youtube.com/watch?v=FDb9UcESKJI> [<https://perma.cc/J78F-ABFL>].

31. See *id.*

32. See Magids et al., *supra* note 8.

ketplace, the big data-fueled personalization of the B2C relationship is generating sophisticated and powerful new tools for firms to manipulate consumers.<sup>33</sup> Societally, the potential for such manipulation is profoundly aggravated by the current loneliness epidemic.<sup>34</sup> Loneliness causes people to crave relationship, and individuals anxious about loneliness can get lost “looking for love in all the wrong places.”<sup>35</sup>

Firms have the economic motivation and technological means to disorient and exploit vulnerable consumers by promising intimacy as part of the transaction.<sup>36</sup> But firms are not people, and are therefore incapable of love, friendship, or affection.<sup>37</sup> As the *New York Times* cautioned its readers, “Sorry, but Your Favorite Company Can’t Be Your Friend.”<sup>38</sup>

Admittedly, some consumers may derive (at least short-term) pleasure or enjoyment from firms’ efforts to transact emotionally.<sup>39</sup> Yet, there are multiple reasons to remain concerned. As we detail below, consumers who believe they can form meaningful relationships with firms may suffer various harms.<sup>40</sup> Love promises keep consumers in an emotional, non-rational state of mind, and are intended to make consumers feel more bonded and loyal to the firm. As a result, consumers may lower their guards, forgive firms that misstep, and generally behave in more firm-regarding (rather than self-protective) ways.<sup>41</sup> This, in turn, may make consumers inclined to buy more products and spend more on them.<sup>42</sup>

Consumers who buy into the fiction of relationship as product may suffer economic loss as a result. But consumers may experience intangible harms as

33. See generally Shaun B. Spencer, *The Problem of Manipulation*, 2020 U. ILL. L. REV. 959, 962 (2020) (discussing online manipulation in the digital era and linking such manipulations to data protection measures); Lauren E. Willis, *Deception by Design*, 34 HARV. J. L. & TECH. 115, 116 (2020) (discussing firms’ ability to utilize data and artificial intelligence in order to micro-target consumers).

34. See discussion *infra* Section II.A. For one survey exploring the loneliness epidemic in the United States, see *Cigna’s U.S. Loneliness Index*, CIGNA (May 1, 2018), <https://www.multivu.com/players/English/8294451-cigna-us-loneliness-survey/> [<https://perma.cc/T8ES-ARQ7>]; see also Shainna Ali, *What You Need to Know About the Loneliness Epidemic*, PSYCH. TODAY (July 12, 2018), <https://www.psychologytoday.com/us/blog/modern-mentality/201807/what-you-need-know-about-the-loneliness-epidemic/> [<https://perma.cc/S5ND-8DE7>]. The loneliness epidemic harms many other affluent countries. The United Kingdom, for instance, has recently established “a minister for loneliness.” See Ceylan Yeginsu, *U.K. Appoints a Minister for Loneliness*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/world/europe/uk-britain-loneliness.html> [<https://perma.cc/2VRJ-W2SR>].

35. JOHNNY LEE, *Lookin’ for Love*, on LOOKIN’ FOR LOVE (Elektra Ent. 1980); see, e.g., Klinenberg, *supra* note 11 (“Anxiety about loneliness is a common feature of modern societies.”).

36. Willis, *supra* note 33.

37. KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 1 (2018) (“Corporations are businesses that make stuff or provide services in exchange for money. They do not have brains or hearts or consciences. They do not feel love, fear, desire, hunger, pride, or spite. They do not suffer from indigestion or take pills for their cholesterol or have bags under their eyes when their kids lie awake coughing all night. They do not worry about aging parents. They do not feel awkward at holiday parties.”).

38. Barro, *supra* note 4.

39. *Id.*

40. See discussion *infra* Part IV.

41. Spencer, *supra* note 33, at 967.

42. See discussion *infra* Section IV.A. For quantifying the impact of personalization on health and beauty shoppers see, for example, Stourm et al., *supra* note 15 (“Through personalized emails, promotions, and rewards offers, loyalty program shoppers can generate 12%-18% more revenue than the average customer.”).

well. For example, through their love promises to consumers, firms position themselves as caregiving “surrogates,”<sup>43</sup> purporting to assume the role of human caregivers, family members, friends, romantic partners, and the like. Firms, however, can assume these roles only superficially.<sup>44</sup> Thus, shallow love promises may lead some consumers to experience loneliness-deepening disappointment and cynicism.<sup>45</sup> This, in turn, can undermine social trust<sup>46</sup> and decrease overall well-being.<sup>47</sup>

Furthermore, the emotional opportunism involved with relationship as product may undermine the solidarity ties that bind communities.<sup>48</sup> This is especially worrisome considering the connection and trust deficits at the root of today’s loneliness epidemic.<sup>49</sup> By promising to provide consumers with care, attention, and love in exchange for a superficial commitment proxy—money—firms may erode consumers’ ability and motivation to engage in actual interpersonal relationships.<sup>50</sup> After all, transacting for relationship is easier than nurturing a relationship with another human being.<sup>51</sup>

This Article marks a first attempt to systematically explore the phenomenon of “relationship as product from a legal perspective.” In so doing, it makes three key contributions. First, it calls for a more comprehensive approach to understanding and regulating B2C relationships. As it stands, the law overlooks the “soft,” emotional aspects of B2C transactions.<sup>52</sup> As a result, it inadequately accounts for, and insufficiently protects consumers against, the more subtle forms of manipulation that are at work in today’s B2C relationships.<sup>53</sup> In considering the nuanced economic, psychological, and societal harms that relationship as products entails, this Article joins the call for additional scrutiny of new forms of consumer manipulation. Second, while consumer law focuses primarily on the pre-contractual stage of the B2C relationship, this Article explores the B2C relationship in a more holistic fashion.<sup>54</sup> Specifically, we identify several distinct

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43. Stephen Marche, *Is Facebook Making Us Lonely?*, ATLANTIC (May 2012), <https://www.theatlantic.com/magazine/archive/2012/05/is-facebook-making-us-lonely/308930/> [<https://perma.cc/V778-PET6>].

44. *Id.*

45. *Id.*

46. See discussion *infra* Section IV.D.

47. See discussion *infra* Section IV.B.

48. See discussion *infra* Section IV.C.

49. See discussion *infra* Section III.A.

50. See discussion *infra* Section II.A.

51. See discussion *infra* Section V.C.3.

52. See discussion *infra* Section V.A.

53. See discussion *infra* Section V.A.

54. To be sure, there are some other important attempts to shed further light on the *ex post* stages of B2C transactions. Recent examples include Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 570 (2016) (discussing dispute resolution); Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 578 (2020) (discussing the broader problems with arbitration between firms and consumers); Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZ. L. REV. 213, 230–33 (2016) (discussing consumers’ willingness to stand for their rights); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69, 73 (2019) (discussing firms’ strategies of being selectively lenient *ex post* toward some groups of consumers); Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts: Empirical and Legal Analysis of Unilateral Modification Clauses in Consumer Contracts*, 55 GA.

stages of the B2C relationship and explain how firms seek to exploit opportunities for emotional connection at each stage.<sup>55</sup> Third, this Article places the phenomenon of relationship as product in a broad context. It moves beyond the micro-level consumer context and traces the macro-level societal harms stemming from firms' dissemination of love promises and manipulative illusions of intimacy.<sup>56</sup>

The remainder of this Article is organized as follows. Part II describes how the relationship that businesses seek to develop with consumers has itself become a product. Part III identifies the forces contributing to the rise of relationship as product in the modern marketplace, particularly the loneliness epidemic and decreasing levels of societal trust. Part IV explains how consumers can be harmed by firms selling relationship as product through the instrumentalities of empty love promises and false claims of human likeness. Part V offers policy recommendations. It examines the possibilities for addressing this phenomenon by rethinking the puffery doctrine and treating relationship as product as a deceptive or unfair trade practice.

## II. WHAT IS THE PRODUCT?

There are various ways to categorize social interactions and relationships. For instance, behavioral economists and social psychologists distinguish between two types of norms and relationships. First, there are “market norms” or “exchange relationships.”<sup>57</sup> These are based on economic principles of exchange for mutual benefit.<sup>58</sup> In these relationships, parties are concerned with what they

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L. REV. 657, 661 (2021) (discussing the lack of transparency in the mechanisms of unilateral modification clauses).

55. Here, we draw insights from an overlapping yet distinct theory dubbed “relationship marketing.” Relationship marketing centers on long-term relationships with customers, moving away from the traditional marketing efforts focused on one-time sales. Thus, relationship marketing is typically not related to a specific product or service. Instead, it aims to maximize the value of the B2C relationship for consumers. For more on the rich and various forms of relationship marketing, see, for example, Shelby D. Hunt, Dennis B. Arnett & Sreedhar Madhavaram, *The Explanatory Foundations of Relationship Marketing Theory*, 21 J. BUS. & INDUS. MKTG. 72, 81 (2006).

56. Cf. Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 215 (2019) (explaining that one of the challenges of realizing the importance of consumer law is its focus on the micro-level harms, rather than the macro-level implications).

57. Hunt et al., *supra* note 55, at 82.

58. *Id.* at 73.

give and compare it to what they receive.<sup>59</sup> They worry about the commensurateness of the values exchanged.<sup>60</sup> Second, there are “social norms” or “communal relationships.”<sup>61</sup> These are based on care, kindness, support, and affection.<sup>62</sup> In this type of relationship, people feel responsible to one another.<sup>63</sup> They engage without harboring expectations of commensurate returns.<sup>64</sup> In communal relationships, people do not meticulously track and compare what they give with what they receive.<sup>65</sup>

Today, firms increasingly use emotional overtures and promises of human connection to confuse consumers about the nature of their relationship.<sup>66</sup> Specifically, companies are reframing the B2C exchange relationship to elicit communal emotions among consumers.<sup>67</sup> They make (de facto false) claims of human likeness and connection without changing their primary relational drive—profitability.<sup>68</sup> By trading in ever-more nuanced emotional “goods” like closeness, intimacy, trust, interdependency, and nurturing, firms shift customers away from exchange dynamics and toward communal dynamics.<sup>69</sup> This can harm consumers and society at large in various ways.

This Part explains these ideas in more detail. Section A illustrates how firms design, market, and sell relationship as product. Section B details the various stages of the B2C relationship, delineating the strategies firms use in each stage.

#### A. *The ABCs of Relationship as Product*

In their book *The Choice Theory of Contracts*, Dagan and Heller opine that different “spheres” of contract law implicate different values.<sup>70</sup> In the case of consumer contracts, they argue, consumers typically do not seek to engage in deep relationship with businesses.<sup>71</sup> The authors submit that for consumers, typical B2C transactions “are like errands.”<sup>72</sup> Firms, moreover, are mainly interested

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59. *Id.*

60. *Id.* at 75.

61. See discussion *infra* Section III.B.

62. See generally Margaret S. Clark & Judson Mills, *Interpersonal Attraction in Exchange and Communal Relationship*, 37 J. PERSONALITY & SOC. PSYCH. 12, 16 (1979); Pankaj Aggarwal, *The Effects of Brand Relationship Norms on Consumer Attitudes and Behavior*, 31 J. CONSUMER RSCH. 87, 87 (2004); James Heyman & Dan Ariely, *Effort for Payment: A Tale of Two Markets*, 15 Psych. Sci. 787, 792 (2004); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 75–102 (2008).

63. Clark & Mills, *supra* note 62, at 13.

64. *Id.* at 18.

65. *Id.* at 13.

66. Hunt et al., *supra* note 55, at 75.

67. *Id.* at 76.

68. *Id.*

69. Aggarwal, *supra* note 62, at 88.

70. HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* 70 (2017).

71. *Id.* at 81.

72. *Id.*

in maximizing their profits.<sup>73</sup> Hence, consumers should not assume they are “entering into a morally thick relationship.”<sup>74</sup>

Yet, while Dagan and Heller envisage simple consumer transactions that rest on thin relational dynamics, firms have a more expansive notion of consumer transactions and the B2C relationship.<sup>75</sup> Firms increasingly invest in developing thick relational dynamics with consumers. For example, firms contemplate and attend to the entirety of the consumer experience—a practice dubbed CX in marketing parlance.<sup>76</sup> Many firms aspire to attract and cultivate invested and committed consumers who adopt a mindset of “[w]e [the business and the consumer] do things together and for each other. We share a past and a future.”<sup>77</sup> This goes beyond traditional notions of consumer interest, involvement, and loyalty.<sup>78</sup> It reaches into consumers’ emotional and communal commitment to the B2C relationship.<sup>79</sup> Indeed, some of the marketing literature promotes emotional branding and CX-focused marketing as *the* selling strategy.<sup>80</sup>

Firms seek to personalize and humanize B2C relationships, making consumers feel understood, secure, hopeful, and cared for.<sup>81</sup> A real-world example would be a large financial or insurance company that advertises itself as a stable, reliable partner or a “good neighbor.”<sup>82</sup> Another example might be a large home improvement retailer that encourages its customers with slogans like “You can do it. We can help.”<sup>83</sup>

A more tailored way for firms to establish relationships with consumers is to offer perks that are not viewed as part of the “tit-for-tat” of exchange relationships.<sup>84</sup> One example is birthday gifts or discounts, which have become prevalent

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73. Klass, *supra* note 6, at 480.

74. *Id.*

75. *Id.*

76. See Madan M. Bhatra, *Customer Experience: Trends, Challenges, and Managerial Issues*, 27 J. COMPETITIVENESS STUD. 138, 139, 147 (2019).

77. See David M. Bersoff, *People to Brands: “I Want to Take Our Relationship to the Next Level,”* EDELMAN (Nov. 1, 2018), <https://www.edelman.com/research/people-brands-want-take-relationship-next-level> [<https://perma.cc/Q8XQ-HJQ9>].

78. Cf. The Edelman Brand Relationship Index (distinguishing between five relationship stages: Indifferent, interested, involved, invested and committed).

79. Aggarwal, *supra* note 62, at 89.

80. See, e.g., Bhatra, *supra* note 76, at 139, 147.

81. See, e.g., *Retail Personalization Index Consumer Survey 2021: Value-Based Personalization Is the Future of Retail*, *supra* note 14, at 7; *Marketing*, SAILTHRU, <https://www.sailthru.com/resources/retail-consumer-survey/> (last visited Aug. 23, 2021) [[perma.cc/WDS3-W6NH](https://perma.cc/WDS3-W6NH)] (noting that “personalization has become a particularly valuable tactic for retailers to improve experiences.”).

82. Consider, for example, the jingle “Like a good neighbor, State Farm is there.” See, e.g., *TheClassicSports, 2002–Like a Good Neighbor, State Farm Is There*, YOUTUBE (Aug. 23, 2016), <https://www.youtube.com/watch?v=kL5MzW2h1WY/> [<https://perma.cc/J7TU-JVAZ>].

83. ARIELY, *supra* note 62, at 78.

84. Such perks may include early access to sales and discounts, free shipping and returns, samples, club memberships, discounts codes, coupons, and the like. See, e.g., E-mail from Carter’s to Customer (May 22, 2020) (on file with authors) (“We [heart] you a lot! . . . [W]e’re so happy you chose to be part of our Carter’s family . . . . New arrivals for you!”); E-mail from Need Supply Co. to Customer (on file with authors) (“Awww, snap. We missed your birthday again. We knew we were forgetting something . . . . It’s cool though, it’s never too late to celebrate. Here’s an extra 20% off your purchase.”). We put “free” in quotation marks since there are no “free

in a wide range of markets. More generally, firms bombard customers with e-mails, letters, and messages that employ friendly, playful, even romantically loving language. These messages convey attention and care. They can feature emojis to impart a sense of playful intimacy. They can address customers as VIPs or as family or community members, or with somewhat flirtatious terms of endearment like, “hey there, pumpkin”<sup>85</sup> on Thanksgiving.

As an illustration, consider Babylist, a firm that enables users to create a free baby registry.<sup>86</sup> The firm welcomes new customers with a friendly e-mail.<sup>87</sup> The email employs informal, empathetic language and is signed “with love.”<sup>88</sup> The email explicitly reminds the consumers of their insecurities as new parents.<sup>89</sup> It further claims that Babylist’s “Happiness Heroes” can fulfill their deep, and sometimes desperate, need for guidance and advice.<sup>90</sup>

Firms also deploy other, perhaps more negative, emotional devices. For instance, firms seek to make consumers feel guilty for leaving their virtual shopping cart unattended or, more dramatically, “abandoned.”<sup>91</sup> Some might defend the practice as good customer service.<sup>92</sup> But when doing so, firms often employ language, a tone, or framing designed to invoke emotional responses, including the fear of missing out.<sup>93</sup> Likewise, firms might make consumers feel disloyal and guilty for not completing transactions or dropping the relationship by employing the voice and language of a jilted lover.<sup>94</sup>

Firms may also stimulate a sense of exclusivity, scarcity, or urgency, e-mailing consumers with “friendly” warnings that their cart is about to expire, like online clothing retailer ASOS: “[d]on’t forget about me. I’m waiting in your

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meals,” and consumers generally end up paying for these perks in one way or another. *See, e.g.*, John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513, 517 (2018).

85. NASTY GAL, <https://www.nastygal.com/> (last visited Aug. 24, 2021) [<https://perma.cc/GCP2-XH8C>].

86. *See generally* BABYLIST, <https://www.babylist.com/> (last visited Aug. 24, 2021) [<https://perma.cc/LRR2-JJ49>].

87. E-mail from Babylist to Customer (Oct. 9, 2019) (on file with authors).

88. *Id.*

89. *Id.*

90. *Id.* (“Congratulations! Welcome to Babylist . . . It can feel so overwhelming to figure out what you really need for baby. *Deep breath*. Babylist is here to help you get exactly what you need for the journey ahead.”).

91. *See, e.g.*, *Free Abandoned Cart Emails for Your Ecommerce Store*, TARGETBAY (Feb. 26, 2021), <https://targetbay.com/blog/abandoned-cart-email/> [<https://perma.cc/8U2J-JLVB>] (providing examples of abandoned cart emails, such as “Come Back, We’re Still Holding On,” “Don’t forget me. Grab me before I’m gone,” “Don’t worry, we’ve got you! We noticed that you left some great stuff in your cart. To make it worth your while, here’s a 10% discount on your entire purchase if you complete your order in the next 24 hours,” and “Don’t go yet! Give us a shot!”—with a photo of cute pup sadly looking out the window).

92. *Id.*

93. *See, e.g.*, Steve Hogan, *10 Effective FOMO Marketing Techniques to Increase Online Results*, DAILY EGG, <https://www.crazyegg.com/blog/fomo-marketing/> (Dec. 19, 2018) [<https://perma.cc/6YHC-WGL9>].

94. *See, e.g.*, Screengrab: Webpage from Debenhams (undated) (on file with authors) (“Is it me you’re looking for? We noticed you’ve been looking at these items recently, and we don’t want you to miss out!”); E-mail from Rue to Customer (on file with authors) (“We hate goodbyes. So we’re emailing you one last time.”); *Urban Outfitters Advertisement*, *supra* note 15 (“Are we seriously breaking up!? This sucks! We LOVE you!”).

saved items. Snap me up before I'm gone.”<sup>95</sup> They may also use friendly language to alert consumers that limited time remains to access discount opportunities.<sup>96</sup> Combined, these emotional and intimacy devices constitute a deliberate marketing strategy, where firms pretend to be consumers' allies and protective advisors.<sup>97</sup>

Yet another, more traditional way for firms to create long-term bonds with consumers is to introduce clubs, loyalty programs, and other schemes.<sup>98</sup> Airlines, credit card companies, online shopping platforms (such as Amazon.com), hotels, and many other firms routinely offer consumers the opportunity to become part of a VIP or otherwise favored group (e.g., a Prime member with Amazon).<sup>99</sup> By employing this strategy, firms seek to transform casual buyers into long-term customers.<sup>100</sup> Often, such schemes require that consumers provide valuable personal data to firms.<sup>101</sup> Firms will then use this data to increase their relational profits by manipulating consumers via individualized, tailored offers.<sup>102</sup>

No market is immune to these practices. Illusions of intimacy, care, and affection can be found in the most sensitive and complex markets. For example, online payday lenders are among the firms that frequently, and concerningly, frame their marketing around an offer to “help.” “We Help’ is our simple mantra” and “[c]all us on 1300 WE HELP” are two conspicuous examples.<sup>103</sup> In other instances, online payday lenders employ explicitly friendly language, such as “know that you’ll be welcomed at [payday lender] and treated with the same respect and care that we would a dear friend in need.”<sup>104</sup>

The friendly tone employed by firms in the online payday lending industry is amplified by other marketing tools, such as blogs that offer financial advice while promoting payday loans.<sup>105</sup> On social media platforms, lenders post content depicting the businesses as fun, helpful, and always available—the virtues of a human friend. Individuals will find this content intermingled on their feeds with posts from family and friends.<sup>106</sup>

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95. See, e.g., Linda Bustos, *16 Tips for Shopping Cart Recovery Email*, ECOMMERCE ILLUSTRATED (Feb. 12, 2017), <https://www.ecommerceillustrated.com/shopping-cart-recovery-tips/> [<https://perma.cc/99JB-LL4M>]; see also Hogan, *supra* note 93.

