**The Promise and Perils of Empathy in Contracts**

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Legal sanctions, reputation costs, economic incentives, and social norms play a pivotal role in influencing behavior within contractual relationships. However, there are instances when individuals disregard breaches, even when doing so runs counter to their economic interests, and do not fulfill their contractual commitments or legal obligations. This article sheds light on a frequently overlooked motivator behind such behavior—contractual empathy. It examines the capacity of contracts to elicit empathy towards a struggling party who cannot fulfill their contractual obligations. It argues that in such cases, empathy can reduce litigation costs, facilitate cooperation and renegotiation, promote efficient and fair loss-sharing between parties, and increase social capital more comprehensively. However, empathy also has its drawbacks, including fostering inefficient behavior in some cases, transferring wealth from empathetic to non-empathetic individuals, and reducing individuals’ well-being by eliciting negative emotions. The empirical findings presented here provide initial insight into the extent to which empathy affects behavior when one party is expected to breach a contract. These findings also highlight factors that moderate people’s willingness to disregard a breach. These factors include whether the promisor is an individual or a company and whether the contract has been formally and legally negotiated. The article concludes by discussing the legal implications of acknowledging empathy as a motivating factor in contractual settings.

**I. Introduction**

What influences behavior during contractual relationships? According to rational choice theory, people behave in a manner that maximizes their benefits. Therefore, people will fulfill a contract if doing so serves their interests and enhances their welfare. From this perspective, legal sanctions and reputational considerations are the main incentives that influence how individuals perform their contracts.[[2]](#footnote-3) In contrast, expressive law theories emphasize the role of the law itself in affecting people’s behavior, beyond its effect via legal sanctions.[[3]](#footnote-4) Applying these theories to the realm of contracts involves viewing contractual obligations and contract law as sources of motivation for action, either independently or through interaction with social norms. A third perspective regarding the motivation for behavior during contractual relationships involves the moral aspects of keeping promises. This motivation can stem from a desire to fulfill commitments or to avoid disappointing others’ expectations.[[4]](#footnote-5)

However, there are behaviors that cannot be fully explained by the motivations mentioned above. Consider, for example, a building contractor who is facing a severe health crisis that prevents them from completing a series of contract-for home renovations in a timely manner. Arguably, at least some homeowners would refrain from demanding the agreed-upon penalties for the delay, and would instead opt to grant the contractor an extension to the deadline set for the renovations. Others might go further by providing support to the contractor during their recovery. Similarly, imagine a single mother renting an apartment whose infant is injured in a car accident, requiring extended hospital stays. As a result, she finds herself unable to meet her rent obligations. In such a situation, it is possible that her landlord would offer the option to defer payments and would even consider waiving some of the payments during this challenging period.

These behaviors may be driven, at least partially, by a frequently overlooked motivator in the realm of contracts—empathy. Empathy is the capacity to be sensitive to another’s experiences, thoughts, and feelings.[[5]](#footnote-6) People may feel empathy towards strangers. However, the relationships that emerge through the formation of a contract, even in the context of a transactional rather than a relational contract,[[6]](#footnote-7) enhances this general empathy. In other words, it is more likely that the homeowner would support the contractor than would a person unrelated to the situation. Similarly, the likelihood of a landlord waiving rent is greater than that of a stranger providing the single mother with the equivalent amount of support. The key factor here is that the contract establishes a connection between parties. This connection evokes a heightened sense of empathy or even a feeling of obligation that stems from this connectedness. Counterintuitively, the obligation felt by the homeowner and landlord towards the contractor and single mother, respectively, arises *not despite* the duties they have towards them, but rather *because* of these duties. To some extent, the homeowner and landlord might see themselves as partially responsible for the difficulties the struggling party is facing, and therefore feel an obligation to alleviate this hardship. This sense of obligation, rooted in contractual relationships, is referred to as contractual empathy. Our focus in this paper is the effect of contractual empathy between a promisee and a promisor when the latter encounters difficulties in fulfilling the obligations of a contract.

Contractual empathy may prompt individuals to overlook contractual breaches, extend deadlines, forgo entitled payments, and even incur losses, to assist a party facing challenges. Contractual empathy has both advantages and disadvantages. First, contractual empathy averts adjudication of legal disputes, thereby eliminating litigation costs.[[7]](#footnote-8) Second, empathy promotes collaboration and eases the process of renegotiation, especially in situations where it is anticipated that one party may breach a contract, and the trust between the parties has been undermined.[[8]](#footnote-9) Contractual empathy also serves as a mechanism for sharing losses in a manner that reflects the financial circumstances of each party. This helps prevent insolvency and promote the fair and efficient allocation of losses resulting from unforeseen circumstances.[[9]](#footnote-10) Last, research predicts that considerate and altruistic actions amplify social capital by fostering compassion, solidarity, and trust.[[10]](#footnote-11)

On the flip side, there are risks associated with contractual empathy. People might take imprudent risks, assuming that the other party will come to their rescue if those risks materialize. Moreover, cynical parties may fabricate a dire situation to evoke empathy, encouraging inefficient behavior and leading to inequitable distributive outcomes.[[11]](#footnote-12) Additionally, considering that resources are limited, rational considerations may not support assisting those who, while evoking the most empathy, may not always be the ones in the most need of help.[[12]](#footnote-13) Finally, empathy can cause people to experience negative emotions that adversely affect people’s well-being. Therefore, in all likelihood, most people will want to avoid such an experience.[[13]](#footnote-14)

