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Trust Relationships: Introduction

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INTRODUCTION

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Law and trust interact. Law addresses trust among individuals and within institutions and societies. As Professor Miller demonstrates, law addresses physicians' trustworthiness, imposing constraints on many aspects of physicians' activities, including research and patients' care.[1] Professor Seligman highlights the impact of law on trust when legal status, which prevailed in the past, moved to the current contract freedom. Legal status provided established clear predictable roles, which inspired confidence. Contract allowed people to play multiple roles of their choice. The variety of roles reduced predictability and transformed historic confidence into relationships fraught with uncertainty, which he called trust.[2]

Law not only affects trust among people but is also affected by trust relationships. For example, Professor Feld's discussion of the trust among congressional legislators can shed light and form the basis of research on the kind of laws they might produce. One might speculate that trusting relationships among legislators, tending to maintain long-term reciprocal relationships, is likely to produce legislative compromises, perhaps vague provisions on unresolved issues, with few drastic future changes. A less trusting relationship, tending to maintain shorter term relationship is likely to produce less compromise and clearer rules, with more frequent drastic future changes.[3]

Our colleagues at this Conference taught us much, and raised many questions to occupy us in the future. This Introduction cannot deal fully even with one theme raised in this Conference, nor summarize the Conference

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[1] *See generally* Frances H. Miller, *The Tricky Business of Trusting in Today's Physician-Patient Relationships: Conflicts of Interest in Clinical Research and Patient Use of the Internet*, 81 B.U. L. REV. 423. (relating the story of conflicts of interest and exploring how these conflicts of interest undermine trust between physicians and their patients in the clinical research context).

[2] *See generally* Adam B. Seligman, *Role Complexity, Risk, and the Emergence of Trust*, 81 B.U. L. REV. (forthcoming June 2001).

[3] *See generally* Alan L. Feld, *Congress and the Legislative Web of Trust*, 81 B.U. L. REV. 349.

papers without doing them injustice. We will instead discuss one example that demonstrates the enormous value of the papers presented in this Conference and the heightened awareness that they offer.

That trusting persons are exposed to the danger of abuse of trust,[4] is taken as a given; the issue is how to induce people to be trustworthy and self-limiting. An illuminating theme that runs throughout the Conference papers is that if people receive "tokens of esteem" that is, signals that they are trusted, they are more likely to live up to the expectation and become more trustworthy.[5] Conversely, if people receive signals that they are not trusted, they are likely to become less trustworthy.[6] Thus, trust begets trust and mistrust begets mistrust.

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[4] *See* Ian Goldberg, Austin Hill, Adam Shostack, *Trust, Ethics and Privacy*, 81 B.U. L. REV. at 414 (stating that repeated vulnerability, or risk, provides parties with information about the behavior of each other, thereby increasing trust); Sirkka L. Jarvenpaa & Emerson H. Tiller, *Trust in Virtual Environments*, 81 B.U. L. REV. (forthcoming June 2001) (echoing the theme that trust is not implicated if the hazards of breach are factored into the terms of the exchange); Helen Nissenbaum, *Securing Trust Online: Wise Choice or Contradiction?*, 81 B.U. L. REV. (forthcoming June 2001) ("Where we depend on others for our well-being and are assured or guaranteed that these others will not harm us, the context is safe, but not one which encourages trust"); Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. (forthcoming June 2001) (arguing that trust in its strongest form arises where the trustor is technically free to breach but "opportunistic behavior would violate values, principles, and standards of behavior that have been internalized by parties to an exchange," and arguing that trust in the sense of willingness to be vulnerable to the power of another improves social welfare); Adam B. Seligman, *supra* note 2, (stating that "[t]rust is not only a means of negotiating risk, it implies risk" and arguing that trust is "most liable to be found" where risk is greatest).

[5] "Tokens" are representations of various things, including conflicting things. We speak of a "token of trust" or a "token of affection" as well as tokens of things potentially antithetical to trust and love, such as money. A coin allowing entry to the underground train can be called a token (representation of a ticket) as well. Being trusted is complimentary, bestowing a feeling of virtue and worth. Being trusted is also beneficial. It is easier to deal with trusting parties.