96. Bustos, *supra* note 95.

97. *Id.*

98. See, e.g., Christopher G. Bradley, *FinTech's Double Edges*, 93 CHI.-KENT L. REV. 61, 65 (2018).

99. See, e.g., *id.*

100. See, e.g., *id.*

101. See *id.*

102. *Id.* at 66.

103. See, e.g., *id.*

104. See *About Us*, JACARANDA, <https://www.jacarandafinance.co.nz/about/> (last visited Aug. 24, 2021) [<https://perma.cc/PU2A-TJGC>].

105. See, e.g., *Welcome to the Nimble Blog*, NIMBLE, <https://nimble.com.au/blog/> (last visited Aug. 24, 2021) [<https://perma.cc/ZV76-FXXX>].

106. See Vivien Chen, *Online Payday Lenders: Trusted Friends or Debt Traps?*, 43 UNIV. NEW S. WALES L.J. 674, 699 (2020).

Real estate transactions are another concerning context in which firms sell relationship as product.<sup>107</sup> Real estate transactions are among the most expensive types of exchange in which an individual may engage.<sup>108</sup> Such transactions are known to be complicated, stressful, and risky.<sup>109</sup> Unsurprisingly, this provides the perfect setting for a real estate company to claim, in its ad, to be the client's "protector."<sup>110</sup> In one specific case, the firm further promises to stand with the client "every step of the way."<sup>111</sup> Alarming, the ad depicts a woman of color being embraced by a white man and "watched over" by a white woman (the Realtor).<sup>112</sup> Overall, the ad implies that the (female, non-white) client will be shielded and guided by the firm as she carries out her real estate transaction.

Yet another way for firms to frame the B2C relationship using a social context is to display leniency and flexibility towards consumers' requests. For example, following a personal conversation between a customer and a bank or airline representative, the business may waive the fees associated with changes or special services. As another example, a business may allow refunds for returns submitted without receipts, extend the return period past that stipulated in the company's policy, or even apply a discount retroactively.<sup>113</sup> Alternatively, a company may waive its right to terminate a contract, sue a consumer, or charge a fee due to a contractual breach.<sup>114</sup> Often firms will signal to consumers that such waivers and exceptions are demonstrations of empathy, care, and understanding—all features of communal relationship.<sup>115</sup>

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107. Sherri Johnson, *Real Estate Is a Relationship Business*, RISMEDIA, <https://rismedia.com/2019/09/23/real-estate-relationship-business/> (last visited Aug. 24, 2021) [<https://perma.cc/PQ73-SNCH>].

108. Liz Kneeven, *The 7 Most Expensive Things You'll Ever Pay for, According to Financial Planners*, BUS. INSIDER (Aug. 15, 2019, 12:54 PM), <https://www.businessinsider.com/personal-finance/most-expensive-things-americans-will-pay-for-2019-8> [<https://perma.cc/63HH-XSDA>].

109. Kelsey Ramirez, *Americans Say Buying a Home is Most Stressful Event in Modern Life*, HOUSINGWIRE (Aug. 6, 2018, 6:20 PM), <https://www.housingwire.com/articles/46384-americans-say-buying-a-home-is-most-stressful-event-in-modern-life/> [<https://perma.cc/QB3B-N3MV>].

110. See, e.g., *About RE/MAX Supercenter*, RE/MAX SUPERCENTER, <https://www.fredremax.com/about/> (last visited Aug. 24, 2021) [<https://perma.cc/P4D3-FQT6>] (featuring photograph that appeared in multiple advertisements for RE/MAX in 2020).

111. RE/MAX, LLC, *Frozen (:30) | RE/MAX 2021 TV Commercial*, YOUTUBE (Jan. 11, 2021), [https://www.youtube.com/watch?v=DH5bDhv8x8A&list=PLadTd4NPtV5dVEIBDo8nx9G7C\\_cOSYxS&index=2](https://www.youtube.com/watch?v=DH5bDhv8x8A&list=PLadTd4NPtV5dVEIBDo8nx9G7C_cOSYxS&index=2) [<https://perma.cc/Y4PJ-K8TS>].

112. *Id.* For a discussion of the ways people of color have been discriminated against and exploited in the real estate market, see, for example, RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* vii, x (2017); see also Florence Wagman Roisman, *Living Together: Ending Racial Discrimination and Segregation in Housing*, 41 IND. L. REV. 507, 508 (2008).

113. See Becher & Zarsky, *supra* note 54, at 69 (discussing the ways firms deviate from the contractual language and exercise leniency toward some consumers); Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 929–30 (2020) (discussing the potential role of assertive and pedantic consumers in disciplining sellers and advancing efficient markets).

114. See discussion *infra* Section II.B. (addressing firms' leniency at the *ex post* stage).

115. See Aggarwal, *supra* note 62, at 90.

Firms employ other tools for personalizing their communications and interactions with individual consumers. Big data enables the making of fake-intimacy gestures by firms.<sup>116</sup> Thanks to advances in technology and data analysis, firms can now learn consumers' secrets and sell them an individualized experience.<sup>117</sup> This furthers consumers' sense of receiving the type of personal or special treatment they might associate with communal relationship.<sup>118</sup>

The marketing strategies described only superficially here are deliberate and manipulative, based on a mix of theory, statistical models, and robust data.<sup>119</sup> Studies indicate that consumers' emotional responses to an ad influence their decision-making more than the ad's content.<sup>120</sup> Research also shows that the richness of an ad's emotional content is more effective at igniting consumer interest and securing consumer loyalty than is the quality of the advertised product.<sup>121</sup> Firms' ability to market to an audience of one, combined with the ability to diagnose one's emotional state, makes emotional appeals significantly more effective.<sup>122</sup>

It is not news that firms sell and market status, along with their products and services.<sup>123</sup> Marketing has always appealed to consumers' desire to belong, be more lovable, attractive, efficient, and successful.<sup>124</sup> Marketing has always been about selling an idea as well as a good.<sup>125</sup> This is why it is often based on narrative, storytelling, and images rather than being strictly informational and

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116. Louis Columbus, *Ten Ways Big Data is Revolutionizing Marketing and Sales*, FORBES (May 9, 2016, 2:56 AM), <https://www.forbes.com/sites/louiscolumbus/2016/05/09/ten-ways-big-data-is-revolutionizing-marketing-and-sales/?sh=24ef050621cf> [<https://perma.cc/EA6Z-6B4S>].

117. See, e.g., Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), <https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html> [<https://perma.cc/KB9X-CJBE>].

118. *Id.*

119. See discussion *infra* Part IV; see also Magids et al., *supra* note 8 (“Given the enormous opportunity to create new value, companies should pursue emotional connections as a science—and a strategy. . . . The advent of big data analytics brings clarity, discipline, and rigor to companies’ long-held desire to connect with the customer emotions that truly matter. Emotional connections no longer have to be a mystery—they can be a new source of real competitive advantage and growth.”).

120. See Neb Ciric, *How to Use Emotions to Improve Customer Experience in 2021*, SURVICATE, <https://survicate.com/customer-experience/emotional-customer-experience/> (last visited Aug. 24, 2021) [<https://perma.cc/F9D9-YRJD>] (suggesting that an emotional connection with consumers “is exactly what drives consumers toward a purchase decision”).

121. *Id.* (“Evidently, emotion plays a vital role in consumer behavior and brands should focus on leveraging it.”).

122. See, e.g., Sam Machkovech, *Report: Facebook Helped Advertisers Target Teens Who Feel “Worthless”* [Updated], ARS TECHNICA (May 1, 2017, 12:00 AM), <https://arstechnica.com/information-technology/2017/05/facebook-helped-advertisers-target-teens-who-feel-worthless/> [<https://perma.cc/8LCH-CUJM>]; Mark Bartholomew, *The Law of Advertising Outrage*, 19 ADVERT. & SOC’Y Q. 1, 23 (2018) (discussing datafication of emotions and citing media studies scholars).

123. See generally VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957) (arguing that “psychology professors turned merchandisers” and detailing how “today’s advertising men are using our hidden urges and frustrations to sell everything from gasoline to politicians.”).

124. See *id.* at 3.

125. See *id.* at 5.

fact-based.<sup>126</sup> Traditional marketing has often been designed to tap into consumers' desire to become "new and improved" versions of themselves.<sup>127</sup>

For example, there is nothing new about a firm implying that using a specific deodorant or wearing a fashionable jacket will make the buyer more attractive or successful. Or suggesting that using a specific telecom service provider will bring families closer and make them happier. Or that feeding one's child a specific brand of cheese (e.g., Kraft Singles) will make the consumer a better parent.<sup>128</sup> There is also nothing new in realizing that relationships are important for understanding contracts.<sup>129</sup>

But the phenomenon of selling *relationship* as product, especially as it unfolds within the big data-driven 21<sup>st</sup>-century digital marketplace, is new. By selling relationship, firms move beyond the familiar selling tactic of 'buy our product and become more attractive/successful/lovable.' Instead, firms imply that it is by transacting with the firm—as distinct from using the firm's product or service—that a consumer will receive deep emotional rewards. That is, firms imply that it is they "who" will provide consumers with an individualized, intimate bond. Firms thus actively cultivate the illusion that the B2C relationship itself will be social, rewarding, and deep. Relationship as product is therefore fundamentally unlike conventional promises of success, lovability, or attractiveness. When firms make love promises to consumers, they are making them on behalf of "themselves," not another (however speculative or fictitious) human. By humanizing the B2C relationship in this way, firms strategically bring a communal relationship ethos into an exchange relationship context.

Humanizing the B2C relationship through the instrumentality of love promises and empty gestures of intimacy serves to shift exchange relationship customers to "emotionally invested loyalists."<sup>130</sup> This, in turn, serves to ensure that

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126. See *id.*; Jan Trzaskowski, *Behavioural Innovations in Marketing Law*, in RESEARCH METHODS IN CONSUMER LAW 296 (Hans-W Micklitz et al. eds., 2018).

127. See, e.g., Trzaskowski, *supra* note 126, at 317 (making a similar claim and referring generally to DALE CARNEGIE, *HOW TO WIN FRIENDS AND INFLUENCE PEOPLE* (1936); ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* ch. 3 (2009) (ebook); DOUGLAS RUSHKOFF, *COERCION: WHY WE LISTEN TO WHAT "THEY" SAY* 19 (1999); SETH GODIN, *ALL MARKETERS ARE LIARS* (2005).

128. See *Kraft, Inc. v. FTC*, 970 F.2d 311, 314, 324 (7th Cir. 1992).

129. A conspicuous example is the literature on relational contracting. See, e.g., Ian R. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 694–96 (1974) (discussing the future of contracts in relations); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U.L. REV. 854, 855 (1978) (discussing contract law in a system of relational patterns); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115(1992) (discussing how the diamond industry utilizes contractual relationships); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U.L. REV. 775, 775 (2000) (considering relational contract theories). In the context of consumer contracts see Hoffman, *supra* note 2, at 1441–42; Ethan J. Leib, *What Is the Relational Theory of Consumer Form Contract*, in REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 259 (2013).

130. Ciric, *supra* note 120.

consumers will stay emotional and not think rationally.<sup>131</sup> Consumers are frequently unaware of what motivates their purchasing decisions.<sup>132</sup> Effective emotional marketing makes consumers more likely to spend more time and money on shopping.<sup>133</sup> Effective emotional promises also increase the likelihood that customers will be less self-interested in their dealings with the firm and more forgiving of firms' mistakes when mistakes happen.<sup>134</sup>

In short, firms are moving away from marketing their wares in the context of one-off transactions. Instead, they are selling entry into a long-term, intimate relationship with the firm. The "trick" of relationship as product is to make consumers believe that they are in a communal relationship with the firm—rather than an exchange relationship—and to behave with the firm as though it were a friend. To achieve this, firms employ various devices designed to spark an emotional connection with the consumer at every "touchpoint" of the relationship.<sup>135</sup> This brings us to the four stages of the B2C relationship.

### B. *The Four Stages of the B2C Relationship*

When regulating the B2C relationship, the law primarily focuses on communications and interactions that occur *prior* to purchase.<sup>136</sup> Business behavior is scrutinized most closely at this pre-contractual, *ex ante* stage ("Stage 1"). At this stage, various rules control the statements and promises that businesses make to consumers, whether oral, televised, in print, on websites, express, or implied.<sup>137</sup> These rules commonly seek to ensure that consumers are provided with truthful and substantiated information at the outset of the B2C relationship.<sup>138</sup> We argue, however, that the singular focus on Stage 1 claims is inadequate; the relationship as product phenomenon invites legal scrutiny beyond Stage 1.

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131. See *id.* ("If you break an emotional bond with a customer, they will usually start thinking rationally.").

132. See Magids et al., *supra* note 8 (submitting that emotional sentiments "are typically different from what customers say are the reasons they make brand choices").

133. See *id.* ("[A]lthough fully connected customers constituted just 22% of customers in the category, they accounted for 37% of revenue and they spent, on average, twice as much annually (\$400) as highly satisfied customers.").

134. See Ciric, *supra* note 120 ("Trust is the foundational element behind any genuine emotional connection . . . By creating consistent experiences, brands can further their relationships with customers, build stronger loyalty, and even gain forgiveness for making mistakes.").

135. Alisha Stein & B. Ramaseshan, *Towards the Identification of Customer Experience Touch Point Elements*, 30 J. RETAILING & CONSUMER SERVS. 8, 9, 17 (2016).

136. See, e.g., 15 U.S.C. § 45(a)(1) (FTC's mandate to prevent "deceptive acts or practices in or affecting commerce"); Fed. Trade Comm'n, Policy Statement Regarding Advertising Substantiation (Nov. 23, 1984) [hereinafter *FTC Policy Statement Regarding Advertising Substantiation*]; FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.1 (2021); Truth in Lending Act, 15 U.S.C. §§ 1601–1667f; FTC Guide Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.4 (2021); *Gut Check: A Reference Guide for Media on Spotting False Weight Loss Claims*, FTC (Jan. 2014), <https://www.ftc.gov/tips-advice/business-center/guidance/gut-check-reference-guide-media-spotting-false-weight-loss> [<https://perma.cc/RS9Z-Y9XG>].

137. See sources cited *supra* note 136.

138. See, e.g., 16 C.F.R. § 260.2 (2021) ("Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims."); FTC Policy Statement Regarding Advertising Substantiation, *supra* note 136.

Particularly in the digital marketplace, firms often engage in continuous—some might say unrelenting—communication with consumers using a range of emotional, personalized, and humanized messaging techniques. Because they are continuous, relationship as product practices are not confined to Stage 1. Rather, they unfold at all stages of the B2C relationship. One is the contract execution stage, or the transactional “moment,” which we term “Stage 2.” The others are the post-contractual, or *ex post* stages, which we dub “Stage 3” and “Stage 4.” Stage 3 refers to the communications and interactions between the parties that pertain to the contract’s performance and seek to keep consumers continuously engaged in the B2C relationship in order to generate repeat business. Stage 4 communications address the consumer’s dissatisfaction with the B2C relationship and seek to keep consumers from demoting or terminating it.

Simply put, Stage 1 includes B2C communications and interactions up to the point at which a consumer decides to transact. Stage 2 encompasses the communications and interactions during the transaction itself. Stages 3 and 4 relate to interactions and communications between the parties once the transaction is completed. Stages 3 and 4 may overlap chronologically, but they are substantively distinct: the former is about nurturing a relationship with presumably “happy customers,” while the latter is about restoring a relationship with unhappy customers.

Stage 1, the *ex ante* stage, can include ads, promotions, packaging, pricing schemes, sales talk, branding efforts, and marketing initiatives. For example, a firm may state that its shoes are sturdy and comfortable, or that its Wi-Fi is fast and reliable. These are pre-contractual statements, which the law generally expects to be accurate.<sup>139</sup>

There are various ways firms personalize Stage 1 to make it feel more “relational.”<sup>140</sup> For instance, consider online apparel retailers that nudge consumers by saying things like, “You have a great eye, let us help you along with these suggestions . . . .” Or, “Based on your excellent previous purchases, we would recommend these items. . . .” Or consider a merchant, such as Alibaba, which “kindly” reminds shoppers of items left in their cart, or Amazon, which notifies consumers of price changes of items in their cart.<sup>141</sup> True, some of these tactics may be efficient means of providing good customer service. Yet, these measures and the way they are presented and drafted can also assist in forming relationships.

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139. We use the term ‘generally’ since some promises and representations do not require substantiation. In various jurisdictions, including the United States, clearly humorous and exaggerated claims are exempted from the need to back them up. This is also known as the doctrine of puffery. See, e.g., David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1396 (2006); Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 128, 132 (S.D.N.Y. 1999), *aff’d*, 210 F.3d 88 (2d Cir. 2000). We return to this in more detail *infra* Section V.B.

140. See Retail Personalization Index Consumer Survey 2021: *Value-Based Personalization Is the Future of Retail Marketing*, *supra* note 14, at 7.

141. See Linda Bustos, *Amazon Alerts Shoppers of Price Changes in Cart*, ELASTIC PATH (Dec. 14, 2008), <https://www.elasticpath.com/blog/amazon-alerts-shoppers-of-price-changes-in-cart> [<https://perma.cc/K2W8-X36M>]; *Shopping Cart Prices*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GF3GA88LAZ36ZMSQ> (last visited Aug. 25, 2021) [<https://perma.cc/BVE2-8YUX>].

Some of these Stage 1 relational overtures rely on customers' previous purchases to glean specific information about their preferences, along with extensive big data profiling.<sup>142</sup> With social media and big data in their arsenal, companies can target individuals with advertising and marketing based on their own past search and purchasing behavior. For instance, Amazon offers consumers books based on their prior searches; eBay recommends items like ones the consumers purchased in the past; YouTube suggests music and other videos similar to what the user previously watched; Facebook, Google, and Instagram utilize user data to tailor advertisements; and Netflix recommends movies and shows based on consumers' prior viewing patterns.<sup>143</sup>

These communications move beyond good and efficient customer care. Such communications will frequently address the consumer by their first name and adopt a casual, informal voice. The tone of these messages resembles that of a friend suggesting things for your benefit, based on intimate knowledge of one's interests. For example, Netflix may write to a customer, saying: "Michelle, we just added a movie/TV show you might like." In fact, technology and data analytics allow firms to know things about consumers, that consumers themselves do not know.<sup>144</sup>

At Stage 1, firms can forge emotional connections by making consumers feel important, unique, understood, and valued. Firms will also signal to the consumer that they want to know and appreciate them more deeply. Firms will attempt to convince the consumer that they want to help and care for him, so that the consumer can flourish and shine. Firms will give the consumer the sense that they are ready to commit. They will promise the consumer to be there "every step of the way . . . ."<sup>145</sup>

Stage 2 is the transaction stage. This stage covers the relational communications between the start of a consumer's transactional process and the completion of a purchase. We include in Stage 2 all services provided until the point of purchase and immediately thereafter.<sup>146</sup> At Stage 2, the consumer becomes more

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142. For one discussion of how big data allows firms to further segment consumers, see Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating "Haves" from "Have-Nots,"* 2014 MICH. ST. L. REV. 1411, 1425–26 (2014).