To gain some initial insight into the extent to which empathy affects contractual behavior, and to assess possible moderating factors that influence empathetic behavior, we conducted two pre-registered studies. Both studies employed the same experimental paradigm. Participants were presented with a vignette where, due to COVID-19 restrictions, one party to a contract experiences economic difficulties and is unable to fulfill its obligation on time. The other party has three possible responses. The first alternative, which we call *self-interest* behavior, involves insisting on receiving the agreed-upon liquidated damages, even if they exceed the damages incurred from the delay. The second alternative, *loss-avoidance* behavior, involves demanding compensation for the damages incurred. The third alternative, *loss-sharing* behavior, involves requesting compensation that does not fully cover the damages (or not requesting compensation at all).

According to the agreement between the parties, the promisee is entitled to receive all the liquidated damages. Additionally, the promisee is not a repeat player, and their reputation is not at risk by requesting full compensation. Thus, in these circumstances, both the economic incentives and the legal requirements suggest that people will adopt a *self-interest* behavior. Moreover, even if people uphold contractual obligations due to the social norm of promise-keeping, they are not expected to forgo the full liquidated damages that both parties agreed upon. Nevertheless, our findings suggest that most people report that they would be satisfied with receiving compensation only for their loss, and some even decided to engage in loss-sharing behavior.

In both studies, most participants did not request the strict enforcement of the contract and instead waived their right to receive full liquidated damages. These participants reported that they acted this way despite believing that they would be awarded the entire liquidated damages if they went to court. A noteworthy minority of participants (13%–14%) stated that they would engage in loss-sharing behavior and absorb some of the losses incurred by the breach. However, most of these participants did not think that their actions should be mandated by law. As anticipated, the response behaviors exhibited had a significant association with the level of empathy that participants felt towards the breaching party.

Study 1 suggests that the identity of the contracting party influences people's behavior. Participants were significantly less focused on economic maximization and more inclined to be loss-sharing when the struggling business was presented as an individual named Jennifer than when the business was portrayed as a company. Study 2 found that eliciting empathy towards the struggling party led to participants being less focused on economic maximization. However, when the contract was crafted in a formal and legal manner, participants were more inclined to maximize their compensation and less likely to exhibit loss-sharing behavior.

While these vignette studies do not aim to replicate the exact incentives at play in real-life events, they do demonstrate the importance of contractual empathy in shaping behavior in such situations. Since empathy plays a critical role in contractual behavior, it must be considered when developing legal policies.

Two important questions arise in terms of normative considerations. First, should we harness the expressive function of contract law to amplify contractual empathy? Here, we contend that determining the optimal level of empathy is not straightforward. Given the unclear nature of the desired outcomes, caution is warranted when navigating human emotions and preferences. Moreover, we emphasize that widespread empathy may institutionalize empathetic behavior as a social norm. While this outcome is potentially beneficial, it also makes adherence almost obligatory. The desirability of this outcome is linked to the second question: Should we introduce more obligatory regulations mandating considerate conduct, or conversely, ease pro-social requirements? We posit that this mandatory approach is problematic, even though it may narrow the behavioral gap between empathetic and non-empathetic individuals. First, many benefits associated with empathy derive from its voluntary nature, and imposing compassion mandates in contracts may yield inadvertent consequences. Second, demanding and enforcing pro-social behavior could trigger a crowding-out effect, leading to decreased considerate behavior due to the obligatory nature of the rules.

The article proceeds as follows. Part II discusses the diverse motivations that influence contract behavior, specifically empathy. Part III explores the advantages and potential drawbacks of contractual empathy. In Part IV, we introduce and analyze our empirical findings. Part V explores the normative implications arising from the presence of contractual empathy. Finally, Part VI concludes and provides guidance for future research.

**II. Contractual Behavior and Empathy**

Stewart Macaulay’s influential 1963 paper convincingly demonstrated that individuals frequently do not insist on enforcing their contractual rights, instead opting to disregard breaches. Traditionally, this has been explained by the value people place on preserving trust in long-term contractual relationships, especially in closed business communities,[[14]](#footnote-15) as well as the importance of maintaining a positive reputation among repeat players.[[15]](#footnote-16)

This phenomenon may have an explanation that goes beyond self-interest incentives. Many experiments have shown that people deviate from purely economic behavior in *trust games*. In a trust game, one player is given a sum of money that they can choose to transfer to a second player. The amount transferred is then multiplied by a certain factor. The second player can then decide whether to return some of the money to the first player. From a rational choice perspective, the first player should transfer nothing, as a self-interested second player will not return any money. However, multiple experimental studies have shown that people do transfer money as “player 1” and return some of the money as “player 2.”[[16]](#footnote-17) This indicates that people often act in a trustworthy manner even without any enforcement mechanism. Moreover, a study by Garry Charness and Martin Dufwenberg found that conveying an unenforceable promise from player 2 to player 1 (what economists would call “*cheap talk*”) significantly increases cooperation between the players.[[17]](#footnote-18) This suggests that contracts, which serve to communicate promises, can facilitate trust and cooperation even without mechanisms of enforcement or reputation.