[6] *See generally* Russell Hardin, *Distrust*, 81 B.U. L. REV. (forthcoming June 2001) (observing that the concept of agreement that is "voluntary and uncoerced" is inherent in trust); Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. (forthcoming June 2001) ("[O]ne of our chief desires is praiseworthiness—not to be praised or esteemed in an instrumental way" and that "the moral psychology of being trusted itself helps to create trustworthiness in people"); Helen Nissenbaum, *supra* note 4 ("Boxing people in is notoriously bad strategy for inducing trustworthiness or even trust-reliance"); Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. (forthcoming June 2001) ("Coercing people to be trustworthy itself introduces an element of self-interest: the trustee is trustworthy in order to escape the pain of penalties," and arguing that "strong form" trust is best promoted by the removal of legal constraints); Tom R. Tyler, *Trust and Law Abingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361 (arguing that where legal authority takes a "command and control" approach, defiance and hostility are encouraged in the regulated); John O. Whitney, *The Economics of Mistrust*, 81 B.U. L. REV. (forthcoming June 2001) (The costs of mistrust are significant in terms of its effect on

Trust comes in many shades and intensities. Unconditional emotion-based trust can be viewed as one extreme. Such a trust, without questions, hesitations, or suspicions, offers the highest compliment to a trusted person; it constitutes the highest token of esteem,[7] likely to give an incentive to become trustworthy.[8] In the other direction, if not on the other extreme, is a self-protective—calculative—trusting. Such a trust, the product of a cost benefit analysis,[9] may destroy or reduce the value of such a token of esteem. Steps taken to protect against risk of abuse may have the same effect.[10] It therefore seems that protections against abuse of trust are self-defeating because they signal mistrust and lead precisely to the opposite result—breach of trust. Paradoxically, absence of protection may reduce the need for protection against breach of trust. This paradox has serious implications for law, if the findings in the Conference papers are valid, as we believe they are. Law, by definition, is coercive, and coercion is a signal of mistrust. Can a coercive regime ever support trust among actors?[11] If law does support trust, and we believe it often does, how does it overcome the negative effect of its coercive nature and message of mistrust?

One answer to this puzzle is found in the law itself. Traditional law governing trusting people does not act merely as an enforcer. It does not merely describe trusted fiduciaries as law-abiding citizens. It goes further and gives trusted persons a special place. Law singles them out as moral persons who deserve high regard. Thus, Justice Cardozo's *prescription* of duties

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employee attitudes. If employers are lucky, employees may sublimate their frustration in pursuit of more challenging activities outside the workplace; if employers are unlucky, employees will direct their anger at the firm.).

[7] This type of trusting can be analogized to Professor Fukuyama's a-rational trusting. *See* Francis Fukuyama, *Differing Disciplinary Perspectives on the Origins of Trust*, 81 B.U. L. REV. (forthcoming June 2001).

[8] During the conference proceedings, Professor Thomas Schelling went even further, stating that the real trustworthy people are those who have incorporated a norm of trustworthiness.

[9] *See* Avner Ben-Ner & Louis Putterman, *Trusting and Trustworthiness*, 81 B.U. L. REV. (forthcoming June 2001). For the authors, the starting point is "self interested calculation" of actors. The decision to trust is based on the probability that the trustee will behave in the desired manner and on the risk aversion of the trusting person. *Id.* This type of trusting can also be analogized to Professor Fukuya's rational type of trusting; *see also* Tamar Frankel, *Trusting and Nontrusting on the Internet*, 81 B.U. L. REV. 457 (discussing the cost benefit analysis of trusting, the different costs and cost allocation that are caused by Internet communications between buyers and sellers).

[10] *See* Professor Larry Lessig, *Preface to a Conference on Trust*, 81 B.U. L. REV. 329.