143. See *Recommendations*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GE4KRSZ4KAZB4BV> (last visited Aug. 25, 2021) [<https://perma.cc/5LK9-JY39>]; Jason Del Rey, *Ebay is Overhauling Its Homepage Again to Personalize Recommendations for Each Visitor*, VOX (Mar. 20, 2017, 8:00 AM), <https://www.vox.com/2017/3/20/14971600/ebay-new-homepage-redesign-recommendations-personalization> [<https://perma.cc/8AY9-6DUM>]; Gavin Phillips, *Sick of Irrelevant YouTube Recommendations? Here's What You Need to Do*, MAKE USE OF (Dec. 9, 2019), <https://www.makeuseof.com/tag/sick-of-irrelevant-youtube-recommendations-heres-what-you-need-to-do/> [<https://perma.cc/5TPA-9YFC>]; Sabrina Weiss, *How to Block Targeted Advertising on Facebook, Google, Instagram and Twitter*, WIRED (May 29, 2019), <https://www.wired.co.uk/article/how-to-block-ad-tracking-facebook-instagram-twitter-google> [<https://perma.cc/D695-QVB3>]; *How Netflix's Recommendations System Works*, NETFLIX, <https://help.netflix.com/en/node/100639> (last visited Aug. 25, 2021) [<https://perma.cc/48MQ-KVCM>].

144. See, e.g., Duhigg, *supra* note 117.

145. See, e.g., *About RE/MAX Supercenter*, *supra* note 110.

146. This stage frequently includes the firm's standard form contract and its privacy policy. However, at times these agreements are hidden, unreadable or provided to the consumer only after the transaction is completed. See generally Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255

familiar with how their transactional partner generally works. For instance, the consumer learns about the checkout process, and how best to get in touch with the firm. At this stage, the consumer may also learn how many pages must be clicked through and how many forms completed to finalize the transaction; whether the price and shipping terms of the deal are clear and transparent; whether the company's return or other policies are easy to find, and what they contain. Each of these touchpoints presents an opportunity for the firm to stimulate the customer's feeling of being supported, empowered, and secure.

During Stage 2, shoppers will also discover some more specific ways that firms customize the shopping experience as part of the B2C relationship. For example, firms may present a variety of shipping options; an individualized price that includes the customers' particular tax and shipping costs; opportunities for consumers to select and save their preferred payment options (*e.g.*, whether they may use instant debit systems, such as PayPal or Apple Pay);<sup>147</sup> and options for moving items from consumers' virtual carts to a "wish-list" or a "favorites" bucket, allowing them to economize future search efforts by easily recovering and reconsidering favored items.

Many B2C transactions involve an intermediary platform such as Amazon or Etsy. Here, Stage 2 can include opportunities for the consumer to communicate with the seller directly (*e.g.*, to ask for a discount or a shipping fee exception). Consumers may also learn how, and under what circumstances, they can change or cancel the transaction. While the consumer may be aware of this at Stage 1, many firms bring this information most effectively to the buyer's attention in their purchase confirmation communications.<sup>148</sup> Stage 2 is also when firms give consumers options that will make repeat transactions as friction-free as possible.<sup>149</sup> In the online world, for example, consumers may be able to add favored items to a "saved for later" cart with a single click. They can save their payment information and easily reproduce previous purchases, and store and easily access past searches.

Of course, for consumers, many of the Stage 2 features and practices are welcome as they make the transactional moment more efficient and even pleasant. They reduce transaction costs and ease online transacting. As the Article argues, however, such efficiency and utility enhancing practices can also be unsalutary, especially when consumers are confused into believing that they are

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(2019) (empirically testing the unreadability of consumer contracts); Shmuel I. Becher & Uri Benoliel, *Law in Books and Law in Action: The Readability of Privacy Policies and the GDPR*, in: CONSUMER LAW AND ECONOMICS 179 (Klaus Mathis & Avishalom Tor eds., 2020) (empirically testing the unreadability of privacy policies); Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863 (2010) (discussing the rolling contracts phenomenon).

147. Offering non-credit card options may seem like a gesture toward a more inclusive marketplace.

148. See, *e.g.*, *Changing or Cancelling an Order*, 23ANDME, <https://customercare.23andme.com/hc/en-us/articles/202907940-Changing-or-Cancelling-an-Order> (last visited Aug. 25, 2021) [<https://perma.cc/UHQ6-4C7V>].

149. See Wes Miller, *Friction-Free Commerce? Hold on to Your Wallet*, GETWIRED (July 15, 2013, 11:49 AM), <https://getwired.com/2013/07/15/friction-free-commerce-hold-on-to-your-wallet/> [<https://perma.cc/6JSG-8NL3>].

engaged in something more profound than a transactional relationship. Admittedly, the line between efficiency-enhancing practices and the types of personalization practices that activate consumer emotions (*e.g.*, loyalty, patience, excitement, concern) may vary from one consumer to another and is not easy to draw. Yet, firms increasingly communicate that convenience is more than just good customer service; it is packaged and sold as a manifestation of the care and affection that the company “feels” for the consumer. Otherwise put, the more individualized the transaction, the more likely it is to lure the consumer into a communal, social state of mind.<sup>150</sup>

Stage 3 is the *ex post*, performance stage.<sup>151</sup> This stage encompasses the firm’s communications and relational activities after the consumer completes a purchase. Stage 3 is, essentially, about stewardship: The consumer is already in a relationship with the firm, so the firm’s goal is to maintain and perhaps strengthen that bond.

One example of B2C Stage 3 interaction arises when a consumer needs to reach the seller to get further information or clarification about their purchase. How easy is it to get hold of the firm? Can the customer speak to a representative quickly, without getting lost in an automated response system? Firms in Stage 3 also frequently request consumer feedback via surveys. Often the surveys will concern the consumer’s shopping experience overall.

Also, in Stage 3, firms may use illusions of intimacy to persuade the consumer that the B2C relationship has value beyond the performance of the original contract. Here, firms may reinforce the message that the consumer has great taste, and that, because of that, they are special. Firms may signal to consumers that they are special enough to be a VIP (maybe another purchase or two will help the consumer achieve this status) or a bona fide member of the club or community. This, in turn, will make the consumer privy to special perks, including being the target of more love promises. This type of communication includes invitations to stay “in the loop” on new services, products, strategies, and developments.

Consumers can choose the level of their desired interaction with the firm at this stage. For example, consumers may opt in or out of receiving company newsletters or text messages. They may choose the frequency with which they want to receive special offers. Whatever level of interaction the consumer chooses, firms regularly attempt to frame this interaction in a personal, social, and engaging way, treating each interaction as an opportunity to deepen the emotional connection with the consumer.

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150. *See id.*; *see also* Screengrab: Oscillating Fan, AMAZON (on file with authors) (captured May 29, 2020) (Amazon’s website allows shoppers to “Buy Now with One Click,” add the product to a cart, list, or registry, or to purchase from another seller. It also provides a product comparison chart and allows the consumer to ask questions or give feedback and repeatedly underscores the ease of returns).

151. With the exception of warranties and guarantees, consumer law has generally let the *ex post* stage escape scrutiny. In this respect, our analysis joins important recent scholarship that takes a closer, more systematic look at the *ex post* stage. *See, e.g.*, sources cited *supra* note 54.

In ordinary times, firms may send consumers promotional brochures, newsletters, coupons, and personal e-mails to keep them up-to-speed.<sup>152</sup> In crisis times, such as the Covid-19 pandemic, firms may inform consumers of operational changes, business status, and steps taken to promote the health and safety of consumers and employees.<sup>153</sup> To make these communications more personal, businesses will often frame their messages around the motto “we’re (still) here to help.”<sup>154</sup> Interestingly, when consumers are not kept up-to-date, they can sometimes feel sorely disappointed, even betrayed. Reportedly, this happened when consumers learned only after the fact that their favorite hotel chain had merged with another.<sup>155</sup> Or, more recently, when users were left off a firm’s Valentine’s Day mailing list.<sup>156</sup>

Stage 3 can also include efforts by the company to “re-engage” former customers they “haven’t seen in a while.”<sup>157</sup> In this context, companies can become quite heavy-handed with personalized messages designed to elicit an emotional response. Such messages, which the authors personally encountered, may read “We miss you!” “We hope it’s not goodbye forever,” “Where did you go?” “Have we broken up?” and “Won’t you come back?” Those messages regularly come with enticements like time-limited discounts (“if you come back today...”) or opportunities to learn about additional perks. After unsubscribing from an email list, one author of this Article was presented with a pop-up window, saying, “[i]s this goodbye?... We still think you’re awesome though so don’t be a stranger.”<sup>158</sup>

Stage 4 arises when the B2C relationship enters troubled waters, and the possibility of its termination comes into view. Examples may include returning a product, unsubscribing from a mailing list, or unfollowing a social media

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152. See Tara Duggan, *Examples of External Communications in the Workplace*, HOUS. CHRON. (Jan. 31, 2019), <https://smallbusiness.chron.com/examples-external-communications-workplace-10949.html> [<https://perma.cc/S7FY-K2M3>].

153. See, e.g., *How We’re Taking Care of Employees During COVID-19*, AMAZON (Feb. 3, 2021), <https://www.aboutamazon.com/news/company-news/how-were-taking-care-of-employees-during-covid-19> [<https://perma.cc/P33B-FC55>]; Anthony E. DiResta, Kwamina Thomas Williford, Da’Morus A. Cohen & Benjamin A. Genn, *The Impact of COVID-19 on Your Advertising and Marketing Campaigns*, HOLLAND & KNIGHT (Apr. 20, 2020), <https://www.hklaw.com/en/insights/publications/2020/04/the-impact-of-covid19-on-your-advertising-and-marketing-campaigns> [<https://perma.cc/45W6-9MUD>].

154. See, e.g., E-mail from State Farm to Customer (May 8, 2020, 2:43 AM) (on file with authors) (“I know you may be coping with a great deal of change and challenges right now, and we’re offering help to our New Jersey customers . . . I hope we can help ease a little of your stress and worry so you can concentrate on what’s really important - the health and safety of you and your family, friends and neighbors.”).

155. Josh Barro, *Starwood Devotees Greet Marriott Merger with Dread and Anger*, N.Y. TIMES (Nov. 18, 2015), <https://www.nytimes.com/2015/11/18/upshot/marriott-merger-has-starwood-lovers-nervous.html> [<https://perma.cc/58FF-LV57>].

156. John Koetsier, *Snapchat Didn’t Send a Valentine’s Day Message to Everyone, and It’s a Thing (Seriously)*, FORBES (Feb. 14, 2020, 3:16 PM), <https://www.forbes.com/sites/johnkoetsier/2020/02/14/snapchat-didnt-send-a-valentines-day-message-to-everyone-and-its-a-thing-seriously/> [<https://perma.cc/HQ5F-LSF4>].

157. See, e.g., E-mail from Pottery Barn to Customer (Nov. 15, 2018, 9:29 PM) (on file with authors) (“We miss you. We couldn’t help but notice you haven’t read our e-mails in a while.”).

158. Screenshot: Message from Headspace (on file with authors.).

feed.<sup>159</sup> Here, the firm's goal shifts from maintaining or strengthening the relationship to *restoring* it. Here again, firms may reveal a surprising degree of leniency and display a willingness to depart from the contractual four corners. Firms may forgo implementing their own policies to provide aggrieved consumers with what feels like a personalized "one-off exception."<sup>160</sup> For instance, a firm may allow a consumer to make a return that their policy would ordinarily prohibit. Or a firm may replace a dysfunctional product even if not obliged to do so under the applicable warranty or contract terms.

Stage 4 is also when firms go to lengths to reduce friction when resolving conflicts with consumers. Firms may provide various platforms and forums for consumers to air their grievances. These can include a hotline, customer service representatives, an ombudsman, online complaint forms, or arbitration.<sup>161</sup> Interestingly, many sellers now seek customer feedback not only with respect to their products and services, but also their dispute settlement or complaints resolution processes.<sup>162</sup> Firms use various methods to individualize and humanize their relationship at this stage, providing consumers with personal attention and the sense that they are receiving special treatment.<sup>163</sup>

Each of the four stages described above contributes to the B2C relationship. Each can add to, or detract from, the trust between the seller and the customer. Consumers who learn that it is hard, unpleasant, or stressful to interact with a firm may not only feel frustrated, but also disappointed and betrayed.<sup>164</sup> Consumers may believe they were not adequately cared for or appreciated in the course of their interaction(s) with the firm. Consequently, they may become more vigilant and suspicious and less trusting, up to the point of being reluctant to stay in a relationship with the business.<sup>165</sup> Emotional disappointment may, in other words, re-activate consumers' rational mind.<sup>166</sup> Conversely, the more consumers feel cared for, the more likely they are to consummate the transaction, stay connected, develop loyalty toward the firm and become repeat customers.<sup>167</sup>

To summarize, the four stages of the B2C relationship are multi-dimensional. Some interactions are utility-based, as expected by two parties who transact to exchange things of value. Others, however, are intended to form thick relationships that go beyond a narrow view of economic exchanges. Relationship

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159. While not the focus of our analysis, a firm may enter stage 4 as well, by discontinuing and product or service, or terminating the B2C relationship more generally.

160. See, e.g., "We Miss You" Email Examples to Winback Customers, OUTCRY (Aug. 19, 2018), <https://outcry.io/2018/08/19/we-miss-you-e-mail-examples-to-winback-customers/> [<https://perma.cc/HBZ9-Y99W>] (discussing a variety of such e-mails as means to win back customers).

161. For an interesting discussion see Van Loo, *supra* note 54, at 571–82 (discussing businesses' internal dispute processes, their promise and perils).

162. See, e.g., *id.* at 575.

163. See *id.* at 577.

164. See, e.g., Barro, *supra* note 155; Koetsier, *supra* note 156.

165. See, e.g., Eileen Brown, *9 out of 10 Consumers Will Stop Purchasing from Brands that Lack Transparency*, ZDNET (Aug. 24, 2018 7:54 AM), <https://www.zdnet.com/article/9-out-of-10-consumers-will-stop-purchasing-from-brands-that-lack-transparency/> [<https://perma.cc/CUY2-BQMX>]; Ciric, *supra* note 120.

166. See Ciric, *supra* note 120.

167. See *id.*

as product induces consumers to adopt a more communal, emotionally invested, and forgiving approach towards the firm, rather than a more individualistic and self-interested one.<sup>168</sup>

In and of itself, the expansion of communal relationship is not a bad thing. To the contrary, much good can come from being in communal-in-reality relationship. The problem with relationship as product is that it creates the illusion of communality for the purpose of altering consumer behavior—so that consumers buy more, more often, and for more money. Further, in the process of buying into the relationship as product illusion, consumers also share information about themselves, their personal data, preferences, and values.<sup>169</sup> That information can then be used by the company to deepen and extend relationships with existing customers, finetune marketing to potential customers, or be sold to other companies—all to increase the firm’s financial gain.

The continuity and intensity of relationship as product practices throughout each of the 4 Stages identified above are integral to the strategy’s success. As observed in a recent report on consumer vulnerability in digital markets by the European Consumer Organisation, “[t]he potential for identifying and targeting vulnerabilities grows as consumers keep using a particular service or app for a longer period of time. Usage over time means collection of user data over time, which translates to more insights into the vulnerabilities of the user.” The continuity of relationship as product practices can also aggravate power asymmetries within the B2C relationship:

[V]ulnerabilities typically originate in the *relations* consumers have with digital choice architectures, or with those implementing and operating them ... The longer the relationship between a consumer and a digital service or app persists, the more the app or services establishes a position of power as a result of increased knowledge about its users.<sup>170</sup>

Thus, contrary to how relationship as product practices are designed to make the consumer feel (e.g., supported, cared for, protected, empowered), they in fact shift the power dynamics in favor of the company at each stage of the B2C relationship. By engaging in these practices, therefore, firms come to “occupy a

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168. Cf. Russell Korobkin, *The Borat Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CAL. L. REV. 51, 83 (2013) (“When contracting with relative strangers, the extent to which parties signal trust or distrust might have a particularly strong impact on the future behavior of the parties. Most people, it turns out, use social cues as a focal point around which to coordinate behavior, exhibiting prosocial behavior when the context seems clearly to call for it and selfish, individualistic behavior when the social context indicates that it would be appropriate.”).

169. As a point of clarification, in a series of articles, Sarah Dadush developed the notion of “identity harm,” which is distinct from the type of harm generated by the relationship as product phenomenon. Identity harm arises when a consumer is misled about the virtuous attributes (e.g., green, fair-trade, Kosher, Made in the USA) of a firm’s *products* in ways that pit the consumer against her own values and damage the integrity of her non-B2C relationships (e.g., with workers, the planet, God, fellow citizens). By contrast, the harm of relationship as product arises from being misled about the nature of the consumer’s *relationship with the firm*—the B2C relationship itself.

170. See THE EUR. CONSUMER ORG. (BEUC), EU CONSUMER PROTECTION 2.0: STRUCTURAL ASYMMETRIES IN DIGITAL CONSUMER MARKETS 22 (2021), [https://www.beuc.eu/publications/beuc-x-2021-018\\_eu\\_consumer\\_protection\\_0\\_0.pdf](https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection_0_0.pdf) [<https://perma.cc/J25K-TGM7>].

key position which allows them to identify (or even evoke) and exploit [consumer] vulnerabilities.”<sup>171</sup>

Rather than being communal, the type of relationship that emerges from relationship as product practices can fairly be described as emotionally and economically extractive. To better grasp the rise of relationship as product and its dangers, the next Part contextualizes the phenomenon’s emergence against the backdrop of the loneliness epidemic.

### III. CONTEXTUALIZING THE RISE OF RELATIONSHIP AS PRODUCT

This Part contextualizes the phenomenon of relationship as product, exploring its behavioral and societal roots. The interdisciplinary analysis in this Part builds on three interconnected themes. The first, discussed in Section A, is loneliness. People are suffering from a loneliness epidemic.<sup>172</sup> People seek ways to avoid loneliness and its negative consequences.<sup>173</sup> They might therefore be more easily seduced by empty love promises enticing them to be in a relationship with a firm. The second theme, discussed in Section B, is the sociological notion of trust. High levels of loneliness are associated with low levels of trust.<sup>174</sup> Trust, in turn, is imperative for well-being and is an important quality for individuals, traders, and markets more generally.<sup>175</sup> Relationship as product may aggravate the trust deficit in modern-day society by creating and profiting from the illusion that a sincere communal relationship with a firm is possible. When that illusion is revealed, disappointment, deepened loneliness, and a deeper erosion of the trust bonds that hold society together may result. Finally, Section C explains how the marketing and the practice of relationship as product tap into consumers’ cognitive biases. We show how these biases could work in firms’ favor, because consumers optimistically believe, and want to believe, that deep connection is possible, even with a firm.

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171. *Id.*

172. See sources cited *infra* notes 177–90; see also discussion *infra* Section III.A.

173. See Tchiki Davis, *Feeling Lonely? Discover 18 Ways to Overcome Loneliness*, PSYCH. TODAY (Feb. 18, 2019), <https://www.psychologytoday.com/us/blog/click-here-happiness/201902/feeling-lonely-discover-18-ways-overcome-loneliness> [<https://perma.cc/S8XV-2Y48>] (discussing various techniques for addressing loneliness).

174. See Frederica Nyqvist, Christina R. Vistor, Anna K. Forsman & Mima Cattan, *The Association Between Social Capital and Loneliness in Different Age Groups: A Population-Based Study in Western Finland*, NCBI (July 11, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4940959/> [<https://perma.cc/Q8EY-V65L>].

175. See Deborah Hardoon, *What Might a Rise in Social Trust Mean for Our Wellbeing?*, WHAT WORKS WELLBEING (Oct. 11, 2018), <https://whatworkswellbeing.org/blog/what-might-a-rise-in-social-trust-mean-for-our-wellbeing/> [<https://perma.cc/2FDC-M7PE>].

A. *The Loneliness Epidemic*

Bye bye Love  
 Bye bye Happiness  
 Hello Loneliness<sup>176</sup>

Loneliness is a subjective, perceived sense of isolation due to lack of connections with others. Loneliness is a “distressing emotion” and a “discomforting sense of being ‘without.’”<sup>177</sup> Whereas loneliness refers to an individual feeling of separation and not belonging, the term “social isolation” is the objective, factual reality of being separated from others.<sup>178</sup> Thus, one can experience loneliness despite having multiple social ties. Likewise, one can be isolated from others yet not experience loneliness.<sup>179</sup> Yet loneliness and social isolation are linked: each can cause the other, and the two often occur simultaneously.<sup>180</sup>

Humans are social creatures that need and long for relationships.<sup>181</sup> Loneliness, therefore, is a serious threat to both our physical and mental health.<sup>182</sup> In short, loneliness poses a public health problem.<sup>183</sup> Indeed, recent research has uncovered some of the negative implications of loneliness, such as stress, high blood pressure, heart disease, and alcoholism.<sup>184</sup> Loneliness can adversely impact the quality of our sleep.<sup>185</sup> The adverse effects of loneliness are comparable

176. THE EVERLY BROTHERS, *BYE BYE LOVE* (Cadence Records 1957).

177. Olivia Marie Ash, *The Prevalence and Effects of Loneliness in the General Population, Lawyer Well-Being, and a Survey of Law Students* 8 (May 17, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3390457> [<https://perma.cc/22XP-TGSB>].