This behavior could be attributed to the inherent value people place on keeping promises. Even if promises are unenforceable, people feel a moral obligation to fulfill them, as breaking this norm leads to feelings of guilt that they would like to avoid.[[18]](#footnote-19) Another explanation stems from the desire to avoid disappointing the expectations of others.[[19]](#footnote-20) Although expectations alone may not necessarily create a commitment, after making a promise to someone, an individual feels obligated to meet the other person’s expectations. This may be due to the belief that the promisor generated these expectations or due to the personal connection that the promise established.[[20]](#footnote-21) Moreover, the personal connection created by a promise or a contract also enhances trust and cooperation in general and affects the expectations of the other party. According to a series of studies by David Hoffman and Tess Wilkinson-Ryan, when a promisee perceives themselves to be in a contractual relationship, they tend to exercise less caution. This work revealed that individuals are more inclined to safeguard their own interests, such as requesting a liquidated damages clause, purchasing a warranty, or shopping around for the best deal, when the contract is not yet finalized, as opposed to when they believe the agreement is already settled.[[21]](#footnote-22)

The moral commitment to perform contractual obligations cannot explain the behavior of overlooking breaches. When faced with norm violations and breaches, trust is diminished, and legal sanctions are expected.[[22]](#footnote-23) However, if entering into a contract creates a personal connection between the parties, it may cause them not to insist on their full contractual rights. More specifically, the personal connection established through the contract may lead the promisee to empathize with the promisor’s situation and refrain from strictly enforcing the contract, regardless of any expectations.

As mentioned above, empathy is the ability to be sensitive to another’s experiences, thoughts, and feelings. Research indicates that empathy drives individuals to engage in pro-social behavior and provide support to those in need.[[23]](#footnote-24) Various situations elicit varying levels of empathy and consequently promote pro-social behavior to different extents. The intensity of negative emotions arising from a situation, coupled with the degree of similarity between the observer and the individual experiencing it, also influences the observer’s reaction.[[24]](#footnote-25) The responses of the parties involved are further shaped by the nature of their relationships. It is expected that empathy between romantic partners or friends would be higher than that between strangers.[[25]](#footnote-26) Similarly, empathy towards a situation in a distant country differs from that towards a similar situation nearby.[[26]](#footnote-27) Thus, it can be expected that individuals who are bound to each other by a contract will develop a mutual sense of empathy, which becomes evident when encountering challenging situations. This response is not as pronounced in situations that arise between strangers.

When one party experiences difficulties in fulfilling a contract, the other party’s behavior may be influenced by the empathy created by the circumstances. Imagine a dedicated kindergarten teacher who also owns and manages a kindergarten. Due to the sudden and tragic death of her son, she finds herself unable to open the kindergarten for a month. This unforeseen personal crisis prevents her from providing the contracted services to the parents and children under her care. It seems plausible that, even in the absence of any legal obligation on behalf of the parents to pay for services that have not been provided during this period, some parents will voluntarily decide to continue paying tuition, at least partially. Such a decision would go beyond the strict terms of the contract and demonstrate a genuine sense of empathy and show of solidarity in supporting the other party.[[27]](#footnote-28) As mentioned in the Introduction, this empathetic obligation is distinct from general compassion and is created by the contract. Contracts are a source of both legal and compassionate duties. The fact that the kindergarten teacher has an obligation towards the parents morally binds the parents when the teacher faces challenges in connection to the contract. The parents are expected to feel more responsible for the kindergarten teacher’s personal situation, to be more empathetic towards her, and consequently to act altruistically by continuing to pay her.[[28]](#footnote-29)

While the law may at times include the principles of mutual consideration and compassion into the parties’ obligations, it does not always do so.[[29]](#footnote-30) However, the excuse doctrine, involving several diverse principles, allows parties to be released from a contract in exceptional and unforeseen cases that fundamentally alter the nature of the parties’ agreement. These principles include the impossibility, impracticability, and frustration doctrines.[[30]](#footnote-31) However, the exact threshold for identifying such exceptional cases is vague, and parties are generally expected to fulfill their contractual obligations even if doing do becomes more challenging than anticipated.[[31]](#footnote-32) Nonetheless, despite the absence of any rule requiring individuals to waive their contractual rights, they may still feel compelled to act compassionately towards a struggling party.

The extent to and manner in which empathy influences behavior in the event of contractual breaches depends on several factors related to the specific context of the situation. These factors include, for example, the nature of the relationship between the parties, the motivation and fault underlying the breach, whether the other party was informed of the breach in advance, and whether the breaching party is an individual or a company.[[32]](#footnote-33) Thus, if the breaching party is an individual and the breach is due to unforeseen circumstances outside of their control, the other parties to the contract may be more understanding and willing to work towards finding a solution. On the other hand, if it is a company that intentionally breached a contract and did not provide advance notice, individuals may be less lenient and more inclined to pursue legal remedies. Overall, the way in which individuals respond to breaches in a contractual situation can be complex and multifaceted.

**III. Benefits and Risks in Contractual Empathy**

Contracts that are founded not only on self-interests and legal commitments but also on empathy contain both advantages and potential pitfalls that have an impact on overall social welfare and distributive objectives. This chapter reviews the benefits and risks inherent in contractual relationships infused with empathy.