[11] It is obvious that law supports Hardin's notion of trust as a credible commitment, based on calculative approach. The question is whether law can also support trust based on emotional approach. *See, e.g.*, Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. (forthcoming June 2001) (According to Williamson and Hardin, "[T]rust without . . . backstops is irrational.").

imposed on "co-adventurers" is also a *description* of fiduciaries. He wrote:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of honor the most sensitive, is then the standard of behavior . . . . Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.[12]

This paragraph has been quoted innumerable times, and is especially relevant to the discussion here. First, Justice Cardozo distinguishes trusted persons from the crowd and the market place. A crowd is, by definition, many people,[13] and the market place seems to denote access to traders—"just anybody who comes to trade."[14] Having distinguished fiduciaries from the crowd and the market place, Justice Cardozo elevates their behavior to a higher level of morality. Moral persons are not merely persons who do the right thing. They are the persons who do the right thing without a policeman around.[15] Judge Cardozo "holds" them to this form of behavior. "Holding" has a double meaning—requiring—denoting coercion—and considering and expecting—denoting emotional unconditional trust. Justice Cardozo has phrased his prescription less as a threat of punishment (which came at the end of the judgment as the remedy for the plaintiff), and far more as a description of special people in a special elevated position expected to behave in a special way.

His approach represents a mix of coercion, which can reduce incentives to be trustworthy, and high regard, which can increase incentives to be trustworthy. High regard is accompanied by a measure of pressure, if not coercion. Regard involves not merely standing higher, but also falling harder. In contrast to a breach of contract, for example, a breach of trust carries a stigma that cannot be expiated by payment alone. It is not surprising that defendant trustees may compromise on a claim for a breach of contract, but strongly defend against a claim for a breach of trust. The implication of this analysis for lawmakers is that if trustees are deemed part of the "crowd" wheeling and dealing in the market place, not only will they lose their unique elevated status, but the deterrence resulting from the threat of this loss will be eliminated as well. Not only will a valuable token of esteem that law can bestow on trusted persons will be lost, but the norm attendant to the status will be lost as well.

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[12] Meinhard v. Salmon, 164 N.E. 545, 546 (1928).

[13] *Webster's Collegiate Dictionary* at 278 (10th Ed. 1999) (defining crowd as "a large number of persons").

[14] *Id.* at 712 (defining marketplace as "the everyday world").

[15] *See* Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795 (1983).

It is true that there is a practical benefit to being singled out and acquiring a special higher place of trustworthiness. They grant a reputational monopoly to trustees that often brings with it lucrative rewards. However, Justice Cardozo does not emphasize this benefit in his decision, nor use it as an incentive. Such an emphasis could erode the trustworthiness of fiduciaries by stressing the benefit from their position, and perhaps the cost benefit analysis in which they may engage, leading them down to the crowded market place. [16]

There is however, another, and even a stronger argument for recognizing law as a support tool for trustworthiness, complementing the findings in Conference papers.[17] The dictates of the law are general, addressing groups of people, such as the presidents of corporations, or partners, or trustees, or most citizens, such as tax payers. Therefore, people need not, and do not, necessarily perceive the coercive and threatening aspect of the law as directed at them. For example, few people consider the prohibition on murder to apply to them; the prohibition applies to murderers, and most people do not view themselves as murderers. The coercive and threatening law, therefore, applies to "the others"—the bad apples in the basket.

For people who identify with the law-abiding rather than with the law-breaking, coercive law provides a satisfying implied distinction between the cooperative "us" and the lawless "them," similar to Justice Cardozo's explicit distinction in his decision between elevated place and marketplace. This point is borne out by Professor Kahan. He notes that people will pay their taxes if they know that others pay their taxes.[18] That does not mean that *all* others are assumed to pay their taxes. It means that more do, even if some do not. Tax-payers then reciprocate to, and identify with, most of the people, and need not identify with the few. Similarly, corporate management distrust of employees may erode the trustworthiness of all employees.[19] But if some employees are caught and punished, the employees' trust in management need not be eroded, so long as these other employees do not identify with those who were punished. Identification with the one group or the other determines whether trust or mistrust is signaled and whether it will be reciprocated.

Law's signals are ambiguous. They can be interpreted as both tokens of esteem—generating trust—and as coercive—generating mistrust. The interpretation of these signals may depend on the peoples' perception of the signals' direction. If people believe that the coercive rules are directed at them personally, or at groups of people like them, they may indeed become

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[16] *See generally* Lawrence Mitchell, *supra* note 11 (commenting on the notion that all trust is to some extent calculative, and that in some instances the mere recognition of this fact can destroy the relationship).

[17] The regulation of fiduciaries rarely addresses particular individuals (e.g., the President of the United States). Congressional private bills do not usually deal with matters of trust.