178. See, e.g., *Social Isolation, Loneliness in Older People Pose Health Risks*, NAT'L INST. ON AGING (Apr. 23, 2019), <https://www.nia.nih.gov/news/social-isolation-loneliness-older-people-pose-health-risks> [<https://perma.cc/U9WU-DH2F>]. The most accurate method to measure isolation is a person's frequency of contacts (rather than measuring social support or lack of discussion networks). See Jan Eckhard, *Indicators of Social Isolation: A Comparison Based on Survey Data from Germany*, 139 SOC. INDICATORS RSCH. 963, 963–64 (2018).

179. See, e.g., Andrea Wigfield, Sarah Alden, Royce Turner, Marcus Green & Vinal K. Karania, *Loneliness and Isolation—Understanding the Difference and Why It Matters*, AGE UK (Oct. 11, 2018), <https://www.ageuk.org.uk/our-impact/policy-research/loneliness-research-and-resources/loneliness-isolation-understanding-the-difference-why-it-matters/> [<https://perma.cc/7GNP-EQWV>].

180. *Id.*

181. ED DIENER & ROBERT BISWAS-DIENER, *HAPPINESS: UNLOCKING THE MYSTERIES OF PSYCHOLOGICAL WEALTH* 66 (2008) (“Like food and air, we seem to need social relationships to thrive.”).

182. *Id.* at 67 (“Lonely people are not only less happy, but their physical health suffers as well.”).

183. Blackpool, Gjøvik & Tokyo, *All the Lonely People: Loneliness Is a Serious Public-Health Problem*, ECONOMIST (Sept. 1, 2018), <https://www.economist.com/international/2018/09/01/loneliness-is-a-serious-public-health-problem> [<https://perma.cc/FRZ5-RYAX>].

184. DIENER & BISWAS-DIENER, *supra* note 181, at 43 (“Isolated individuals are more likely to . . . have high blood pressure.”); Steven W. Cole, John P. Capitanio, Katie Chun, Jesusa M. G. Arevalo, Jeffrey Ma & John T. Cacioppo, *Myeloid Differentiation Architecture of Leukocyte Transcriptome Dynamics in Perceived Social Isolation*, 112 PROC. NAT'L ACAD. SCI. 15142, 15142 (2015).

185. Vivek Murthy, *Work and the Loneliness Epidemic*, HARV. BUS. REV. (Sept. 26, 2017), <https://hbr.org/cover-story/2017/09/work-and-the-loneliness-epidemic> [<https://perma.cc/JAS5-T54S>]; see also VIVEK MURTHY, *TOGETHER: THE HEALING POWER OF HUMAN CONNECTION IN A SOMETIMES LONELY WORLD* 14 (2020).

to those of smoking, obesity, and a sedentary lifestyle.<sup>186</sup> Loneliness may even shorten one's life: Lonely people are twenty-six percent more likely to die early than those with sufficient social connections.<sup>187</sup>

Loneliness can also be linked to psychological and mental health issues. Loneliness makes people more likely to view the world as threatening and beyond their control.<sup>188</sup> More generally, loneliness is correlated with depression, anxiety, and suicide. It can also reduce the capacity to reason and be creative.<sup>189</sup>

Ironically, while technological advancements enhance our ability to connect with others, these advancements can aggravate loneliness.<sup>190</sup> Among other things, people spend more time on their electronic devices and apps, and less time interacting directly with peers.<sup>191</sup> It has been observed that “the more connected we become, the lonelier we are . . . . And loneliness makes us miserable.”<sup>192</sup> Indeed, those who suffer from loneliness are more prone to exhibit compulsive technology use, looking for virtual connections.<sup>193</sup> This, unfortunately, can create a vicious circle. Searching for social ties online can generate a false sense of human connection.<sup>194</sup> But in fact, much time spent online leads to increased isolation, disconnection, and anxiety.<sup>195</sup>

The statistics around loneliness and social isolation are alarming.<sup>196</sup> For various cultural, societal, and technological reasons, rates of loneliness in the United States have doubled in the last fifty years.<sup>197</sup> Loneliness is not confined by geographic location, gender, race, or ethnicity.<sup>198</sup> Thirty-five percent of

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186. Julianne Holt-Lunstad, Timothy B. Smith, Mark Baker, Tyler Harris & David Stephenson, *Loneliness and Social Isolation as Risk Factors for Mortality: A Meta-Analytic Review*, 10 PERSP. PSYCH. SCI. 227, 233 (2015).

187. *Id.*

188. See generally Louise C. Hawkey & John T. Cacioppo, *Social Connectedness and Health*, in HUMAN BONDING: SCI. OF AFFECTIONAL TIES 343 (Mary I. Campa & Cindy Hazan eds., 2013).

189. *Id.*

190. See, e.g., Klinenberg, *supra* note 11 (arguing that a possible key cause of loneliness may be “the rise of communications technology, including smartphones, social media and the internet”).

191. See generally SHERRY TURKLE, ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER (2011); Michael Price, *Questionnaire: Alone in the Crowd*, AM. PSYCH. ASS'N. (June 11, 2011), <https://www.apa.org/monitor/2011/06/social-networking> [<https://perma.cc/MW5T-PFX9>].

192. Marche, *supra* note 43.

193. Rebecca Nowland, Elizabeth A. Necka & John T. Cacioppo, *Loneliness and Social Internet Use: Pathways to Reconnection in a Digital World?*, 13 PERSP. ON PYSCH. SCI. 70, 71 (2018).

194. For one accessible account, see George Monbiot, *The Age of Loneliness Is Killing Us*, GUARDIAN (Oct. 14, 2014 2:49 PM), <https://www.theguardian.com/commentisfree/2014/oct/14/age-of-loneliness-killing-us> [<https://perma.cc/XT64-EB7C>] (discussing the loneliness epidemic and its tragic consequences).

195. See Marche, *supra* note 43. That said, some argue that social media platforms can combat loneliness if users focus on active use, rather than passive scrolling. See, e.g., Philippe Verduyn et al., *Passive Facebook Usage Undermines Affective Well-Being: Experimental and Longitudinal Evidence*, 144 J. EXPERIMENTAL PSYCH.: GEN. 480, 480 (2015).

196. See, e.g., *id.* at 486.

197. Murthy, *supra* note 185.

198. Shawn Achor, Gabriella Rosen Kellerman, Andrew Reece & Alexi Robichaux, *America's Loneliest Workers, According to Research*, HARV. BUS. REV. (Mar. 19, 2018), <https://hbr.org/2018/03/americas-loneliest-workers-according-to-research> [<https://perma.cc/FJ8W-FGMG>].

Americans over forty-five years old are chronically lonely.<sup>199</sup> Nearly half of Americans surveyed reported always or sometimes feeling lonely or left out.<sup>200</sup> Some 25% of Americans rarely or never feel that others understand them.<sup>201</sup> Only about 50% of Americans have meaningful daily social interactions.<sup>202</sup> Along similar lines, a third of Americans never meet their neighbors, and only 8% of Americans report having meaningful conversations with their neighbors.<sup>203</sup>

In fact, a recent study found that the situation may be more severe than previously assumed, with some 76% of study participants reporting moderate to high levels of loneliness.<sup>204</sup> When it comes to young people, loneliness can rank as a number one fear, ahead of global warming, losing a job, or being diagnosed with cancer.<sup>205</sup> Perhaps surprisingly, people in their late twenties are among those most likely to suffer from loneliness.<sup>206</sup>

Against this background, it is easy to see why people desire meaningful connection in their lives. It is also easy to see how people experiencing loneliness might become more susceptible to opportunistic invitations to connect. Those (many) who lack, but long for, meaningful relationship might feel desperate to connect with others.<sup>207</sup> Such desperation can make one less discerning about who/what one “lets in.” Thus, the loneliness epidemic may make it easier for

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199. See G. Oscar Anderson, *Loneliness Among Older Adults: A National Survey of Adults 45+*, AARP RSCH. (Sept. 2010), [https://www.aarp.org/research/topics/life/info-2014/loneliness\\_2010.html](https://www.aarp.org/research/topics/life/info-2014/loneliness_2010.html) [<https://perma.cc/TJ59-CA8W>].

200. *Cigna's U.S. Loneliness Index*, *supra* note 34.

201. *Id.*

202. *Id.*

203. See Melissa Dahl, *A Third of Americans Have Never Met Their Neighbors*, CUT (Aug. 24, 2015), <https://www.thecut.com/2015/08/third-of-americans-dont-know-their-neighbors.html> [<https://perma.cc/8A8D-UQMR>]; David Brooks, *The Lies Our Culture Tells Us About What Matters – and a Better Way to Live*, TED (Apr. 2019), [https://www.ted.com/talks/david\\_brooks\\_the\\_lies\\_our\\_culture\\_tells\\_us\\_about\\_what\\_matters\\_and\\_a\\_better\\_way\\_to\\_live?referrer=playlist-curator\\_s\\_picks\\_top\\_10\\_ted\\_talks\\_of\\_2019](https://www.ted.com/talks/david_brooks_the_lies_our_culture_tells_us_about_what_matters_and_a_better_way_to_live?referrer=playlist-curator_s_picks_top_10_ted_talks_of_2019) [<https://perma.cc/X9DH-BRTX>].

204. Ellen E. Lee et al., *High Prevalence and Adverse Health Effects of Loneliness in Community-Dwelling Adults Across the Lifespan: Role of Wisdom as a Protective Factor*, 31 INT'L PSYCHOGERIATRICS 1447, 1457 (2018).

205. Hannah Ewens, *What Young People Fear the Most*, VICE (Sept. 21, 2016, 5:35 AM), [https://www.vice.com/en\\_uk/article/nyk37/what-vice-readers-fear-the-most-hannah-ewens-love-loneliness](https://www.vice.com/en_uk/article/nyk37/what-vice-readers-fear-the-most-hannah-ewens-love-loneliness) [<https://perma.cc/8EF7-PSYE>] (reporting on a UK census).

206. Lee et al., *supra* note 204. Other age groups that may be at high risk of loneliness include people in their 50s and 80; see *id.* For the specific risks of elderly people see, for example, Alejandra Morlett Paredes et al., *Qualitative Study of Loneliness in a Senior Housing Community: The Importance of Wisdom and Other Coping Strategies*, 25 AGING & MENTAL HEALTH 559, 559–66 (2021).

207. The importance of human relationships is further illustrated by the famous (yet contested) Maslow's hierarchy of needs. Maslow's hierarchy of needs is a motivational theory, which comprises five levels of human needs. According to this hierarchy, love and belonging—which are linked to friendship, intimacy, and connection—consist the third ‘layer’ of human needs. The theory posits that when a person is deprived of a need, they are motivated to fulfill it. The longer the need is denied and unmet, the stronger the motivation becomes to satisfy it. In our context, the longer a person suffers from social isolation and loneliness, the more this person is driven to establish inter-personal relationships. See Abraham H. Maslow, *A Theory of Human Motivation*, 50 PSYCH. REV. 370, 370 (1943).

firms to entice consumers with empty love promises and empty gestures of intimacy—and to profit from doing so. As the Economist observes:

[S]ervices that offer human contact to the lonely will thrive . . . . [T]his manifests itself in agencies and apps that allow you to rent a family or a friend—a girlfriend for a singleton, a funeral mourner, or simply a companion to watch TV with . . . . One Caring Team, an American company, calls and checks in on lonely elderly relatives for a monthly fee.<sup>208</sup>

People who experience loneliness and fear its consequences may genuinely believe that relationships with firms will ease their pain. Unfortunately, however, the phenomenon of relationship as product may only make matters worse. Moreover, the loneliness epidemic may be the ideal setting for the risks associated with relationship as product to materialize.

### B. *Relationship, Trust, and Well-being in the Consumer Marketplace*

Healthy relationships are characterized by trust. From an economic perspective, trust reduces transaction costs and minimizes the need to protect against opportunism.<sup>209</sup> When parties trust one another, they have less need to scrutinize each other's statements.<sup>210</sup> As Putnam puts it, “[h]onesty and trust lubricate the inevitable frictions of social life.”<sup>211</sup> And as Kohn explains, people who trust others are optimistic, happier, tolerant, and “welcome dealing with strangers as opportunities rather than threats.”<sup>212</sup>

The loneliness epidemic is linked to the erosion of social trust.<sup>213</sup> As loneliness deepens, levels of social trust are also deteriorating; and most Americans

208. *All the Lonely People, All the Lonely People: Loneliness is a Serious Public-health Problem*, ECONOMIST: INTERNATIONAL (Sept. 1, 2018), <https://www.economist.com/international/2018/09/01/loneliness-is-a-serious-public-health-problem> [<https://perma.cc/4YAB-7474>] (arguing that migrants and people with disabilities are more likely to suffer from loneliness).

209. Gimun Kim & Hoonyoung Koo, *The Causal Relationship Between Risk and Trust in the Online Marketplace: A Bidirectional Perspective*, 55 COMPUT. HUM. BEHAV. 1020, 1025 (2015) (“[T]rust continues to reduce perceived risk overtime . . . . The end result is that buyers trust to the point that their intention to engage in transactions is decisively enhanced, and perceived risk begins to encourage purchase behavior rather than discouraging buyers from engaging in transactions.”); Stephen Knack & Philip Keefer, *Does Social Capital Have an Economic Payoff? A Cross-Country Investigation*, 112 Q. J. ECON. 1251, 1252 (1997) (“Individuals in higher-trust societies spend less to protect themselves from being exploited in economic transactions.”); Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 ECON. J. 295, 296 (2001) (“Because trust reduces the cost of transactions ([that is,] less time is spent investigating one’s broker), high trust societies produce more output than low trust societies.”).

210. *See, e.g.*, Knack & Keefer, *supra* note 209, at 1252.

211. *See, e.g.*, ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 135 (2000).

212. MAREK KOHN, *TRUST: SELF-INTEREST AND THE COMMON GOOD* 123 (2008) (referring to Eric Uslaner’s findings).

213. *Cf. id.* at 133 (“Trust is desirable in itself . . . . Trust is to be sought for its own sake, and because it keeps good company.”); Eric M. Uslaner, *Producing and Consuming Trust*, 115 POL. SCI. Q. 569, 575–81 (2000) (discussing trust’s consequences).

are concerned about it.<sup>214</sup> Trust is becoming even more scarce among Generation Z and millennials.<sup>215</sup>

Social science literature distinguishes between two types of trust. Interestingly, this distinction parallels the two types of relationship discussed in this Article—communal and exchange.<sup>216</sup> The first type of trust is trust among friends, neighbors, or family members.<sup>217</sup> This trust, also called “thick trust,” is based on close ties, which create “bonding social capital.”<sup>218</sup> Thick trust correlates with what social psychologists and behavioral economists identify as communal relationships and social norms.

The second main type of trust is a more general one, which can be described as “thin trust.” For instance, thin trust can underlie the relationships between citizens and governments, insureds and insurance companies, clients and financial institutions, or consumers and firms.<sup>219</sup> Thin trust is described as “bridging social capital.”<sup>220</sup> In the context of relationship as product, it correlates with “exchange relationships” and “market norms.”

Trust, which encourages healthy relationships and social support, is closely related to well-being. Relationships, social support, and trust are all crucial for our happiness and physical and mental health.<sup>221</sup> Social relationships, trust, and happiness “reinforce each other.”<sup>222</sup> Happy people are sociable, devoting much time to nurturing and enjoying their relationships, which leads to relaxation and satisfaction.<sup>223</sup>

214. See, e.g., Lee Rainie, Scott Keeter & Dana Page et al., Lee Rainie et al., *Trust and Distrust in America*, PEW RESEARCH CENTER: U.S. POL. & POL’Y, (July 22, 2019), <https://www.people-press.org/2019/07/22/the-state-of-personal-trust/> [<https://perma.cc/48WZ-ZS7Z>] (explaining that “many Americans are anxious about the level of confidence citizens have in each other. Fully 71% think interpersonal confidence has worsened in the past 20 years.”).

215. See, e.g., Eric Uslander, *The Real Reason Why Millennials Don’t Trust Others*, WASH. POST (Mar. 18, 2014, 11:00 AM) <https://www.washingtonpost.com/news/monkey-cage/wp/2014/03/17/the-real-reason-why-millennials-dont-trust-others/> [<https://perma.cc/EV54-3S64>] (discussing research findings that indicate low levels of social trust among young generations); DELOITTE, THE DELOITTE GLOBAL MILLENNIAL SURVEY 2019 1 (2019), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/deloitte-2020-millennial-survey.pdf> [<https://perma.cc/GSZH-RRGG>] (reporting low levels of trust in businesses and government among Millennials and generation Z).

216. See, e.g., PUTNAM, *supra* note 211, at 136.

217. *Id.*

218. *Id.*

219. *Id.*

220. Tristan Claridge, *What Is Bridging Social Capital?*, SOC. CAPITAL RSCH. & TRAINING (Jan. 7, 2018), <https://www.socialcapitalresearch.com/what-is-bridging-social-capital/> [<https://perma.cc/SM5Z-DL5H>].

221. See, e.g., DAVID G. MYERS, THE PURSUIT OF HAPPINESS: WHO IS HAPPY—AND WHY 143 (1992) (noting the importance of social support and close relationships to both health and happiness).

222. DIENER & BISWAS-DIENER, *supra* note 181, at 66; see also SONJA LYUBOMIRSKY, THE HOW OF HAPPINESS: A SCIENTIFIC APPROACH TO GETTING THE LIFE YOU WANT 138 (2008) (“The causal relationship between social relationships and happiness is clearly bidirectional.”).

223. LYUBOMIRSKY, *supra* note 222, at 22, 25, 263; see also MYERS, *supra* note 221, at 143 (noting the importance of social support and close relationships to both health and happiness); Daniel Kahneman, Alan B. Krueger, David A. Schkade, Norbet Schwarz & Arthur A. Stone, *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 SCI. 1776 (2005) (showing women’s happiness levels were generally higher while socializing and interacting with others than while they were on their own).

Intimate, social relationships are based on mutual understanding, kindness, and caring.<sup>224</sup> They allow us to feel comfortable with ourselves and replace anxiety with trust.<sup>225</sup> Having close relationships with others provides an opportunity to love and be loved, be cared for, and feel secure.<sup>226</sup> In fact, the mere presence of others can bring us a sense of comfort, perceived as a potential safety net that eases the anxiety of our lives.<sup>227</sup> Relationships can also help us form a sense of meaning and realize our goals.<sup>228</sup> Additionally, social relationships can provide us with joy, laughter, and entertainment,<sup>229</sup> which lower stress hormones.<sup>230</sup> Thus, social relationships grounded in trust are essential for happiness, human flourishing, and well-being.

As Diener and Biswas-Diener eloquently state, “we need others to flourish.”<sup>231</sup> People may become strongly motivated to fulfill this need if left unmet. In fact, a recent study employed functional magnetic resonance imaging (fMRI) to measure neural responses to total social isolation.<sup>232</sup> The study found that such responses were like the brain’s responses to hunger.<sup>233</sup>

From here, it again becomes easy to see why people long for and seek out relationships. The need for relationship and togetherness is not only acute—for most people—it is also a central part of *being* human. It explains why social distancing is hard for people to follow—let alone thrive in—even when the stakes are very high, as in the context of Covid-19.<sup>234</sup> This also clarifies why people may actively seek relationship with non-humans or entities that “speak” in a human-like voice and communicate using emotional language.

Like loneliness, the widespread decline in trust levels can be exploited by firms that sell relationship as product. Firms deliberately and strategically blur the line between thin and thick, or bridging and bonding, trust. This can confuse consumers by manipulating them into thinking or feeling that they are in a communal relationship with a firm, when in fact they are in—what can only ever be—an exchange relationship. The B2C relationship is not a safe place to exercise one’s thick trust muscles, nor is it a safe place to behave according to social norms. Rather, the B2C relationship is a setting for thin trust and market norms.

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224. DIENER & BISWAS-DIENER, *supra* note 181, at 51. For more on kindness, see LYUBOMIRSKY, *supra* note 222, at 125–137.