***Litigation costs.*** The impact of empathy on social welfare is notably manifested in the realm of litigation costs. The empathetic connection between a promisee and a struggling promisor can lead to a considerate response, wherein a breach is either overlooked or some of the resulting losses are willingly absorbed by the promisee. Consequently, this empathetic behavior makes it more likely that the promisor will fulfill their remaining obligations, thus reducing the probability that the situation will result in legal proceedings. Even in situations where the promisor believes they are justified in breaching the contract, the inclination to pursue litigation is curtailed. This reduction in litigation propensity can be attributed to two key factors. First, the promisor, who has not been made to absorb all the losses, finds the potential benefits of litigation reduced. Second, in the face of the promisee’s goodwill, the promisor may reciprocate in kind and forgo stringent insistence on perceived rights. To illustrate, consider the case of the kindergarten teacher who, having suffered a personal tragedy, believes she is legally entitled to a month’s compassionate leave with full pay. However, the parents, displaying empathy, willingly offer to pay half the tuition fees even though the kindergarten cannot provide services. In such a scenario, the teacher might opt against legal action, either due to uncertainty about prevailing in court or out of appreciation for the parents’ willingness to cover half the expenses.[[33]](#footnote-34)

***Increased Cooperation.*** Facilitating cooperation is another dimension in which empathy can enhance the overall social welfare arising from a contract. Cooperation often results in an increased joint surplus for both contracting parties. In the context of contracts, cooperation hinges on the assumption that both parties adhere to their contractual obligations. When faced with a breach, the promisee has two general response options: insistence on the promisor’s obligations with subsequent legal sanctions, or a more empathetic approach, involving the waiver of some legal rights. While imposing legal sanctions may bolster future cooperation overall through deterrence, waiving rights can foster cooperation through reciprocal goodwill. Research suggests that employing costly punishments in cooperation games tends to reduce the joint surplus compared to strategies that refrain from such punitive measures.[[34]](#footnote-35)

There is ample research suggesting that empathy could enhance cooperation by allowing parties to overcome misunderstandings between them, which sometimes hinge on the likelihood of cooperation.[[35]](#footnote-36) Research on social cooperation predicts that empathy has the potential to improve the goodwill of parties to the contract and consequently the efficacy of contracts, given the frequency of cases of uncertainties, especially in long-term contracts.[[36]](#footnote-37)

However, persistently demonstrating goodwill in the face of defection from cooperation may also be an ineffective strategy for the cooperating party.[[37]](#footnote-38) Interestingly, C. Daniel Batson—one of the leading scholars supporting the benefits of empathy to society and social interactions[[38]](#footnote-39)—was also one of the early voices recognizing that empathy might become counterproductive in cases where the target of empathy exploits trust and defect.[[39]](#footnote-40) Finally, other studies have demonstrated the importance of having the ability to punish others for lack of cooperation[[40]](#footnote-41) in order to enable effective social cooperation to work. Thus, we can safely assume that excessive empathy towards a person who breaks their promise and attempts to avoid conflict and confrontation at any cost is likely to harm the likelihood of cooperation.[[41]](#footnote-42)

***Facilitates renegotiation.*** If both parties possessed full information and crafted a complete contract that accounted for all potential future contingencies and factors impacting the parties,we could presume the contract’s efficiency. However, in reality, unforeseen events may occur, rendering the existing contract inefficient. For example, imagine a homeowner who orders a product where the damages for any delay in delivery amount to $20, while the provider’s estimated cost for timely delivery is only $10. In such a scenario, the provider might agree to include a $20 liquidated damages clause for a potential delay. Yet, unexpected events can alter the circumstances; if the homeowner’s damages from any delay decreases to $10, and the provider’s cost for timely delivery rises to $15, strictly adhering to the original contract becomes inefficient. Ideally, renegotiation should allow for adjustments that benefit both parties by optimizing the joint surplus. A rational choice perspective suggests that even without empathy, renegotiation is likely, and the parties will reallocate the gains from the contract. However, renegotiation can be cumbersome, especially in the face of an expected breach. When empathy is present, demonstrating a willingness to absorb some losses incurred by the other party increases the likelihood of successful renegotiations.

***Efficient and fair loss-sharing.*** *Ceteris paribus,* it is preferable that parties will fairly share losses resulting from unforeseen events. Determining a fair distribution of losses is a complicated process, influenced by factors such as the parties’ expected gains from the contract, their responsibility to foresee unexpected events, and their relative wealth. Beyond the normative aspect of determining a fair distribution, there is a factual dimension in that the parties, who possess intimate knowledge of the situation, are better suited to navigate it than are the courts. When the promisee is driven by empathetic concerns and willingly participates in fair loss-sharing, the likelihood of achieving fairness in distribution is greater than that of relying on legal proceedings. Additionally, from the perspective of distributive justice, empathy is expected to better redistribute wealth. A poor party will not bear the burden of losses when the wealthier party encounters difficulties fulfilling the contract. Consequently, contractual parties—who possess more information than the court on the relevant circumstances—are more adept at generating a fair and equitable distribution of wealth.[[42]](#footnote-43) Furthermore, the normative complexities inherent in determining how to share losses become more manageable when the sharing is voluntary.