[18] *See* Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. at 333.

[19] *See* John O. Whitney, *supra* note 6, (arguing that the costs of mistrust are significant in terms of its effect on employee attitudes).

untrustworthy and feel free, or even take every opportunity, to disobey the rules. Thus, when the police single out people by group, members of the group may consider themselves distrusted, and may be likely to become untrustworthy.

But if people view the rules as applicable generally, and not as singling them out, and if people consider the rules to apply only to the "others"—the law breakers—then people are likely to identify with the law-abiding group and act accordingly.[20] Thus, if, as Professor Tyler suggests,[21] police treated members of a dissident or minority community with respect (assuming that is how police treat everyone else, including each other), the police would then signal that they trust the members of the community, and that trust will be reciprocated, even though the police represent the coercive force of the law. With trust, police become protectors against the "others"—law-breakers.

The Conference papers suggest two conclusions. First, a trusting is a *relationship*—interactive and reciprocal. One has a sense, however, that trusting is not merely a two way street but a spiral relationship. Actions and signals flow from one party to another, ricocheting time and again. This spiral relationship is evident also between lawmakers and the persons subject to the legal system. As law reacts to changes in peoples' behavior, people change their behavior in reaction to the law. Second, the Conference papers suggest how law can contribute to enhanced trusting relationships by offering high esteem to trustworthy behavior and punishment to disappointing behavior.

Additional suggestions come to mind. First, the effect of law on trustworthiness may depend on the size and nature of the group with whom people wish to identify (those who breach trust and those who do not), and the strength of the incentives that law provides to joining either group. If the law views all people, including trustees (those whom others need to trust), as actors in the market place crowd; if law expects trusted person to behave like market traders; and if the emphasis of law shifts from distinguishing trustworthy people as special to making them indistinguishable; then law's support of trustworthiness is likely to weaken.

Not surprisingly, some difficult issues remain unanswered. Can law affect trustworthiness by signals and information; if so, what information should the law produce? Professor Kahan suggests that people will pay their taxes if they know that many others do. Would credible information about the number of tax-payers (and the amounts paid) sufficient to effectively induce tax-paying? Is the group of trustworthy people pre-determined, and is there a way to distinguish between this group and the one that is not, and to address each

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[20] *See generally* Frances H. Miller, *supra* note 1 (relating examples of conflicts of interest that everyone should condemn).

[21] *See* Tom R. Tyler, *supra* note 6, at 367 (arguing that where legal authority takes a "command and control" approach, defiance and hostility are encouraged in the regulated; the police are more effective in maintaining social order when they seek to gain the cooperation of citizens).

separately, in the most effective manner to each?[22] How should law address changes in the environment that facilitates reduced trustworthiness (e.g., relative increase in financial frauds,[23] or in frauds on the Internet)?

Rarely can individuals survive without depending on others. Societies cannot prosper without interdependence among their members. Interaction and dependence requires some measure of trust, and law is one mechanism that supports it in society. Trust underlies almost all branches of law, sometimes directly, as in fiduciary and trust law and often indirectly as in contract, taxation, property, procedure, constitutional, and international law. Therefore, understanding what triggers and maintains trusting is of utmost importance to lawyers and lawmakers. The papers in this Conference have enriched our understanding of trusting. They offer ideas for refining the law and making it more effective. For this, we are grateful.

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[22] For example, would trustworthiness be produced by the high esteem of office or power, as well as by great shame and degradation of office holders on abuse of trust? Even if so, the question of selecting the office holder is difficult. Arguably, such a selection is anti-egalitarian and anti-democratic, unless the office holders are elected. Another possibility is to bestow esteem on groups whose members are encouraged to follow the norm of trustworthiness, on the one hand, and put a stigma on those groups which do not encourage the norm. This solution also presents difficult problems of government interference in the credos of private groups. These and other alternatives remain to be explained. The most important point that can be made here is that law should contain both incentives, with attention paid to the channels of receptivity.

[23] Increase in financial frauds is not easily measured, for it may depend on increase in financial activities or increase only in one type of fraud. But notwithstanding the difficulty of determining precisely the degree to which such an increase has occurred, a rough measure may indicate whether a significant increase has occurred.