225. MYERS, *supra* note 221, at 150; DIENER & BISWAS-DIENER, *supra* note 181, at 51.

226. DIENER & BISWAS-DIENER, *supra* note 181, at 54.

227. *Id.*

228. LYUBOMIRSKY, *supra* note 222, at 271.

229. DIENER & BISWAS-DIENER, *supra* note 181, at 225.

230. LYUBOMIRSKY, *supra* note 222, at 253.

231. DIENER & BISWAS-DIENER, *supra* note 181, at 50.

232. *See generally* Livia Tomova et al., *The Need to Connect: Acute Social Isolation Causes Neural Craving Responses Similar to Hunger Evokes Midbrain Craving Responses Similar to Hunger*, 23 *BIORxiv NATURE NEUROSCIENCE* 1597, 1597 (2020).

233. *Id.* at 1603.

234. Jenny Anderson, *Social Distancing Isn't the Right Language for What COVID Asks of Us*, QUARTZ (Apr. 3, 2020), <https://qz.com/1830347/social-distancing-isnt-the-right-language-for-what-covid-19-asks-of-us/> [<https://perma.cc/4PDB-FLWG>] (arguing that the term social distancing should be replaced with physical distancing at a time when we need social connection more than ever).

The human need for relationship, particularly against the backdrop of the loneliness epidemic, explains why empty love promises and gestures of intimacy work. It also explains why firms dedicate substantial resources to emotional branding and other marketing initiatives designed to sell relationship as product.<sup>235</sup> While firms and consumers can interact in ways that “extend beyond mere utilitarian benefits,”<sup>236</sup> it is doubtful whether such interactions can fulfill the deep need for inter-personal connection. And yet, in this lonely time, firms have strong incentives to prey on people’s hunger for connection and trust and feign having the capacity to maintain close relationships.<sup>237</sup>

### C. Exploiting Consumers’ Cognitive Biases

Consumers’ cognitive biases are another factor that makes relationship as product a successful strategy. Cognitive biases are unconscious errors in cognition.<sup>238</sup> Such errors can sway people and lead them astray when making decisions, forming judgments, and assessing risks.<sup>239</sup> Cognitive biases have been rigorously explored in the behavioral literature, with numerous applications to the law in general<sup>240</sup> and to consumer law specifically.<sup>241</sup>

The marketing of relationship as product taps into some of the most powerful and ubiquitous cognitive biases. One cognitive bias activated by relationship as product is optimism.<sup>242</sup> The literature on this bias robustly illustrates how people often display unrealistic optimism in their dealings.<sup>243</sup> People view their futures through rose-tinted glasses and systematically underestimate how exposed they are to various risks.<sup>244</sup> For example, most people believe they are less likely than others to be involved in accidents and suffer from health-related problems.<sup>245</sup>

235. See Magids et al., *supra* note 8.

236. See, e.g., Aggarwal, *supra* note 62, at 88.

237. See ARIELY, *supra* note 62, at 86 (“In the last few decades companies have tried to market themselves as social companions—that is, they’d like us to think that they and we are family, or at least are friends who live on the same cul-de-sac.”).

238. DANIEL KAHNEMAN, THINKING: FAST AND SLOW 62 (2011).

239. For a systematic and comprehensive review, see *id.*

240. Plentiful studies and books have been published in this tradition. For a recent excellent example, see EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW & ECONOMICS (2018).

241. For an early important contribution, see Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999).

242. Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCH. 806, 806 (1980).

243. See, e.g., *id.*; Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 147 (1981).

244. See, e.g., Weinstein, *supra* note 242, at 1232; Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 443, 447–48 (1993); Neil D. Weinstein & William M. Klein, *Unrealistic Optimism: Present and Future*, 15 J. SOC. & CLINICAL PSYCH. 1, 1–2 (1996).

245. See, e.g., Weinstein, *supra* note 242, at 806.

Optimism is largely a positive human trait and a good quality to possess.<sup>246</sup> It is generally good for our confidence.<sup>247</sup> It protects us in times of stress and anxiety.<sup>248</sup> It also contributes to our happiness, health, personal relationships, and ambition.<sup>249</sup> Unrealistic optimism can, however, lead people to take excessive risks; consumers may ignore or unduly discount risks and future failures.<sup>250</sup> In our context, consumers are likely to be overly optimistic about the prospects for establishing meaningful long-term social relationships with firms. This makes consumers even more susceptible to believing that having a deep B2C relationship is possible and less likely to take necessary measures to protect themselves.

“Outcome desirability” is a related phenomenon that may lead consumers to misunderstand, and be overly optimistic, about the promise of the B2C relationship. People may believe that something (*e.g.*, a deep relationship) *will* happen simply because they *want* it to happen.<sup>251</sup> People may also overestimate the chances of having deep and lasting relationships with firms because of the confirmation bias.<sup>252</sup> Confirmation bias leads people to look for information that buttresses their pre-existing beliefs, rather than contradicts them.<sup>253</sup> Consider a consumer who longs for connection and decides, with “help” from sophisticated and targeted data analytics, to pursue one with a firm. This consumer is likely to look for, and find, evidence to support his decision. He is also likely to ignore warning signs and contradicting evidence.

Cognitive biases may thus lead consumers to believe in the possibility of, and pursue, deep B2C relationships. However, the nature of these biases is such that consumers are likely unaware of them.<sup>254</sup> This cognitive blindness deepens consumers’ vulnerability, since they are less likely to take measures to protect themselves from those who would exploit them, or to be on guard against self-interested, relational “fakers,” including firms.

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246. See, *e.g.*, Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 PSYCH. BULL. 193, 198 (1988).

247. *Id.*

248. *Id.* at 201.

249. See, *e.g.*, TALİ SHAROT, THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN 190 (2011); Carolyn E. Cutrona, *Transition to College: Loneliness and the Process of Social Adjustment*, in LONELINESS: A SOURCEBOOK OF CURRENT THEORY, RESEARCH AND THERAPY 291, 304–05 (Letitia Anne Peplau & Daniel Perlman eds., 1982); Taylor & Brown, *supra* note 246, at 198.

250. See, *e.g.*, OREN BAR-GILL, SEDUCTION BY CONTRACT 204 (2012); Gustavo E. de Mello & Deborah J. MacInnis, *Why and How Consumers Hope: Motivated Reasoning and the Marketplace*, in INSIDE CONSUMPTION 61–62 (S. Ratneshwar, Ratneshwar & David Glen Mick eds., 2005); Shmuel I. Becher, Yuval Feldman & Orly Lobel, *Poor Consumer(s) Law: The Case of High-Cost Credit and Payday Loans*, in LEGAL APPLICATIONS OF MARKETING THEORIES (Jacob Gersen & Joel Steckel eds.) (forthcoming 2022).

251. See generally Zlatan Krizan, & Paul D. Windschitl, *The Influence of Outcome Desirability on Optimism*, 133 PSYCH. BULL. 95, 95, 109–11 (2007).

252. See, *e.g.*, SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION-MAKING 233 (1st ed. 1993); Stephanie M. Stern, *Outpsyched: The Battle of Expertise in Psychology-Informed Law*, 57 JURIMETRICS 45, 53 (2016) (“we process information in ways that support our goals, including the goal of maintaining preexisting beliefs . . .”).

253. See *Confirmation Bias and the Power of Disconfirming Evidence*, FS, <https://fs.blog/2017/05/confirmation-bias/> (last visited Aug. 26, 2021) [<https://perma.cc/WM7N-3N2X>].

254. *Id.*

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#### IV. THE DEFECTIVE NATURE OF RELATIONSHIP AS PRODUCT

Through the strategic deployment of love promises and empty gestures of intimacy, firms make consumers feel cared for, understood, unique, and appreciated. Consumers targeted by such promises may come to believe that firms can be partners in communal relationships.<sup>255</sup> Such beliefs may come at a price, however, both literally and figuratively.

This Part describes the dark side of selling relationship as product. Sections A–D below focus on the manipulative nature of relationship as product, pointing to the various risks associated with creating illusions of intimacy and care. This discussion serves as the foundation upon which we develop the law and policy recommendations, outlined in the next Part.

##### A. *Reduced Levels of Vigilance*

At their core, B2C relationships are exchange relationships. The consumer typically gives away her money, attention, or personal information in exchange for a product or service she values. Such an exchange assumes that the consumer knows what she wants. Ideally, the consumer consults the relevant information at hand, considers her alternatives carefully, and then makes a choice aligned with her preferences. The consumer is expected to be alert, watchful, and rational.

Yet, as explained above, today's consumers are particularly vulnerable to firms' love promises. Consumers may become confused about what kind of relationship a business is seeking, and capable of having. Some consumers may come to believe they can forge a real friendship or communal relationship with a firm. Even mundane, friendly, and informal communications can cause confusion and lead consumers to let down their "exchange guards."

Exchange relationships are rooted in "thin" norms. They are expected to yield measurable and commensurate benefits. They involve self-interested and vigilant parties that scrutinize each other's motives and communications. On the other hand, communal relationships are rooted in trust, loyalty, and vulnerability. Thus, a major concern of selling relationship as product is that this practice can, and is intended to, reduce consumer vigilance by enticing consumers to observe communal norms of behavior, rather than market norms. Firms that sell relationship as product lull consumers into a false sense of communal security. They encourage consumers to believe that they can, and should, act like friends in the B2C relationship, rather than as transactional counterparts.

To understand this problem, consider how good it feels to be appreciated and receive special treatment.<sup>256</sup> Indeed, when someone makes us feel good, we

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255. At times, this is powerfully illustrated in popular culture. For a persuasive demonstration of how individuals may be misled into believing that they are forming a deep and unique relationship with non-humans, and how this belief can lead emotional devastation, see the movie *HER* (Annapurna Pictures, 2013).

256. See, e.g., Amie M. Gordon, Christopher Oveis, Emily A. Impett, Aleksandr Kogan & Dacher Keltner, *To Have and to Hold: Gratitude Promotes Relationship Maintenance in Intimate Bonds*, 103 *J. PERSONALITY & SOC. PSYCH.* 257, 271, 259 (2012) ("[P]eople . . . engag[e] in relationship maintenance when they feel appreciated

become inclined to believe that they care about us and have our best interests at heart.<sup>257</sup> This may increase the level of commitment and engagement we offer to this person.<sup>258</sup> It may also augment our desire to cooperate, so that we can remain with the positive feelings.<sup>259</sup>

Furthermore, when someone elicits positive and pleasant emotions in us, we may overlook aspects of their personality that would otherwise be perceived as annoying or bothersome.<sup>260</sup> Simply put, we may adopt a “don’t sweat the small stuff” attitude that makes us more lenient and forgiving. For example, a consumer who believes that she is in a trusting, communal relationship with a firm may disregard important legal information, such as the terms and conditions and the privacy policy that govern the transaction. While it is true that consumers do not read their form contracts (especially *ex ante*) in general,<sup>261</sup> the illusion of being in a communal relationship may further diminish consumers’ motivation to investigate the deal and thus decrease their awareness of its legal aspects.<sup>262</sup>

Part of the relationship as product strategy is to make consumers feel good, so that they relax their critical senses. Susceptible consumers may become more open to the firm’s suggestions, more amenable to its invitations to transact, and more forgiving of its missteps.<sup>263</sup> The idea is that committed and emotionally invested consumers will continue:

[P]urchasing even when there are good reasons to switch. This is a loyalty that will lead someone to keep their accounts with Wells Fargo despite it repeatedly getting fined, to get the new Samsung Galaxy even after the 7 was recalled, or to buy a VW in the face of the emissions test scandal.<sup>264</sup>

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by a valuable partner. . . . [A]ppreciative feelings shift people’s focus from their own immediate self-interest toward broader considerations such as their partner’s needs . . .”).

257. *Id.* at 260.

258. *See id.* at 260, 271.

259. *Id.*

260. *See* William Park, *The Surprising Benefits of Being Blinded by Love*, BBC (Aug. 5, 2019), <https://www.bbc.com/future/article/20190805-the-benefits-of-being-blinded-by-love> [<https://perma.cc/P6CC-AFSP>].

261. *See, e.g.*, 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, 2 (2014).

262. One of the authors of this Article recently had an experience involving the clothing rental company Rent the Runway (RTR), a frequent maker of love promises. RTR members can rent clothing items and also purchase items they have rented. The purchase price is included in the listing for the rental. In the space of a week, the purchase price for a particular rented item more than doubled. The author complained about the practice, which may be considered as “bait and switch.” In the course of discussing the issue with the firm, the author came to understand—in the friendliest of exchanges—that RTR could change the “discounts” at will, which is indeed reflected in the terms and conditions. However, minimal protesting led to the selling of the item at the originally listed price. We suspect that consumers whose vigilance is diminished by love promises may not notice or mind instances like this where the economic benefits suddenly tip in favor of the firm.

263. Indeed, some research suggests more generally that while breach of contract by individuals is viewed “as a moral transgression,” contractual breach by organizations may be perceived as “a legitimate business decision.” *See* Uriel Haran, *A Person–Organization Discontinuity in Contract Perception: Why Corporations Can Get Away with Breaking Contracts but Individuals Cannot*, 59 MGMT. SCI. 2837, 2837, 2839 (2013). If anything, the practice of relationship as product exacerbates this reality.

264. *See* Bersoff, *supra* note 77.

Thus, relationship as product can make consumers more complacent, forgiving, and cooperative. After all, if the relationship is thick, friendly, and personal, there should be less need for vigilance. If the consumer believes she is in a communal relationship, formalities and exact utility measurements may feel unnecessary and even inappropriate.<sup>265</sup> Consumers thus become less cautious about transacting and engaging with, as well as committing to or recommending, firms.<sup>266</sup>

### B. Consumers' Misperception and Well-Being

The second harm to consumers is related to well-being. Firms may instill in consumers a sense that their relationship requires trust and collaborative effort to sustain. The consumer may be made to believe that the firm *needs* her to thrive, and vice versa, that there is a mutual emotional exchange afoot, in other words. Of course, this is an illusion. Firms do not have emotional needs; their feelings do not get hurt, they do not experience disappointment.<sup>267</sup>

Realizing or recalling this truth can reduce consumers' trust not only in love promise-making firms, but other firms and the marketplace more broadly. The consequences of which may be far-reaching.<sup>268</sup> To begin with, consumers may take excessive precautions when dealing with firms or reduce their participation in the market.<sup>269</sup> Recall, too, that trust has societal value.<sup>270</sup> Maintaining trust is critical for achieving many positive societal outcomes. It sustains social networks and social capital, which, in turn, may facilitate economic growth<sup>271</sup> and promote a higher quality of life.<sup>272</sup> Eroding consumers' trust may therefore have consequences that harm society at large.<sup>273</sup>

265. Interestingly, the actual impact and firms' benefit of this false sense of complacency and comfort may differ among the various contractual stages. For example, it might be especially beneficial for firms to lower consumers' guard at the *ex ante* stage, since consumers are likely to be more vigilant during the pre-purchase stages. See Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1280–300 (2015) (arguing that contracting parties increase their obligation and commitment towards the transaction gradually).

266. See Bhatra, *supra* note 76, at 144 (“Delighted customers who ‘love’ a company’s brand tend to purchase more, stay longer, and recommend it to their friends, leading to faster organic growth.”) (internal citation omitted).

267. GREENFIELD, *supra* note 37, at 1.

268. Cf. Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1747–50, 1757 (2001).

269. See, e.g., Kim & Koo, *supra* note 209, at 1020, 1025.

270. See, e.g., KOHN, *supra* note 212, at 121 (“[G]eneralized trust describes something that is at the heart of a good society...”).

271. See, e.g., Knack & Keefer, *supra* note 209, at 1251–52, 1284 (presenting evidence that trust and civic norms impact measurable economic performance); see also Yann Algan & Pierre Cahuc, *Inherited Trust and Growth*, 100 AM. ECON. REV. 2060, 2074 (2010). According to the authors' approximation, African countries will experience a five-fold increase in GDP should they enjoy the same level of inherited social attitudes as Sweden. *Id.*

272. See, e.g., Esteban Ortiz-Ospina & Max Roser, *Trust*, OUR WORLD DATA, <https://ourworldindata.org/trust> (last visited Aug. 26, 2021) [<https://perma.cc/4PF9-KLYU>] (“Trust is a fundamental element of social capital—a key contributor to sustaining well-being outcomes, including economic development.”).

273. As Mill explained 170 years ago, “[t]he advantage to mankind of being able to trust one another, penetrates into every crevice and cranny of human life: the economical is perhaps the smallest part of it, yet even

The market environment is not necessarily a “safe space” for consumers to pursue meaningful, self-actualizing relationships, despite firms’ promises to the contrary.<sup>274</sup> Consumers who realize that firms manipulate them using empty love promises may become more suspicious, disappointed, and discontented. This could further undermine social trust.

### C. *Undercutting Consumer Solidarity*

In their current form, alternative dispute mechanisms undermine consumers’ collective power and ability to influence the market. The harm of forced arbitration, for instance, goes beyond severely narrowing the prospects for class actions. It undermines consumers’ solidarity and encourages consumer isolation.<sup>275</sup> Indeed, firms benefit from isolating customers and depriving them of their power to organize as a class.<sup>276</sup> Some view this as an “assault on collectivity,” which turns “mandatory isolation into the new default rule.”<sup>277</sup>

B2C relationships fueled by disorienting and false affective claims can exacerbate this problem, weakening allegiances between consumers by forging allegiances between consumers and firms. An individual consumer who believes that she has a unique emotional connection with a firm may feel more loyal toward it.<sup>278</sup> This may, in turn, make the consumer less likely to join a class—assuming that was even an option—or to participate in coordinated consumer

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this is incalculable.” 1 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 150 (William J. Ashley ed., 7th ed. 1909).

274. There is a global movement afoot to revisit the purpose of the corporation and to expand management focus beyond the single (profit) bottom line to include other stakeholders, specifically, people and planet. However, this movement remains nascent. See, e.g., *Business Roundtable Redefines the Purpose of a Corporation to Promote an Economy that Serves All Americans*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.business-roundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/E99Z-T9ES>] [hereinafter *Business Roundtable*].

275. Keren, for example, observes that “[b]oth the existence and the content of consumer-created complaint websites can illustrate how corporate wrongdoing generates a painful sense of powerlessness that is followed by a rise of need to alleviate the pain by creating solidarities with others who similarly suffered.” Keren, *supra* note 54, at 43.

276. *Id.* at 6, 20.

277. *Id.* For an interesting discussion from a different perspective, see generally Rachel Connolly, *This Brand Is Late Capitalism*, BAFFLER (Feb. 19, 2020), <https://thebaffler.com/latest/this-brand-is-late-capitalism-connolly> [<https://perma.cc/488C-B8UP>].

278. See Bersoff, *supra* note 77.

activism against the firm.<sup>279</sup> Similarly, people in invested communal relationships often prefer to engage in informal dispute resolution with their partners.<sup>280</sup> When a problem arises, they may seek to discuss and resolve it by, for example, reaching out to the friend in question directly rather than airing private issues in public.<sup>281</sup> Because firms create the impression that each B2C relationship is unique and personal, some consumers may believe that their problems with the firm are unique and personal, too, not widely shared by other customers.<sup>282</sup> As a result, a dissatisfied or aggrieved consumer may prefer to interact directly with the firm to resolve the issue, rather than join forces with other consumers.<sup>283</sup>

Thus, the third problem with selling relationship as product is that it erodes consumers' sense of community and solidarity. Firms cultivate emotional bonds with individual consumers and/to direct consumers' sense of communal belonging toward the firm itself. Meanwhile, firms also expose consumers to biased algorithms and dispute resolution mechanisms—namely, arbitration, which can proliferate feelings of hopelessness and powerlessness.<sup>284</sup>

#### D. Underenforcement of Consumer Rights

For various reasons, underenforcement of consumer rights is prevalent within the consumer marketplace. For a start, consumers are not always aware of their rights.<sup>285</sup> Even if consumers *are* aware of their rights, they may not detect the injury they suffer from deceptive or unfair trade practices.<sup>286</sup> And even if

279. For example, in the immediate wake of Volkswagen's "Dieselgate" scandal, some consumers who felt warmly toward Volkswagen as the "People's Car" manufacturer or as a kind of benevolent grandfather figure might have felt defensive of the company. Shawn Langlois, *Why Some Volkswagen Fans Are Shrugging Off 'Dieselgate,'* MARKETWATCH (Nov. 27, 2015, 9:22 AM) <https://www.marketwatch.com/story/why-some-volkswagen-fans-are-shrugging-off-dieselgate-2015-11-23> [perma.cc/676B-GBBM] ("VW never lost my trust," one Facebook user wrote recently on the company's page. "VW now and forever!" wrote another."). See also Conall Ó Fátharta, *Volkswagen Owners Stay Loyal Despite Emissions Scandal, Survey Shows*, IRISH EXAM'R (Jan. 21, 2016, 12:00 AM), <https://www.irishexaminer.com/news/arid-20377346.html> [https://perma.cc/T76B-CFHG].