Moreover, the issue of loss-sharing extends beyond mere distribution; it also has a significant impact on total social welfare. When one party faces financial distress and is on the brink of insolvency, social welfare may be enhanced if the other party chooses to share some of the losses to aid in the struggling party’s survival. For example, allowing parents to not pay the teacher during her leave may lead to the kindergarten’s bankruptcy, impacting both the parents and the teacher. In cases where it is in the mutual interest of both parties for the institution to remain operational, successful renegotiation can still result in an efficient sharing of losses. However, when the party who has adequate alternatives is not legally obligated to share losses, legal rules may fall short in addressing this issue. Courts lack the necessary knowledge to determine the most efficient way to allocate losses. In contrast, empathy motivates the promisee to assist a struggling promisor only when needed, since individuals are inclined to help when the costs are modest and the benefits for the other party are significant.[[43]](#footnote-44) Consequently, loss-sharing through empathetic actions is likely to yield a more efficient distribution of losses.

Interestingly, Givati, Kaplan, and Listokin have posited that the legal uncertainty associated with the excuse doctrine can create incentives for loss-sharing among different classes of contractual parties, ultimately minimizing the costs of prolonged economic instability.[[44]](#footnote-45) An illustrative example occurred during the coronavirus pandemic, when the excuse doctrine facilitated an extraordinary surge in contractual renegotiation and loss-sharing without triggering excessive litigation. Alternatively, one could interpret this phenomenon as arising from the widespread challenges posed by the pandemic, which fostered a heightened sense of empathy. Faced with an unexpected and universally impactful event, individuals may have been more inclined to participate in renegotiation to ensure fair and efficient loss-sharing.

However, the optimistic perspective on how empathy facilitates fair and efficient loss-sharing is jeopardized by the potential for deceptive claims of need. Recognizing that individuals are responsive to empathy and are inclined to share losses in the event of unforeseen circumstances, there is a risk that some individuals may feign dire situations. In such instances, empathy has the potential to result in inefficient and unjust loss-sharing.

***Social capital.*** The literature on social influence[[45]](#footnote-46) and reciprocity[[46]](#footnote-47) suggests that pro-social behavior arising from empathy can have an impact on the parties involved in the contract as well as on society at large. Empathy extends not only to the future interactions between the parties in the current contract, but also spills over to various other interactions that may arise within the struggling party’s future relationships with others.[[47]](#footnote-48) Altruistic and empathic actions also contribute to the growth of social capital by nurturing compassion,[[48]](#footnote-49) solidarity,[[49]](#footnote-50) trust,[[50]](#footnote-51) and honesty.[[51]](#footnote-52) A society with such high social capital is likely to enjoy greater social cohesion, increased civic engagement, more inclusive social institutions, and stronger social networks. The main process through which greater compassion in contracts could spill over to society is through reciprocity, which could lead to changes in the social norms regarding contracts. Parties to a contract who, when faced with hardship, experience that the other party to the contract tries to accommodate their needs, are likely to reciprocate and behave similarly to others who face similar situations.[[52]](#footnote-53)

***Incentives to inefficient behavior.*** When a party is aware that breaching a contract gives rise to paying damages equivalent to the harm caused by the breach, there is an incentive to invest a comparable amount to prevent the breach from occurring. Alternatively, the party may decide not to enter the contract at all if the anticipated damages would surpass the profit expected from the contract. However, if a promisor understands that, in the event of a breach, they would not bear the full consequences due to empathetic loss-sharing, there is a risk of underinvestment in precautionary measures to prevent the breach. Also, such a scenario could lead to the parties entering an inefficient contract where the risk of a breach outweighs the benefits, resulting in a negative surplus.

Similar fears have been raised regarding bankruptcy law in general[[53]](#footnote-54) and government bailouts for companies that are “too big to fail.” In in a sense, this is an example of a much larger problem that is associated with the question of moral hazard in law and economics.[[54]](#footnote-55) If a corporation or, in our context, contractual parties know that there is a greater chance that, if they face difficulties, the other party to the contract will forgive them, they might be encouraged to take too many risks, which they will not fully internalize.[[55]](#footnote-56)

Indeed, the voluntary nature of empathetic behavior provides individuals with the flexibility to discern irresponsible conduct. Consequently, when a promisee perceives that a promisor has taken unreasonable risks, they will be less inclined to help. Nonetheless, even if a promisee understands that a promisor took imprudent risks, they may still be willing to share the losses due to empathy.

Another inefficient behavior arising from empathetic loss-sharing occurs when individuals breach contracts even when such actions are inefficient. For example, leveraging the generosity of the parents, the kindergarten teacher may choose to take more than one month’s leave, secure in the knowledge that she will still receive payment despite her breach of contractual obligations. This behavior, driven by the expectation of empathetic compensation, may lead to suboptimal outcomes and undermine the efficiency of contractual relationships.

Finally, empathy can sometimes prove to be inefficient in business, given the problems inherent in combining money and love in economic activity.[[56]](#footnote-57) In the economic literature, the combination of money and love is seen as harming the ability of parties to remain objective when evaluating the performance of friends with whom they do business. In addition, friends might avoid alerting the other party to misbehavior because of the fear of harming their social relationship. In addition, in many situations where people have some duty to oversee the performance of other parties in a business endeavor, they may find themselves in an ethical conflict of interest because of a friendship or emotional connection. Although neither love or friendship are directly under discussion here, it is possible that similar issues may arise in the context of empathy, albeit to a lesser degree.