280. Cf. *The Pros and Cons of Alternative Dispute Resolution*, CALKINS LAW FIRM (Feb. 3, 2020), <https://www.calkinslawfirm.com/resources/the-pros-and-cons-of-alternative-dispute-resolution-26756> [https://perma.cc/34HA-AYFD].

281. Cf. John R. Allison, *Five Ways to Keep Disputes Out of Court*, HARV. BUS. REV. (Feb. 1990), <https://hbr.org/1990/01/five-ways-to-keep-disputes-out-of-court> [https://perma.cc/44AR-CYV8].

282. Cf. Will Kenton, *Business-to-Consumer (B2C)*, INVESTOPEDIA (July 11, 2020), <https://www.investopedia.com/terms/b/btoc.asp> [https://perma.cc/G9DU-8GH2].

283. Given the rise of forced arbitration provisions in just about every type of consumer contract, the consumer would probably be right to think that they will have a better chance of seeing their grievances addressed by approaching the firm directly than going the class action route. In fact, consumers might even get special treatment for pursuing this personal, individual course of action. See Van Loo, *supra* note 54, at 573 ("Corporations arguably provide more substantive redress simply by providing greater access to redress. Most consumers for small-value transaction-based disputes would never bring a case in court or in arbitration, but do complain to corporations and obtain redress . . . . [E]ven some consumers who would have brought individual lawsuits or been part of class actions fare better in the corporation as courthouse . . . . [C]ustomer service departments . . . regularly grant consumers' requests even if no legal claim exists . . . .").

284. See *id.* at 579–80.

285. See Arbel & Shapira, *supra* note 113, at 937.

286. *Id.* at 938.

they do recognize the harm, it is often too small or intangible to justify a costly and time-consuming legal battle.<sup>287</sup> A variety of other forces may further impede consumers from enforcing their rights. These can include lack of resources, lack of familiarity or trust in the legal system, and fear of a conflict with a big firm.<sup>288</sup> As a result, many consumer harms go under-recognized or under-addressed, and consumer rights are underenforced.<sup>289</sup>

Framing the B2C relationship as a social or communal relationship can aggravate the problem of underenforcement. Relationship as product reduces consumers' incentives to vindicate their rights.<sup>290</sup> By blurring the lines between communal and exchange relationships, firms deepen consumer loyalty while dampening consumers' will to defend their rights.<sup>291</sup> As noted, when consumers feel that they are in a social relationship, they can become more forgiving and accommodating.<sup>292</sup>

Additionally, as explained, frustration and disappointment that arise in a communal relationship are less likely to be framed in legal terms or channeled into the legal system. Conflicts between close friends, next-door neighbors, or one's children are seldom resolved in court.<sup>293</sup> This suggests that consumers who view their B2C relationship as thick and communal will be less likely to take legal action against misbehaving firms.<sup>294</sup>

Lastly, consumers who believe they are engaged in a communal relationship with a firm may fear failing as a relational partner should they assert their legal rights. Consumers may dread the prospect of losing their corporate friend or no longer being regarded as a special or VIP customer. They may fear the risk of both "defeat and retaliation."<sup>295</sup> All this impairs consumers' ability to snap out of the illusion that they and the firm are in a real relationship, which may make them less inclined to enforce their rights.

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287. *Id.*

288. *See* Schmitz, *supra* note 54, at 214.

289. *See, e.g., id.*; Arbel & Shapira, *supra* note 113.

290. Van Loo, *supra* note 54, at 548.

291. *See* ARIELY, *supra* note 62, at 78.

292. *See id.* at 78–79.

293. *See, e.g.,* ROBERT C ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 1 (1991).

294. For an example of this, see the RTR story, *supra* note 262.

295. *See* Keren, *supra* note 54, at 46.

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By now, we hope that the overall picture is clear. Naturally, “[w]hen [firms] are responsive to you, you think they care for you. You infer intentions and thoughts that are consistent with the behavior you observe.”<sup>296</sup> This understanding is natural and intuitive, yet naïve and incorrect: firms cannot love you, be your best friend, or care for you deeply.

Firms’ love promises and empty affective gestures are based on manipulation and misperception. The marketing strategies that underlie the relationship as product phenomenon are dangerous and potentially harmful.<sup>297</sup> They exploit consumer trust, cognitive biases, psychological weaknesses, and fundamental needs. And, as discussed in the next Part, they can also establish problematic precedents and habits for inter-human relationships. We believe that firms’ illusory claims of care and intimacy are unethical.<sup>298</sup> They give love a bad name.<sup>299</sup>

## V. CORRECTING COURSE: POLICY RECOMMENDATIONS

The law has an important role in protecting consumers from unethical practices by firms. As a general rule, the law requires that firms refrain from engaging in deceptive, exploitative, or otherwise unfair trade practices with consumers.<sup>300</sup> Firms are generally expected to respect consumers’ right to make informed and autonomous decisions.<sup>301</sup>

We argue that the law should do more to promote trust, police the boundary between exchange and communal relationships, and prevent firms from exploiting consumers’ loneliness and related vulnerabilities.<sup>302</sup> It should, in other

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296. Barro, *supra* note 4 (quoting Nicholas Epley, a professor of behavioral science at The University of Chicago).

297. Relationship as product practices may constitute a type of “dark pattern.” For a definition of “dark patterns” see, e.g., BEUC, *supra* note 170, at 6 (defining dark patterns as design tools that manipulate users).

298. Interestingly, this is generally aligned with the finding that communal language in corporate codes encourage unethicality. See Maryam Kouchaki, Francesca Gino & Yuval Feldman, *The Ethical Perils of Personal, Communal Relations: A Language Perspective*, 30 PSYCH. SCI. 1745, 1746 (2019).

299. With apologies to BON JOVI, *You Give Love a Bad Name*, on SLIPPERY WHEN WET (Mercury 1986).

300. For instance, Section 45(a) of the Federal Trade Commission Act provides the Federal Trade Commission (FTC) with a mandate to act against “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a) (2006).

301. Fed. Trade Comm’n, Policy Statement on Unfairness (Dec. 7, 1980) [hereinafter FTC Policy Statement on Unfairness] (“Sellers may adopt a number of practices that unjustifiably hinder such free market decisions . . . leaving buyers with insufficient information for informed comparisons . . . . [T]hese practices undermine[] an essential precondition to a free and informed consumer transaction, and . . . [e]ach of them is therefore properly banned as an unfair practice under the FTC Act.”).

302. For the argument that B2C relationships should create fiduciary duties on firms see Lauren Henry Scholz, *Fiduciary Boilerplate: Locating Fiduciary Relationships in Information Age Consumer Transactions*, 46 J. CORP. L. 143, 143 (2020) (“Information age consumer transactions should create fiduciary relationships between firm and consumer as a matter of law. Recognizing this fiduciary relationship at law honors the existence of consumer agreements while also putting adaptable, context-sensitive limits on opportunistic behavior by firms. . . . Firms owe fiduciary duties of loyalty and care to their customers that cannot be displaced by assent to boilerplate.”).

words, better support social capital, healthy communities, and well-being.<sup>303</sup> This requires broadening the focus of the law to encompass both the communal and the exchange aspects of B2C relationships.

This Part offers legal and policy recommendations for protecting consumers and the marketplace from the harmful trickery of selling relationship as product. Section A suggests a conceptual framework for engaging in more holistic scrutiny of B2C relationships. Section B explores how the puffery doctrine could be adjusted to better address love promises and tactics that foster the illusion that B2C relationships are more intimate than they are and can ever be. Section C considers how selling relationship as product might be regarded as a deceptive or unfair practice worthy of additional regulatory and judicial attention.

Given the scope, complexity, and novelty of relationship as product, it is difficult to identify precisely which practices are most harmful to consumers. It is also difficult to know the degree to which consumers experience the phenomenon's injurious aspects. Consequently, it would be too ambitious at this stage to categorically prescribe a particular solution to the problems that relationship as product entails. What follows is an attempt to offer a consumer litigation-based solution, but policymakers and governmental agencies may wish to explore other avenues.

#### A. *Scrutinizing the Communal Aspects of B2C Relationships*

We submit that consumer law should adopt a more macro-level perspective to advance collective benefits. Accordingly, it should address the consequences of relationship as product at the individual and societal levels. As a first step, the law should strive to facilitate a market environment in which the "average" or "reasonable" consumer is not expected to be hyper-vigilant and cynical at all times.<sup>304</sup> Consumers should not have to assume that "all marketers are liars" or continually police themselves and the sellers with which they transact.<sup>305</sup> That is too much to ask. It is also corrosive for society to leave its constituents to choose between being exploited and operating on a hyper-vigilant default setting.

Instead, the law should acknowledge that consumers cannot always remain rational. In fact, firms often push consumers into irrationality. As we have explained, firms routinely nudge consumers into emotional states through the strategic deployment of devices such as love promises.<sup>306</sup> These promises fuel the relationship as product phenomenon. In short, the law should make more room

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303. For the general argument that the law should adopt a well-being analysis, rather than an economic cost-benefit analysis, see JOHN BRONSTEEN, CHRISTOPHER BUCCAFUSCO & JONATHAN S. MASUR, HAPPINESS AND THE LAW 4-5 (2015).

304. See generally Jason Cohen, *Bringing Down the Average: The Case for a "Less Sophisticated" Reasonableness Standard in U.S. and E.U. Consumer Law*, 32 LOY. CONSUMER L. REV. 1 (2019); Celine Shirooni, Note, *Native Advertising in Social Media: Is the FTC's "Reasonable Consumer" Reasonable?*, 56 WASH. U. J. L. & POL'Y 221, 239 (2018).

305. Alluding to GODIN, *supra* note 127.

306. See discussion *supra* Part I.

for irrational consumers, especially where the specific aim of today's marketing strategies is to make and keep consumers irrational.

Firms should be subject to closer scrutiny for tricking consumers into believing that exchange relationships are more emotionally thick, intimate, and nurturing than they are—or can be. Firms should be restricted in how they attempt to humanize the firm and, by extension, the B2C relationship. The illusion of a firm's humanness has (at least) a tendency to confuse consumers regarding the nature of the B2C relationship and to lull consumers into a false sense of security. Once lulled, consumers are likely to be less vigilant and take fewer measures to protect themselves within the relationship.

These tendencies are likely aggravated by the pervasiveness of loneliness in our society(ies). Our conjecture is that the loneliness epidemic makes consumers more susceptible to being enticed by empty love promises. It also increases the likelihood that consumers' cognitive biases will influence their behavior in ways that serve the firms' interests to the detriment of their own—and society's. The relationship as product phenomenon is all the more alarming because the loneliness epidemic shows no signs of abating, especially against the backdrop of an ongoing pandemic.<sup>307</sup>

In this regard, our view is that the law's approach to vulnerability (and rationality) should be expanded to account for the fact that some forms of commercial manipulation are designed not only to exploit, but also to create vulnerabilities. As the European Consumer Organisation report emphasizes, novel personalization and persuasion tools enable firms to make consumers—even those that do not belong to the typical categories of vulnerable consumers—vulnerable, in the sense of affecting their ability to rationally deal with a particular marketing practice."<sup>308</sup>

Vulnerability should continue to be understood as an inherent characteristic of particular groups (*e.g.*, the elderly, children, people with HIV). But, vulnerability should also be understood as a feature of lopsided commercial relationships that are continuously, dynamically, and strategically adapted by firms to make consumers more suggestible and exploitable.<sup>309</sup> Marketing and selling relationship as product to exploit and create new consumer vulnerabilities warrants legal attention, even if the precise focus of this attention is hard to nail down at this stage.

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307. Daniel R. Malcom, Commentary, *Loneliness as a Downstream Concern in a Pandemic World*, 85 AM. J. PHARM. EDUC. 1, 3 (2020).

308. BEUC, *supra* note 170, at 11 ("Data-driven digital environments that can learn about their users and, moreover, can dynamically be adjusted based on what they learn, are precisely the types of (digital) environments that can *engineer* trust by finding out what it is that makes user trust something and change (elements of) the digital environment accordingly to evoke (a psychological state of) trust. The resulting trust renders consumers vulnerable to the exploitation of that trust.")

309. In calling for an expanded understanding of and legal approach to vulnerability in the relationship as product context, we build on and pay tribute to the writings of the pioneering vulnerability scholar, Martha Albertson Fineman.

Sketching a new regulatory framework to police the line between acceptable and exploitative love promises is no simple task.<sup>310</sup> Regulating the marketing and sale of relationship as product may also entail high monitoring costs and bring about increased litigation.<sup>311</sup> Nonetheless, given the harms associated with relationship as product practices, it is important to start the conversation. While we cannot provide an all-inclusive legal solution to the problem, we offer some preliminary recommendations for moving forward.

We begin with firms' explicit and implied promises of emotional connection. While firms employ a variety of devices to sell relationships to consumers, the primary ones are language and visuals. Words and images (*e.g.*, a sad puppy in a shopping cart) can spark reactions and create expectations, and the law is generally vigilant in policing firms' claims about their products and services. Indeed, the law already makes it clear that firms must refrain from misrepresentation and deception.<sup>312</sup> Firms must be able to substantiate whatever factual (especially scientific) claims they make about their products and services.<sup>313</sup> The law's focus on verbal communications makes sense, as the very use of language dramatically "increase[s] the potential for deception."<sup>314</sup> As Kohn opines, "[w]ords are cheap signals that slash the cost of manipulating others."<sup>315</sup> Similarly, visual representations (*e.g.*, before and after photos) are powerful tools for enticing consumers to pay attention and convincing them that the product or service is of a high quality.

Traditionally, the law has focused on claims and statements that are informational, concerning the product's composition, quality, or other verifiable attributes.<sup>316</sup> The law largely overlooks softer, affective, or relational claims. It therefore overlooks representations and claims that concern the B2C relationship itself, rather than the product or service being sold.

Take, for instance, a carton of orange juice. The law cares about a seller's claims concerning the ingredients used, country of origin, nutritional value, amount or quantity, expiration date, and health-related benefits.<sup>317</sup> But the law

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310. As Hillman notes, line drawing is difficult, and, to be sure, a car dealer should not be prevented from approaching customer in a friendly manner. See Robert Hillman, *Business Strategies in the Computer Age*, JOTWELL (Sept. 7, 2020), <https://contracts.jotwell.com/business-strategies-in-the-computer-age/> [<https://perma.cc/BM28-ESVB>] (reviewing this article).

311. See, *e.g.*, Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563, 1614 (2019) (discussing how regulatory monitoring is warranted for transactional manipulation despite the compliance costs).

312. Fed. Trade Comm'n, Policy Statement on Deception 4 (Oct. 14, 1983) [hereinafter FTC Policy Statement on Deception]

313. FTC Policy Statement Regarding Advertising Substantiation, *supra* note 136.

314. KOHN, *supra* note 212, at 40.

315. *Id.*

316. For an argument that consumer law should look beyond words and regulate also non-verbal manipulative strategies see Shmuel I. Becher & Yuval Feldman, *Manipulating, Fast and Slow: The Law of Non-Verbal Market Manipulations*, 38 CARDOZO L. REV. 459 (2016).

317. See, *e.g.*, Elizabeth O'Connor Tomlinson, *Cause of Action by Consumers Against Manufacturers and/or Sellers of Energy Drinks Under State Consumer Protection Statutes*, 65 CAUSES OF ACTION 2D 205 § 2 (July 2020); Elizabeth O'Connor Tomlinson, *Litigation Concerning Unsubstantiated Health Claims Regarding Food and Beverages*, 127 AM. JUR. TRIALS 487 §§3-5 (May 2020).

does not pay much attention to the softer types of B2C representations. It is unlikely to scrutinize representations that are made, not about the product, but about the emotional rewards of making the purchase—or entering and staying in the B2C relationship. Thus, love promises that associate the purchase with feelings of intimacy, emotional connection, belonging, affection, love, or friendship are unlikely to be caught in the law’s protective net.

Presumably, the focus on quantifiable or verifiable claims is based on an exchange view of the B2C relationship. According to this view, the business merely offers—and the consumer merely accepts—a product or service in exchange for payment. If firms sold nothing besides products and services, then the law’s focus on the factual and measurable dimensions of the product would be satisfactory.

Since firms are increasingly in the business of selling relationship, however, the law’s focus on the quantifiable or verifiable aspects is inadequate. Firms are selling relationship by cladding the transaction in communal, affective, and emotive language and imagery. The law therefore needs to scrutinize the emotionally manipulative aspects of B2C marketing techniques more closely. This will allow regulators to better address the problematic asymmetries—economic and emotional—that are creating new and troubling insecurities within the consumer marketplace.<sup>318</sup>

To be clear, we are not proposing strict regulation of all marketing that contains emotional content. Rather, we propose that the law should scrutinize those claims that are likely to trick consumers into believing that their relationship with a firm can yield sincere, caring, reciprocal emotional connections. The objective would be to restrict the extent to which firms strategically, opportunistically, and exploitatively mispresent exchange relationships as communal. Let us now examine how this could work.

### B. *Rethinking Puffery*

Consumers are regularly bombarded with marketing and advertisements designed to excite them about available products and services. To attract consumers, advertisements often include vivid, memorable claims that embellish, exaggerate, or humorize the truth. Such claims are frequently insulated from legal scrutiny under the well-established doctrine of “mere puffery.”<sup>319</sup> According to this doctrine, some exaggerated and even factually untrue statements are treated as legitimate selling statements and techniques.<sup>320</sup> Thus, puffery is a contractual defense that allows promisors to disregard certain (puffed) promises they made about their wares.<sup>321</sup> In other words, if an advertiser’s claim or promise is

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318. RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 8, (AM. L. INST., Discussion Draft No. 4, 2017) (The “asymmetry in information, sophistication, and stakes between the parties to the contract” requires special scrutiny.).

319. Hoffman, *supra* note 139, at 1397 (“Puffery is a ‘vague statement’ boosting the appeal of a service or product that, because of its vagueness and unreliability, is immunized from regulation.”).

320. *Id.* at 1396.

321. *Id.*

identified as mere puffery, then the promisee will not succeed in suing the seller for breach of contract.<sup>322</sup>

An advertisement may enjoy a kind of puffery-immunity “when it is objectively unreasonable to rely on it.”<sup>323</sup> For instance, the statement “Red Bull Gives You Wings,” in and of itself, denotes something impossible and unbelievable.<sup>324</sup> No reasonable consumer would expect to grow wings by consuming an energy drink. Thus, the statement cannot be viewed as a contractual promise.

How does one distinguish between advertisements containing humorous or clearly exaggerated claims and claims that consumers can justifiably rely on and enforce? Puffery law does not supply a particularly satisfying answer, and it is notoriously inconsistent.<sup>325</sup> That said, one main strategy for drawing this line is to ask whether the claims at issue are “capable of measurement” or otherwise verifiable.<sup>326</sup> The more verifiable, the less likely to be treated as puffery.

We join others in criticizing this methodology and in calling for a different approach. Puffery law should recognize that consumers do in fact rely on general assertions, regardless of their verifiability.<sup>327</sup> As Hoffman explains, “marketing scholars have demonstrated that puffing statements are believed on their own terms and lead some individuals to further imply facts about the puffed speech that are untrue.”<sup>328</sup> Adopting a more realistic view of consumers’ behavior would make it easier to see that some types of non-measurable or soft promises, such as love promises, go beyond mere embellishment and reach into the terrain of improper influence.<sup>329</sup>

False love promises and empty gestures of affection can have a powerful impact on consumers’ decision-making processes. Such promises and gestures keep consumers in an emotional state of mind by opportunistically tapping into their cognitive biases.<sup>330</sup> Simply put, these types of promises influence consumers’ purchasing decisions in ways that are more profound than mere puffery. Firm practices that are calibrated to activate a communal ethos at every touchpoint in the B2C relationship, should, therefore, not be dismissed as mere puffery, at least not out of hand.