***Non-empathetic people prosper.*** A prominent drawback of relying on empathy for loss-sharing is that only empathetic individuals are likely to engage in such behavior. Consequently, over the long term, this practice may result in transferring wealth from empathetic individuals to those lacking empathy. Empathetic behavior, as discussed earlier, can be advantageous to the empathetic person by fostering cooperation, encouraging renegotiation, and potentially yielding positive effects. Nevertheless, in many instances, empathetic individuals may find themselves transferring wealth without receiving anything in return beyond the satisfaction of positive emotions.

In some cases, variations in the level of empathy can directly result in cross-subsidization. Consider a company aware of a 10% chance that it will not fulfill its contract. In case of a breach, the company expects to pay compensation of $100 to 50% of its customers. The other 50% are anticipated to be empathetic and be content with just $50 in compensation. In this scenario, the company is likely to increase prices for all customers by $7.50, allocating $5 to cover damages for non-empathetic parties and only $2.50 to cover damages for empathetic parties.[[57]](#footnote-58)

***Selective and inefficient charitable behavior.***Paul Bloom, in his powerful book,[[58]](#footnote-59) largely suggests that empathy is a very problematic emotion on which to base public policy. While some of his arguments are related to policy decisions made by states rather than by parties to a contract, some of his arguments seem highly relevant to the context of this paper. First, empathy could be highly affected by various biases, such as the identified victim effect[[59]](#footnote-60) or ingroup bias.[[60]](#footnote-61) This suggests, for example, that if we encourage reliance on empathy in contracts, we might create a situation where people demonstrate more empathy towards contractual parties with whom it is easier to identify, or with people who look like them.[[61]](#footnote-62)

***Negative emotions.*** Our discussion has focused primarily on how empathy influences behavior in contractual situations. However, it is also worth considering the negative emotional impact on individuals who express empathy, especially in the context of social welfare. Empathy, while beneficial, can sometimes be a source of distress for the empathizer. This aspect of empathy can be viewed as a social cost, a perspective supported by scholars such as both Paul Gilbert and Thomas Hayashi.[[62]](#footnote-63)

Importantly, the negative impact of empathy on emotions is inherently tied to the behavior of the involved parties. For example, consider a case where a promisee empathizes with a promisor, yet they are unable to reach a mutual agreement, leaving the promisor dissatisfied with the proposed solution. In such cases, the initial empathy felt by the promisee might gradually weaken. This erosion of empathy may become more pronounced if the conflict escalates to legal proceedings, where the formal and adversarial nature of the setting may further dampen empathetic feelings. However, if a resolution is found—such as the promisor accepting the promisee’s proposal to share the losses—the promisee’s feelings may evolve from sympathy towards the promisor to a sense of fulfillment derived from providing assistance. This dynamic nature of empathy, and its varying impact depending on the outcomes of the interaction, adds layers of complexity when considering empathy as a factor in the social welfare equation.

Furthermore, an alternative approach may not perceive the negative emotions stemming from empathy as a cost. Instead, it may value the presence of empathy in society for its intrinsic worth, independent of its direct contributions to social welfare. Consider, for example, a world in which parents who lose a child in an accident feel no sorrow due to a lack of empathy. Is such an emotionless society desirable? Many would argue against the idea of a world stripped of such fundamental human emotions, underscoring the inherent value of empathy that transcends its tangible impact on social welfare metrics.

Our objective here is not to determine which of these perspectives is more valid, but to highlight the importance of considering these differing viewpoints when developing policies that might affect empathy levels in society.

In this section, we investigated the risks and benefits associated with contractual empathy when one party encounters challenges in fulfilling a contract. But to what extent does this phenomenon occur, and how does it influence people’s propensity to empathize with the other party and correspondingly alter their behavior? The following section offers preliminary findings that contribute insights to these questions.

**IV. Experimental Investigation**

This paper has three general hypotheses. First, in situations where a party is experiencing economic hardship that makes it difficult for it to fulfill its contractual obligations, most people will not act in a self-interested manner. Second, many people will act charitably and absorb some of the losses caused by the breach, without requiring compensation. Finally, these behaviors are expected to be associated with the level of empathy that one feels towards the struggling party. In the following section, we present two studies designed to test these hypotheses, as well as explore various factors that may influence people’s behavior in such situations.

To explore empathetic behavior in contractual relationships, we conducted a series of studies employing a similar experimental paradigm. Participants were presented with a vignette describing a promisor who, due to economic difficulties, had asked to delay a delivery, and thus breach the contract. The promisee, John, had three alternative responses to this situation. First, he could insist that the delivery be made on time or receive compensation that would exceed the damages he would incur due to the delayed delivery—what we termed *self-interest* behavior. Second, he could demand compensation for the damages he would incur from the breach, a *loss-avoidance* behavior. Finally, he could demonstrate *loss-sharing* behavior by agreeing to take some of the damages upon himself, and not receive full compensation for them. John is not a repeat player and his reputation would not be threatened if he chose to demand full compensation. Consequently, the two latter behaviors may be considered altruistic, and seemingly not driven by legal obligations or self-interest motives. The following studies aim to show the extent of altruistic behavior in different contexts, its connection to empathy, and how different factors elicit this type of behavior.

***a******. Study 1: The Effect of Empathy and Type of Contracting Party on Behavior Towards the Struggling Party.***

The objective of our study was to investigate methods for eliciting altruistic behavior in cases of contract breach. Since this behavior goes beyond the norm of keeping promises, we hypothesized that it would stem primarily from the level of empathy that the promisee feels towards the struggling promisor. Therefore, in this study we manipulated the level of empathy the promisee felt towards the breaching promisor to test the effect of empathy on behavior. Additionally, we examined the impact of the type of contracting promisor on the promisee’s behavior. Previous research by Uriel Haran suggests that contracts involving individuals are more closely associated with promises than those involving organizations.[[63]](#footnote-64) Thus, breaching a contract with an individual is seen as a moral transgression, while exhibiting the same behavior with an organization is viewed as a legitimate business decision. This discrepancy is reported in the literature, which shows how people differentiate in the empathy they have towards corporations and individuals.[[64]](#footnote-65) At the same time, some studies have shown that, although people are well aware that corporations are highly unlike individuals, they still exhibit emotional reactions towards them and their actions, and perceive their behavior to be intentional and internally driven.[[65]](#footnote-66) Furthermore, researchers have also found that people’s impressions of corporations are formed in accordance with the same principles that guide their impressions of human warmth and competence. Warmth judgments include perceptions of generosity, kindness, honesty, sincerity, helpfulness, trustworthiness, and thoughtfulness, whereas competence judgments include notions of confidence, effectiveness, intelligence, capability, skillfulness, and competitiveness. Generally speaking, studies have shown that non-profit organizations are seen as less competent but as having higher levels of warmth than for-profit organizations.[[66]](#footnote-67) Thus, when comparing corporations to people, it is expected that discrepancies in perceived warmth will also translate into discrepancies in empathy, as identified in a series of findings by Simone Tang and Kurt Gray.[[67]](#footnote-68)

Based on this literature, we hypothesized that people would display more altruistic behavior towards individuals due to the moral considerations inherent in such contractual relationships, while exhibiting less altruistic behavior towards companies, where contractual relationships are typically viewed as business deals driven mainly by economic considerations.

**1. Participants**

A total of 203 participants from the United States were recruited through the crowdsourcing company Prolific and completed a pre-registered questionnaire online.[[68]](#footnote-69) Of these, 29 participants who failed the attention check were excluded from the study. Of the remaining 174 participants, 91 were male and 83 were female. The average age was 36.84 (SD = 13.65), 112 had some academic education, and the average Political Worldview score (on a scale from *0 = liberal*, to *100 = conservative*) was 36.48 (SD=27.19).

**2. Methods**

Participants were presented with a vignette describing a transaction in which John ordered light fixtures from a small business to replace his existing ones. According to the agreement, the light fixtures should be delivered by April 30, 2020, and in the event of a delay in delivery, John would receive $1,000 in compensation. After the deal had been made, the coronavirus pandemic began to spread, and the restrictions caused an expected two-week delay in the delivery of John’s light fixtures. Since the contractor who was renovating John’s house was supposed to finish working for John by the end of April, the delay in delivery would result in additional costs of $500 for installing the light fixtures.

The study design included two independent variables in a 2x2 between-subject design. The first variable was *empathy elicitation*, where half the participants simply read the vignette as presented (the control group), while the other half were informed about the supplier business’s recent history of delayed orders, customer complaints, and compensation demands, which had put it in danger of closing and resulted in job losses for employees (*empathy* *elicitation* condition). The second independent variable was the type of contracting parties, where half of the participants were told that Jennifer was the owner of the small business and all interactions were between Jennifer and John (*individual* condition), while the other half were informed that the business was named Light Fixtures Inc. and the name of the owner was not mentioned (*company* condition).

Participants were initially posed three questions to test their comprehension. They were then asked to put themselves in John’s situation and choose one of three options: (1) demand either an expedited delivery or the agreed compensation of $1,000 (or more than $500); (2) ask for compensation of $500 for their loss; or (3) accept not being compensated for the full loss (less than $500). They were also asked to predict what the outcome *would* be if the case were to go to court, and what the judgment *should* be. The participants then rated, on a scale of 1 to 7, whether behaviors (1) and (2) above were immoral, and the extent to which they should be viewed as reasonable business behavior. They also indicated their agreement with three statements designed to gauge their empathy for the small business. Finally, the participants provided some demographic information (for the full text see Appendix A1).[[69]](#footnote-70)

**2. Results**

Only 42% of the participants demanded compensation of more than $500 or insisted on expedited delivery. Forty-five percent of participants demanded compensation that would cover their losses, and 13% agreed to only partial compensated or no compensation at all. To test the impact of empathy on the behavior of with the contracting party, we created two dummy variables: (1) *Self-interest*, which was assigned a value of 1 when participants expressed a desire for either an expedited delivery or compensation exceeding $500, and 0 in all other cases; (2) *Loss-sharing*, which was assigned a value of 1 when participants indicated a willingness to accept less than $500 in compensation, and 0 in all other cases.