Much marketing literature suggests that emotional branding works. Independent empirical research is needed to assess whether, and to what extent, this

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322. See FTC Policy Statement on Deception, *supra* note 312.

323. IAN AYRES & GREGORY KLASS, *INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT* 151 (2005).

324. Lara O’Reilly, *Red Bull Will Pay \$10 to Customers Disappointed the Drink Didn’t Actually Give Them ‘Wings’*, BUS. INSIDER (Oct. 8, 2014, 3:49 AM), <https://www.businessinsider.com/red-bull-settles-false-advertising-lawsuit-for-13-million-2014-10> [<https://perma.cc/L5UT-NPP8>].

325. See Hoffman, *supra* note 139, at 1405.

326. *Id.* at 1402–03.

327. See *id.* at 1435.

328. *Id.*

329. For some concrete suggestions, see *id.*, at 1443–47. See also Ahmed Taha, *Advertising Opinions* (unpublished manuscript) (on file with authors).

330. Donald Braman, Dan M. Kahan, & David A. Hoffman, *Some Realism About Punishment Naturalism*, U. CHI. L. R. 1531, 1572 (2010) (quoting Perry Haan & Cal Berkey, *A Study of Believability of the Forms of Puffery*, 8 J. MKTG. COMM. 243, 246 (2002)).

is true. Without this data, it is not possible to offer a precise limiting test for which love promises should benefit from puffery-immunity, and which should not. Our objective is not to offer a formula, but rather to sound the alarm for consumers, consumer advocates, and regulators. We aim to alert them to a new type of manipulative practice—relationship as product—and its potentially injurious effects. Our view is that these potential effects should be concerning, particularly for a society struggling under the weight of pervasive loneliness.

*C. Relationship as Product as a Deceptive and Unfair Practice*

We have seen how firms strategically conflate exchange and communal relationships by employing emotionally sophisticated marketing techniques. By selling relationship as product, firms cultivate a sense of attachment, loyalty, commitment, and even guilt in their customers.<sup>331</sup> Firms strive to trick consumers into believing they owe the firm the same kind of care that exists in truly communal, interpersonal relationships and to behave and transact accordingly. The following analysis identifies certain legal dimensions of the relationship as product problem, examining whether it could be viewed as deceptive or unfair under the FTC Act.<sup>332</sup> It highlights where our protective system comes up short and ways to redress this deficiency.

*1. The General Framework*

Our suggested framework responds to three related problems associated with selling relationship as product. First, firms misleadingly pretend to be human and capable of experiencing human emotions. Second, firms lead consumers to believe erroneously that B2C relationships can provide deep and abiding emotional connection and intimacy. Third, when selling relationship as product, firms manipulate consumers by keeping them in an emotional state of mind, which prevents them from taking measures to protect their interests. This ensures that consumers are made credulous, drop their defenses, and become more likely to purchase from and stay in relationship with the firm.

Consumers are heterogeneous. Some consumers may believe that they are immune to love promises and emotional manipulation. These consumers may dismiss relationship as product as ineffective and irrelevant to their behavior. They may also erroneously believe that other consumers are immune from such manipulations, just as they (presumably) are.<sup>333</sup> Consumers may, however, be unconsciously influenced by the subtle and nuanced manipulations that firms employ. Indeed, a large body of psychological literature illustrates how individ-

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331. See *supra* note 4 and accompanying text.

332. 15 U.S.C. § 45.

333. This might be due to the false consensus effect, which leads people to overestimate the likelihood that their own beliefs are shared and held by others. See Lee Ross, David Greene & Pamela House et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 2769 (1977).

uals unconsciously succumb to manipulative techniques and are frequently influenced by them.<sup>334</sup> Furthermore, the practice of selling relationship as product entails investments and costs, which are likely to be passed on (at least in part) to consumers.<sup>335</sup> Relationship as product may thus result in higher prices for goods and services for all consumers, not just those who fall for love promises.<sup>336</sup>

Current law inadequately protects consumers from the perils of relationship as product for two main reasons. First, as suggested above, it is overly focused on protecting “reasonable” consumers.<sup>337</sup> We argue that in assessing what constitutes “reasonable” in today’s consumer marketplace, greater account should be taken of the rationality-diminishing effects of firms’ promises of emotional connection.<sup>338</sup> Second, we have seen that the law focuses on those claims and promises pertaining to the more objective, technical, and measurable aspects of a firm’s wares.<sup>339</sup> Thus, it does not fully consider promises that strike a softer, more emotionally impacting note for consumers. Slightly restated, the law is under-equipped to police the subjective and emotionally qualitative appeal—and harm—of relationship as product.

While consumer law often lags behind behavioral insights,<sup>340</sup> it already views certain types of human impersonation as deceptive. For instance, the FTC’s Endorsement Guidelines regulate the content and presentation of third-party testimonials.<sup>341</sup> Such regulation seeks to ensure that consumers are not deceived by people who may look and sound like them but are actually being paid to promote the product or service they are endorsing.<sup>342</sup> The seller/sponsor is required to make it clear that the endorser is being remunerated to offer his/her positive review. Otherwise, the endorsement itself would be treated as deceptive, and the seller would be in violation of the FTC Act. In other words, pretending

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334. For a general comprehensive discussion of how unconscious biases and heuristics can shape our perceptions, judgments and behaviors, see KAHNEMAN, *supra* note 238.

335. For a general discussion about passing costs onto consumers via products’ prices, see Richard Craswell, *Passing on the Cost of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationship*, 43 STAN. L. REV. 361 (1991).

336. This is likely to imply a cross-subsidy, where rational consumers subsidize the cost for (or bear the cost of) emotional consumers. Whether this cross-subsidy raises distributional concerns is beyond the scope of this Article.

337. Cf. Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 623 (1990).

338. Luke Herrine, *Consumer Protection After Consumer Sovereignty*, (manuscript on file with authors), at 46 (adding a moral dimension to the analysis: “[t]o determine how well a given heuristic works—how ‘rational’ it is—one has to define the desideratum, which requires tracing out which interests a consumer is seeking to further in the situation at hand. Every consumer decision is limited. The question, then, is which limitations present practical and moral problems.”).

339. See *supra* note 316 and accompanying text.

340. See e.g., Becher & Feldman, *supra* note 316.

341. See generally 16 C.F.R. § 255.0. (2020).

342. According to the FTC Endorsement Guidelines, an endorsement is “any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other than the sponsoring advertiser.” An endorsement is considered deceptive when: (1) it does not reflect the honest opinion of the endorser; (2) the claims it contains are not substantiated; and (3) when unexpected and undisclosed remuneration or financial ties exist between the firm and the endorser. *Id.*

that an endorser is a regular customer (“just like you”) is considered a deceptive practice.

Applying this approach in our context would mean looking more closely at how firms strategically mimic friendly, sincere, human interaction at every B2C touchpoint to make consumers believe that they are dealing with a “someone” who genuinely cares about them. Just like false testimonials, false love promises and empty intimate gestures might improperly influence consumers in their decision to enter and stay in a B2C relationship.

There are differences between deceptive endorsement practices and our context.<sup>343</sup> Most significantly, the FTC Guidelines police testimonial-supported claims about the quality and nature of the *product* or service being sold, not claims about the quality and nature of the B2C *relationship* being sold. We argue, however, that the logic of the Guidelines should be extended to apply to the relationship as product context precisely because of the expanding practice of selling relationship *as* product. And, as we have shown, firms are making unfounded claims about the nature and quality of the B2C relationship, pretending that it is more caring, more intimate, more human than it is or can be.

In short, if the law protects consumers from deceptive endorsements, it should also protect them from claims of human likeness that misleadingly recast exchange relationships as communal. Such an extension seems justified given that the B2C relationship is increasingly based on more than just the terms of the contract or the quality of the product or service being sold. This is so for various reasons, including the widespread use of impenetrable, self-modifying boilerplate that no one reads;<sup>344</sup> the prevalence of forced arbitration provisions that massively increase the infrastructure for conflict resolution within the firm;<sup>345</sup> and, last but not least, the increasing use of softer, more emotional, and more emotionally manipulative forms of persuasion by firms.<sup>346</sup>

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343. The FTC’s Guidelines are about ensuring that the *endorser’s* opinion is sincere. If the endorser could be biased, this must be disclosed. This aspect of the regulatory rationale is irrelevant in the relationship as product context. See FTC Guide Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.4 (2021).

344. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19-32 (2013) (discussing the erasure of assent through boilerplate); Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 1 EUR. REV. CONT. L. 1, 2 (2009) (explaining that consumers do not read disclosures and contracts and that even if they did, it would do little to alter their behavior); Oren Bar Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1 (2010) (calling for additional policing of firms’ unilateral modifications of consumer contracts).

345. See generally Van Loo, *supra* note 54, at 554–55 (discussing the increasingly expansive and sophisticated dispute resolution infrastructure within corporations).

346. See also Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 845, 850 (2013) (“... [I]n many cases, parties understand their contractual obligations to encompass general moral and social norms of reciprocity and trustworthiness”; “buyers and sellers may have long-term relationships in which they exchange written forms but explicitly agree that their deal is governed by the informal arrangements that they have worked out over time.”).

## 2. Deception

A claim or practice is deceptive if it is likely to mislead a consumer acting reasonably under the circumstances and is material.<sup>347</sup> In determining whether an advertisement is deceptive, the FTC comprehensively assesses the advertisement or marketing campaign, considering “the whole mosaic, not just the individual tiles.”<sup>348</sup> Actual injury is not a prerequisite for finding a claim or practice deceptive. As Klass explains, “rather than a duty not to lie or utter falsehoods, advertisers have a responsibility to consumers not to cause them false beliefs.”<sup>349</sup>

In the context of relationship as product, firms make both implied and express claims of human affection, intimacy, and care. These claims are false. As previously discussed, firms are not human; they cannot feel happy, sad, or lonely; they cannot be friends, family members, or lovers. This is not to say that firms do not play an important communal role in society at large, or that they cannot become better corporate citizens.<sup>350</sup> Such debates are not our present concern. Our gripe is with the deception at the heart of the relationship as product phenomenon. The B2C relationship is inherently one of exchange. By their nature, firms’ love promises are impossible to keep. As such, they are false.

The next issue to consider is whether a consumer, acting reasonably under the circumstances, is likely to be deceived. As explained in our overview of cognitive biases, for most consumers, acting reasonably does not necessarily mean acting rationally.<sup>351</sup> In fact, people frequently behave in a manner that economists would view as irrational.<sup>352</sup> In our context, some consumers are especially likely to behave emotionally. This is precisely the goal of emotional branding, CX-focused marketing, and the like. Companies *intend* to stimulate consumers emotionally by using these strategies. We therefore believe some consumers are indeed likely to be deceived.

We further believe that the loneliness epidemic heightens the risk of relationship as product deception.<sup>353</sup> Indeed, people suffering from acute loneliness may be particularly susceptible to firms’ love promises and empty gestures of care and affection. One might even view loneliness as a type of vulnerability.<sup>354</sup> Consumer law recognizes that the degree of a consumer’s vulnerability can in-

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347. FTC Policy Statement on Deception, *supra* note 312.

348. *FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963).

349. Gregory Klass, False Advertising Law, in *THE Oxford Handbook of THE New Private Law 407* (Andrew Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin, Henry E. Smith eds., 2020 Oxford Univ. Pr. forthcoming).

350. *See Business Roundtable*, *supra* note 274.

351. *See supra* Section III.C.

352. *See, e.g.*, KAHNEMAN, *supra* note 238.

353. *See supra* Section III.A.

354. For discussions on vulnerability, see, for example, Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & BUS. 617, 670 (2009) (“People with low socio-economic status, ethnic minorities, young people, and women might be more vulnerable to be defrauded than higher status people . . .”). *See also* Peter Cartwright, *Understanding and Protecting Vulnerable Financial Consumers*, 38 J. CONSUMER POL’Y. 119 (2014).

crease the likelihood of being misled by a particular claim or practice. More specifically, when a vulnerable group is targeted, the “acting reasonably” element of FTC Act deception is easier to satisfy.<sup>355</sup> Consider, for instance, firms’ love promises during the ongoing Covid-19 pandemic. This time has been marked by severely increased isolation, anxiety, and fear, all of which create fertile ground for emotional manipulation.<sup>356</sup>

Another example of a vulnerable group might be expectant parents. Expectant parents may feel particularly receptive to messages that make them feel comforted and cared for.<sup>357</sup> These examples highlight a risk of emotional manipulation during vulnerability-enhancing times: A connection forged in times of crisis, challenge, or significant transition can be more enduring than one forged in ordinary times.<sup>358</sup>

Recall Babylist, the firm enabling expectant parents to create a “free registry.”<sup>359</sup> Babylist’s users can easily be described as potentially vulnerable: expectant parents who are buying unfamiliar products for their baby often experience intense pressure to “get it right.”<sup>360</sup> Such vulnerability can make consumers more susceptible to firms’ targeted love promises, such as “let us be your Hero/Helper.”<sup>361</sup>

Lastly, to be deceptive under the FTC Act, the claim or practice must be material (*i.e.*, impact consumers’ purchasing decisions).<sup>362</sup> In our case, we believe consumers’ purchasing decisions are impacted by love promises and the emotional stimuli underlying the sale of relationship as product. The deliberate conflation of exchange and communal relationship alters the decision-making

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355. For instance, terminally ill cancer patients were considered a vulnerable group when targeted by a travel company to travel to Asia to receive curative “psychic surgery.” For a vulnerable consumer, such as someone who is terminally ill, the reasonableness standard is adjusted. *See* F.T.C. v. Travel King, Inc., No. C74-6S, 1974 WL 809, at \*1 (W.D. Wash. Feb. 22, 1974).

356. In this vein, commentators are calling for increased vigilance with respect to other Covid-19 related deceptive promises that target vulnerable consumers. *See, e.g.*, Chad G. Marzen & Michael Conklin, *Coronavirus “Cures” and the Courts*, 12 WM. & MARY BUS. L. REV. 1, 17–18 (2020).

357. *See generally* Lara Freidenfelds, *Buying for the Baby: Marketing to Expectant Parents*, in *THE MYTH OF THE PERFECT PREGNANCY: A HISTORY OF THE MISCARRIAGE IN AMERICA* 116 (2020).

358. *See, e.g.*, Emma Sepala, *How the Stress of Disaster Brings People Together*, *SCI. AM.* (Nov. 6, 2012), <https://www.scientificamerican.com/article/how-the-stress-of-disaster-brings-people-together/> [<https://perma.cc/9EGJ-UMFK>].

359. *See* BABYLIST, *supra* note 86.

360. *See generally* Julie V. Stanton & Deirdre T. Guion, *Taking Advantage of a Vulnerable Group? Emotional Cues in Ads Targeting Parents*, 47 J. CONSUMER AFF. 485, 485 (2013).

361. *Id.* at 514.

362. FTC Policy Statement on Deception, *supra* note 312 (“The basic question is whether the act or practice is likely to affect the consumer’s conduct or decision with regard to a product or service. If so, the practice is material. . . .”); Andrea Moretta Tartaglione, Ylenia Cavacece, Giuseppe Russo & Ciuseppe Granata, *A Systematic Mapping Study on Customer Loyalty and Brand Management*, 9 ADMIN. SCIS. 1, 11 (2019) (“[T]he [B2C] relationship quality is based on the dimensions of trust, commitment, and satisfaction . . . . [Firms’] ability to maintain long-term customer relationships contribute to an increase in the revenue. . . .”); Magids et al., *supra* note 8.

matrix for consumers. The vast literature on CX marketing and emotional branding, combined with firms' willingness to invest heavily in these strategies,<sup>363</sup> further attest to the potential effectiveness and impact of such promises.<sup>364</sup>

In this regard, it is once again important to acknowledge consumer heterogeneity. Some consumers are less likely than others to be deceived. Others may value relationship as product and genuinely derive enjoyment and personal fulfillment from it.<sup>365</sup> We therefore need to make room for the possibility that some consumers may draw emotional satisfaction from the B2C relationship. But this possibility does not invalidate our argument that the relationship as product phenomenon warrants closer scrutiny, especially considering the potentially severe injurious effects for consumers and society at large.

### 3. *Unfairness*

There is no precise definition for what constitutes an unfair trade practice.<sup>366</sup> While a practice can be both deceptive and unfair, it need not be deceptive to be unfair. Unfairness is broader and more *encompassing* than deception.<sup>367</sup> As a result, it is also more demanding of claimants.<sup>368</sup>

For the first few decades of FTC regulation of unfair practices, three factors were considered: (1) whether the practice injures consumers; (2) whether it violates established public policy; and (3) whether it is unethical or unscrupulous.<sup>369</sup> Under current FTC policy, the analytical emphasis is on (1) the existence of consumer injury; factors (2) and (3) have largely fallen by the wayside.<sup>370</sup> Thus, to be unfair, a practice must (a) cause or be likely to cause *substantial* injury that is

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363. For example, the consulting firm PwC found consumers are willing to pay up to sixteen percent more for products from companies that provide a good consumer experience and humanize their interactions with consumers. See PWC, EXPERIENCE IS EVERYTHING: HERE'S HOW TO GET IT RIGHT 11, [www.pwc.com/us/en/advisory-services/publications/consumer-intelligence-series/pwc-consumer-intelligence-series-customer-experience.pdf](http://www.pwc.com/us/en/advisory-services/publications/consumer-intelligence-series/pwc-consumer-intelligence-series-customer-experience.pdf) [https://perma.cc/XU2P-UTEW] (last visited Aug. 26, 2021) ("How to win the experience wars . . . Be—or Feel—More Human").

364. Cf. Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1325 (2015) ("[L]egal decisionmakers must understand that today's retailers are not just large versions of the mom-and-pop hardware store of the past: they are data-driven, psychologically informed institutions that systematically tailor prices and products to consumers' shopping shortcomings.").

365. Barro, *supra* note 4 ("[M]any consumers seem to draw real, genuine enjoyment from their love affairs with companies.").

366. See FTC, Policy Statement on Unfairness, *supra* note 301 (quoting *FTC v. R.F. Keppel & BroRaladam Co.*, 28391 U.S. 643, 648 (1931), 304, 314 (1934) ("the ban on unfairness 'belongs to that class of phrases which do not admit of precise definition . . .')").

367. For a compelling argument to move away from the "consumer sovereignty" model of consumer protection and revitalize the FTC's unfairness authority, see J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FTC (May 30, 2003), <https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection> [https://perma.cc/9TH7-6TVH].

368. FTC Policy Statement on Unfairness, *supra* note 301.

369. J. Thomas Rosch, Commissioner, Federal Trade Commission, Speech at the California State Bar: Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence, 8, (May 18, 2007), [https://www.ftc.gov/sites/default/files/documents/public\\_statements/deceptive-and-unfair-acts-and-practices-principles-evolution-and-convergence/070518evolutionandconvergence\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/deceptive-and-unfair-acts-and-practices-principles-evolution-and-convergence/070518evolutionandconvergence_0.pdf) [https://perma.cc/Z5TK-37UU].

370. *Id.* at 9; see also FTC Policy Statement on Unfairness, *supra* note 301.

(b) not reasonably avoidable, and (c) not outweighed by benefits.<sup>371</sup> We examine each in turn.

First, to qualify as substantial, the injury cannot be trivial or speculative, and typically must involve either a monetary harm or health or safety risk.<sup>372</sup> Generally, cases that are centered on intangible harms, such as emotional injuries, “face a perilous path to court.”<sup>373</sup> In our context, the financial injury would stem from firms’ conflation of social and market norms, which is intended to influence consumers’ purchasing decisions.<sup>374</sup>

As explained, such conflation may confuse consumers, making them more emotionally and financially invested, less vigilant about problematic terms and practices, and more forgiving vis-à-vis firms that misstep. In other words, consumers who fall for firms’ love promises may spend more and more often for the privilege of being in an exchange relationship pretending to be a communal relationship. While the typical individual consumer may suffer only a minor monetary harm as a result, the FTC Policy on Unfairness clarifies that “[a]n injury may be sufficiently substantial . . . if it does a small harm to a large number of people, or if it raises a significant risk of concrete harm.”<sup>375</sup>

Where financial injury is difficult to prove, alternative paths can be considered. One such path is to establish that the practice—here, selling relationship as product—creates a health or safety risk. While hollow love promises would not entail a risk of physical health harm, they may entail a risk of mental health harm.<sup>376</sup> As we have shown, making empty claims of emotional connection, particularly in the context of the loneliness epidemic, may create or exacerbate existing mental health risks. These practices can cause disappointment and frustration, further eroding already-weakened social trust bonds. This, in turn, can deepen loneliness and undermine consumer and societal well-being.<sup>377</sup>

As another example of non-monetary harm, it is possible that the relative ease of B2C relationships may make consumers less tolerant of the complexities and effort involved in genuinely communal relationships. Thick human relationships require attention, hard work, and a robust commitment to practicing communal ethics.<sup>378</sup> Companies’ hollow love promises may distort consumers’ perceptions and expectations of what human connection should look and feel like. This, in turn, could make it harder for individuals to sustain human relationships and, ultimately, to be less lonely. Paraphrasing Professor Turkle, the relationship

371. 15 U.S.C. § 45(n).

372. FTC Policy Statement on Unfairness, *supra* note 301.

373. Jackson Erpenbach, *A Post-Spokeo Taxonomy of Intangible Harms*, 118 MICH. L. REV. 471, 471 (2019).

374. *See supra* Section III.A.

375. FTC Policy Statement on Unfairness, *supra* note 301, n.12.

376. *See generally* Betsy J. Grey, *The Future of Emotional Harm*, 83 FORDHAM L. REV. 2605, 2605 (2015) (“Why should tort law treat claims for emotional harm as a second-class citizen? . . . [M]any of the justifications for curtailing this tort have been discredited by scientific developments . . . . [V]alidity evidence for emotional harm claims—like evidence of physical harm—should be entrusted to juries.”).

377. *See supra* Part III.

378. *See, e.g.*, Mario Mikulincer & Phillip R. Shaver, *An Attachment and Behavioral Systems Perspective on Social Support*, 26 J. SOC. & PERS. RELATIONSHIPS 7, 7–8 (Feb. 2009); MYERS, *supra* note 221, at 143.

as product phenomenon may hamper the development of the emotional muscles needed to form and nourish relationships with real people.<sup>379</sup>

On a related track, one might also argue for a policy against unethical human impersonation by corporations, especially when firms stand to profit from pretending to be human.<sup>380</sup> The argument here is that corporations unethically claim and exercise the right to be (a feeling, emotional) human. To be sure, there are ways in which the humanization of the corporation can be beneficial to society.<sup>381</sup> For instance, it can shift the corporation away from a singular focus on short-term shareholder value maximization toward a longer-term, stakeholder-oriented approach.<sup>382</sup> Where corporate humanization is strategic, however, as in the relationship as product context, it may erode our ability to evolve as humans. This risk can materialize when we take our cues for how to behave in human relationships from our B2C relationships.

Such dynamics are depicted with beguiling intricacy in the 2013 Spike Jonze film, *Her*, which tells the story of the creation and dissolution of a deep human-AI relationship—deep for the human party, at least.<sup>383</sup> The narrative beautifully conveys the lonely protagonist’s relief and enjoyment at finding a girlfriend (an operating system) who is entirely focused on knowing and understanding him and taking care of him. It also shows his heartbreak when he discovers that their connection is not unique and that “she” is engaged in deep relationships with countless other people. The relational process described in the film feels only a small step removed from our reality.

In fact, the dangers of not-really-human interactions such as those depicted in *Her* are already more than fictional or theoretical. Children who learn to engage with an AI assistant like Alexa or Siri have been shown to pick up aggressive patterns of communication that translate into bossiness and rudeness with other humans—children and adults alike.<sup>384</sup> This suggests that how we communicate with non-humans that act human—like corporations making love

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379. See Cade Metz, *Riding Out Quarantine With a Chatbot Friend: 'I Feel Very Connected'*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/technology/chatbots-quarantine-coronavirus.html> [<https://perma.cc/74ZJ-24F3>] (quoting Prof. Turkle explanation that talking to machines and spending a lot of screen time “does not develop the muscles—the emotional muscles—needed to have real dialogue with real people.”).

380. In some contexts, impersonation can, of course, be criminal. See, e.g., Andy Loo & Walter Block, *The Political Philosophy of Impersonation: A Libertarian Analysis*, 36 J. L. & COM. 45, 45 (2017); see also Ava Farshidi, *Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger*, 9 HARV. J. SPORTS & ENT. L. 185, 186–200 (2018) (discussing the failure of the current regulatory scheme to hold companies accountable for undisclosed use of compensated fashion bloggers, a type of social media influencer).

381. See *Business Roundtable*, *supra* note 274.

382. *Id.*

383. *Her*, *supra* note 255.

384. See, e.g., Alice Truong, *Parents Are Worried the Amazon Echo is Conditioning Their Kids to Be Rude*, QUARTZ (June 9, 2016), <https://qz.com/701521/parents-are-worried-the-amazon-echo-is-conditioning-their-kids-to-be-rude/> [<https://perma.cc/BP3B-NGVG>]; Sue Shellenbarger, *Alexa, Don't Let My 2-Year-Old Talk to You That Way*, WALL ST. J. (Jul. 11, 2018, 10:17 AM), <https://www.wsj.com/articles/alexa-dont-let-my-2-year-old-talk-to-you-that-way-1531229274> [<https://perma.cc/NMR4-X7MM>] (July 11, 2018, 10:17 AM).

promises—can strongly influence how we communicate with and relate to humans.<sup>385</sup> This makes intuitive sense: it is much easier to be in a relationship when one can access emotional benefits without giving anything back or making any real effort beyond paying money.

Finally, in selling relationship as product, firms harvest, mine, and manipulate data. They combine this data with insights from other fields, such as neuroscience and psychology, in sophisticated ways. Given the aggressive tactics firms use to pull on consumers' emotions, emotional marketing strategies may constitute a new type of harassment that is contrary to public policy.<sup>386</sup>

Once the “likely to cause substantial injury” requirement is satisfied, we must examine whether the injury can be reasonably avoided. Here, we argue that the injury generated by relationship as product is not reasonably avoidable. We have repeatedly argued that relationship as product exploits consumers' emotions, cognitive biases, and other psychological vulnerabilities.<sup>387</sup> Consumers are unaware of the nuanced injuries associated with selling relationship as product and cannot realistically protect themselves from them.

To paraphrase Van Loo, consumers cannot avoid making decisions that are influenced, at least to some extent, by the desire for love and human connection.<sup>388</sup> The law does acknowledge this complex reality to a limited degree. Unfairness analysis is based on the “reasonable consumer,” not the “perfect consumer”; likewise, it does not “require perfectly rational behavior.”<sup>389</sup> The law does not go far enough to protect consumers from relationship as product, however, and should go further down this protective path.<sup>390</sup>

Injuries from relationship as product are even harder to avoid at a time when loneliness is so pervasive. The loneliness epidemic renders consumers more susceptible to firms' empty love promises and hollow affective gestures. Such promises target consumers' fundamental needs as humans. It seems unreasonable to expect consumers to avoid the injuries caused by misleading communications that speak directly to the natural desire for connection.

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385. NICHOLAS CHRISTAKIS, BLUEPRINT: THE EVOLUTIONARY ORIGINS OF A GOOD SOCIETY, 413-417 (Little, Brown & Spark eds. 2019) (explaining that “hybrid systems” or “machines that act in humanlike ways” can modify human behavior and that “the ways in which we interact with one another—certain social niceties—can be supplanted by a computational device”); Jeff Coughlin, *Alexa, Will You Be My Friend? When Artificial Intelligence Becomes Something More*, FORBES (Sept. 23 2018, 8:39 AM), <https://www.forbes.com/sites/joseph-coughlin/2018/09/23/alexa-will-you-be-my-friend-when-artificial-intelligence-becomes-something-more/?sh=4d5d71f85c81> [<https://perma.cc/NMR4-X7MM>] (“In the absence of a warm-blooded alternative, even a brief interaction with a ‘voice’ that serves, interacts and responds every time, all the time, may someday transform our collective perception of AI from that of a simple tool that ‘does stuff’ around the house, to a presence that is a real part of our social self.”).

386. While the 1984 FTC policy severely narrowed the scope for making moral or public policy arguments to substantiate unfairness, it did not entirely close it. Therefore, if there is a public policy interest that would be negatively impacted by a particular practice, this impact can be used to substantiate the injury and meet the substantial injury test. For further discussion, see Van Loo, *supra* note 364, at 1372–73.

387. *Id.* at 1371.

388. *Id.*

389. NAT'L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES (2016) (quoting CONSUMER FIN. PROT. BUREAU [CFPB], CFPB EXAMINATION HANDBOOK (2011)).

390. Beales, *supra* note 367.

One way that the FTC assesses the degree to which a substantial injury can be reasonably avoided is to examine whether the practice intervenes with consumer decision-making.<sup>391</sup> Van Loo, for example, concludes that case law indirectly supports the proposition that “the doctrine of unfairness covers sales practices that contribute to consumer irrationality or information asymmetries.”<sup>392</sup> In our context, emotional branding, CX marketing, and the like—strategies that seek to transplant social norms into the exchange context of the B2C relationship—are specifically designed to impair consumers’ rational decision-making. Thus, there should be little question as to whether the injury created by the practice of selling relationship as product is avoidable.

Finally, the third component in the unfairness analysis is whether the injury is outweighed by the benefits to consumers or competition.<sup>393</sup> This component requires a cost-benefit analysis. Simply put, for a practice to be unfair, it must have a negative net effect.<sup>394</sup>

As we recognized above, some consumers may indeed derive enjoyment and positive feelings from having an emotional connection with a firm. At least in the short term, love promises may make some consumers feel good. That said, relationships that are based on deception and exploitation are unhealthy and unsustainable. It is likely that many consumers would feel betrayed and outraged to learn that firms are continually pressing their hidden, emotional buttons.

It is probably the case that consumers enjoy the short-term gains of relationship as product without fully realizing the price they (and others) pay.<sup>395</sup> True, some of these prices, such as the pressure on employees to provide all shades of emotional support to consumers go beyond the traditional consumer law domain. Yet, they are related to consumers’ misperception of the nature of the B2C relationship and as such constitute a relevant piece of the puzzle.

The real price of relationship as product, as argued throughout our analysis, is considerable. Relationship as product can aggravate the loneliness epidemic, reduce levels of trust, decrease levels of well-being, and diminish consumers’ ability to engage in meaningful and complex human relationships. This all comes on top of the price premium that consumers pay for relationship as product. Recall that firms are likely to pass at least some of the costs of emotional marketing and branding onto consumers. In a way, this premium could constitute a hidden fee on unsuspecting consumers.

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391. Van Loo, for instance, explains that “[m]ost of the Commission’s unfairness matters are brought . . . to halt some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making. This definition was later adopted by courts and has become part of the accepted definition of the FTC’s test for unfairness.” Van Loo, *supra* note 364, at 1374–75.

392. *Id.* at 1375.

393. FTC Policy Statement on Unfairness, *supra* note 301.

394. *See id.*

395. For a discussion on passing emotional labor costs onto employees, see Mat Zucker, *How Brands Can Say I Love You*, FORBES (Feb. 8, 2019, 9:05 AM), <https://www.forbes.com/sites/matzucker/2019/02/08/how-brands-can-say-i-love-you/> [<https://perma.cc/HQ67-79MV>]. For a discussion of the emotional price that employees pay to offer customers “a magical experience” see Planet Money, Call Center Call Out, NPR PLANET MONEY (Oct. 2, 2020), <https://www.npr.org/2020/09/29/918195277/call-center-call-out> [<https://perma.cc/MAN3-ALEA>].

Finally, cost-benefit analysis requires consideration of whether the costs of remedying the practice of relationship as product outweigh the benefits. Here, the analysis should consider the increased regulatory burden, potential negative impacts on innovation, and enforcement costs.<sup>396</sup> This raises a few challenges. Most conspicuously, it is hard to put a dollar amount on the so-called “soft” injuries we have identified. More promising, at this stage, would be disgorgement. Disgorgement could be assessed by calculating the additional profits generated by emotional marketing and branding. For instance, a recent study published in the *Harvard Business Review* shows how companies that engaged in emotional branding saw their revenues expand.<sup>397</sup> Disgorgement would also be a more accurate measure of damages than restitution (*i.e.*, refund) since consumers presumably received some benefit from their purchases.

As far as injunctive remedies are concerned, there are two options to consider: practice injunctions and information injunctions. The former would require firms to cease their emotional branding and marketing programs. The latter could take the form of adding warnings, issuing corrective advertising, and mandating other disclosures. However, Lauren Willis and others have shown that such injunctions are onerous to implement and limited in terms of effecting behavioral change.<sup>398</sup>

Another path would be to adopt Professor Willis’ idea of performance-based remedies.<sup>399</sup> Under this framework, a firm would be ordered to comply with a “confusion injunction” or, alternatively, a “consequences injunction.”<sup>400</sup> Confusion injunctions prohibit firms that have “unfairly, deceptively, or abusively exploited customer confusion” from continuing to do so.<sup>401</sup> In our context, firms would be required to stop confusing consumers about the non-communal nature of the B2C relationship. Consequences injunctions prohibit firms from continuing to “unfairly, deceptively, or abusively” inflict ill consequences on their customers.<sup>402</sup> In other words, a consequences injunction would require the firm to police the extent to which their unfair practice continues to affect consumer decision-making.<sup>403</sup>

Quantifying the injury from relationship as product to consumers and society certainly poses challenges. But allowing the stronger corporate party to exploit its weaker consumer counterpart’s emotions—just because this exploitation

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396. FTC Policy Statement on Unfairness, *supra* note 301.

397. See Magids et al., *supra* note 8.

398. See, e.g., OMRI BEN-SHAHAR & CARLE E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014); Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 167–177 (2007); Oren Bar-Gill, David Schkade & Cass R. Sunstein, *Drawing False Inferences from Mandated Disclosure*, 3 BEHAV. PUB. POL’Y 209, 210 (2019); Oren Bar-Gill, *Smart Disclosures: Promise and Perils*, BEHAV. PUB. POL’Y 1, 1 (2019); Willis, *supra* note 33.

399. Lauren E. Willis, *Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud*, 80 L. & CONTEMP. PROBS. 7 (2017).

400. *Id.* at 8, 30.

401. See *id.* at 30–31.

402. *Id.*

403. See *id.*

is hard to quantify—offends our sense of justice. Thus, special efforts should be made to advance tools and methods that will facilitate this quantification.

Furthermore, establishing a quantifiable consumer injury is not a dispositive requirement. Governments and organizations around the world are moving away from a singular focus on traditional economic metrics. In various contexts, a more nuanced and holistic approach to shadow-pricing certain softer dimensions is proposed.<sup>404</sup> This move facilitates policies that can protect societal interests, such as building social capital, deepening trust, and improving well-being.<sup>405</sup> Consumer law can and should do more to advance such efforts.

## VI. CONCLUSION

Humans are a social species, and social connection is a core biological need. People crave deep relationships and want to trust others. Realizing this, firms are selling consumers the promise of deep, thick B2C relationships. Strategies that market and sell B2C exchanges as if they were communal relationships are sophisticated and convincing. They mislead consumers into believing in—and buying into—firms' ability to form and nurture deep relationships.

Firms play an important role in society, and their aspirations to become better corporate citizens can be genuine and impactful. Nevertheless, firms cannot establish close, intimate relationships with consumers for the simple reason that they are not and cannot be human. The law fails to police this reality properly. It adopts a narrow and outdated view of B2C relationships and consumer behavior. Within the softer realms of marketing—those typically protected by the puffery doctrine—the law tends to assume that consumers can maximize their welfare *and* their well-being. It largely ignores the emotional complexities of consumer decision-making.

This Article argues for a more nuanced and responsive approach to addressing the relationship as product phenomenon legally. It calls for regulatory scrutiny that better integrates the sociological and psychological realities at play and offers a more comprehensive account of the macro impacts of firms selling relationship on the basis of (empty) love promises. The regulatory focus should be

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404. See, e.g., ORG. FOR ECON. CO-OPERATION & DEV. [OECD], OECD GUIDELINES ON MEASURING SUBJECTIVE WELLBEING (2013), [https://read.oecd-ilibrary.org/economics/oecd-guidelines-on-measuring-subjective-well-being\\_9789264191655-en](https://read.oecd-ilibrary.org/economics/oecd-guidelines-on-measuring-subjective-well-being_9789264191655-en); SUSTAINABLE DEVELOPMENT SOLUTIONS NETWORK, WORLD HAPPINESS REPORT 2020, 94–111 (2020), <https://happiness-report.s3.amazonaws.com/2020/WHR20.pdf> [<https://perma.cc/GFM3-DGDF>] (ranking countries based on happiness measurements).

405. See, e.g., RICHARD LAYARD, MEASURING WELLBEING AND COST-EFFECTIVENESS ANALYSIS—USING SUBJECTIVE WELLBEING: DISCUSSION PAPER, WHAT WORKS CTR., (Dec. 2016) <https://whatworkswellbeing.files.wordpress.com/2016/08/common-currency-measuring-wellbeing-series-1-dec-2016.pdf> [<https://perma.cc/8WV8-PUCJ>]; see also *OECD Better Life Index*, OECD, <http://www.oecdbetterlifeindex.org/> (last visited Aug. 5, 2010) [<https://perma.cc/E8EH-PRHA>] (“There is more to life than the cold numbers of GDP and economic statistics”) (alteration in original) (last visited Mar. 8, 2021); *Measuring Well-being and Progress: Working Papers*, <https://www.oecd.org/statistics/measuringwell-beingandprogressworkingpapers.htm> [<https://perma.cc/TPG3-5FXB>] (explaining that “measuring well-being and progress agenda calls for new and improved statistics, aimed at complementing standard economic statistics and developing indicators that have a more direct bearing on people’s life.”).

not on the humanization of the corporation *per se*. Rather, the law should scrutinize humanization strategies that are employed to opportunistically manipulate consumers' communal impulses so that they lower their guard and become less self-interested.

This Article sounds the call for empirical and theoretical research into the relationship as product phenomenon. Such research could generate deeper insight into the causal connection between love promises and purchasing behaviors and yield a more complex taxonomy of the types of consumer vulnerabilities involved, as well as the different injuries that can result from the emotional mining of B2C relationships.

Future research in this area may consider adopting different legal approaches to different markets, given that both consumers and businesses are heterogeneous. Indeed, while our analysis focuses on large firms that cynically manipulate consumers' thirst for relationships, small, local, or non-chain businesses might in fact offer exchanges that are more genuinely focused on building communal ties. Additionally, useful distinctions may be made between firms that are able to offer socio-emotional rewards (such as Apple and Harley Davidson) and those that offer primarily utilitarian rewards (such as Comcast Cable or Exxon/Mobil), as Dagan and Heller envisage. Different kinds of rewards moving through the relationship as product machinery may warrant different legal responses.

Firms' may use various strategies to manipulate people's craving for, and understanding of, relationships. For example, firms do not only sell B2C relationships, but also Consumer-to-Consumer (C2C) relationships. The success of various social media platforms (such as Facebook, Instagram, Yelp, TikTok, and Twitter) is based on their ability to sell C2C relationships.<sup>406</sup> These platforms are vehicles for creating and deepening relationships between platform users. They are designed, at least in part, to foster a sense of community and connection among users. Additionally, some firms are now selling apps that supply users with a digital friend.<sup>407</sup> Businesses that sell C2C relationships or chatbot friendships merit a separate study that could draw upon the analysis presented in this Article.

More generally, machine content analysis may reveal important trends in the friendly, communal tone of today's B2C communications. Future research should also attend to the distinct possibility that consumers enjoy firms' affective strategies. Though B2C relationships may constitute only a thin social bond, such

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406. See Evan Tarver, *Customer to Customer (C2C)*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/ctoc.asp> [<https://perma.cc/3Z55-KNWV>] (Dec. 27, 2020) (explaining C2C business models).

407. See, e.g., Metz, *supra* note 379; see also HER, *supra* note 255; BLADE RUNNER 2049 (Warner Bros. Pictures, 2017); All In The Mind, *Getting Sexy with Robots*, ABC RADIO NAT'L (Feb. 3, 2019), <https://www.abc.net.au/radionational/programs/allinthemind/getting-sexy-with-robots/10765876> [<https://perma.cc/UPD7-WQB6>]; Invisibilia, *Raising Devendra*, NPR (Dec. 17, 2019), <https://www.npr.org/transcripts/787876476> [<https://perma.cc/Z87N-FSD8>].

bonds can nevertheless benefit consumers. Our call to better scrutinize the phenomenon of relationship as product does not imply that these benefits should be categorically ignored.