To test the association between empathy and contract behavior, we regressed both *Self-interest* and *Loss-sharing* on *empathy elicitation*. No significant effect was found (p=0.36 in both logistic regressions), suggesting that our attempt to elicit empathy to encourage solidarity failed. Moreover, no significant association was found between the empathy participants felt towards the small business—as measured by the three-statement scale (α=0.81)—and the *empathy elicitation* condition. This implies that our elicitation did not evoke empathy. However, as shown in Table 1, empathy as measured by the scale was highly significantly associated with both *Self-interest* (negatively) and *Loss-sharing* behavior (positively).

An association was also found between the type of contracting party and behavior. When the small business was portrayed as Jennifer as opposed to Light Fixtures Inc., participants were more solidaristic (see Figure 1). Logistic regressions (shown in Table 1) demonstrated a significant association between the contracting party and *Self-interest* even after controlling for demographics, and no significant association between the contracting party and *Loss-sharing*. Additionally, no interaction effects of the contracting party and empathy condition on either *Self-interest* or *Loss-sharing* were found. In addition, under the *individual* condition, participants reported significantly more empathy towards the business (r=0.19, p=0.01).

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| --- | --- | --- | --- | --- | --- | --- |
| **Table 1:** *Logistic Regression Analysis of The Effect of Empathy and Contracting Party on Behavior in Study 1* (n=174) | | | | | | |
|  | **DV: *Self-interest*** | | | **DV: *Loss-sharing*** | | |
|  | **M1** | **M2** | **M3** | **M1** | **M2** | **M3** |
| Empathy Scale | -0.47\*\*\* |  | -0.42\*\* | 0.65\*\* |  | 0.66\*\* |
| Company |  | 0.83\*\* | 0.7\* |  | -0.76 | -0.64 |
| Political Worldview |  |  | 0.01 |  |  | 0.01 |
| Academic Training |  |  | -0.33 |  |  | 0.07 |
| Age |  |  | -0.2+ |  |  | 0 |
| Female |  |  | 0.19 |  |  | -0.13 |
| **R2** | 0.07 | 0.03 | 0.1 | 0.07 | 0.02 | 0.1 |
| + *p* < 0.1. \* *p* < 0.05. \*\* *p* < 0.01. \*\*\* *p* < 0.001. | | | | | | |

As shown in Table 2, the majority of participants who reported loss-avoidance and loss-sharing behaviors stated that they thought they were not obligated by law to behave in such a manner (55% and 86%, respectively). Moreover, a substantial portion of participants who exhibited loss-avoidance behavior (32%) and a majority of those displaying loss-sharing behavior (64%) believed that their actions should not be mandated by law.

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| --- | --- | --- | --- | --- | --- | --- |
| **Table 2:** *Participants’ Reported Behavior by Their Expected Judgment and Personal Attitude in Study 1* (n=174) | | | | | | |
|  | **Expected Judgment** | | | **Desirable Judgment** | | |
|  | **S.I.** | **L.A.** | **L.S.** | **S.I.** | **L.A.** | **L.S.** |
| **Self-interest** | 84% | 16% | 0% | 82% | 16% | 1% |
| **Loss-avoidance** | 55% | 42% | 3% | 32% | 65% | 3% |
| **Loss-sharing** | 27% | 59% | 14% | 14% | 50% | 36% |

**4. Discussion**

These findings show that most participants exhibited altruistic behavior by refraining from demanding compensation that would leave them better off than if the contract had been fulfilled without any delays. Of these participants, 62% acted in this way even though they believed they could receive greater compensation through legal means. Furthermore, 13% of the participants stated that they would behave in a loss-sharing manner in such a situation, forgoing full compensation for any damages incurred.

Although a significant association was found between the empathy that participants had towards the struggling party and their behavior, empathy manipulation did not have such an impact on behavior. However, it is difficult to derive any meaningful insights from this null effect, since no significant association was found between empathy elicitation and actual reported empathy, suggesting that the manipulation did not necessarily evoke empathy as anticipated. Conversely, the identity of the contracting party did influence participants’ behavior, with those who contracted with a company being less inclined towards altruistic behavior than those who contracted with an individual.

***B. Study 2: The Effect of Empathy and Formation-of Contract Method on Behavior Towards the Struggling Party***

In this second vignette study, our aim was to further examine the impact of empathy on behavior by enhancing empathy elicitation. Furthermore, we sought to investigate the influence of the formation-of-contract method on contractual behavior. We hypothesized that the more formal and legally binding a contract appears to people, the more likely their behavior will align with legal obligations. Conversely, when a contract appears less formal, moral considerations may play a greater role in determining behavior. To test this hypothesis, we manipulated the contract formation process in our study.

**1. Participants**

A cohort of 200 participants from the United States were recruited through Prolific and completed a pre-registered questionnaire online.[[70]](#footnote-71) A total of 32 participants who failed the attention check were excluded from the analysis. Of the remaining 168 participants, 84 were male and 84 were female. The average age was 38.67 (SD = 14.1), 107 participants had some academic education, and the average Political Worldview score (on a scale from *0 = liberal*, to *100 = conservative*) was 33.3 (SD = 25.58).

**2. Procedure**

The experimental procedure was basically identical to that of Study 1, with the exception of four changes made to the legal vignette. First, to increase empathy for the business in the empathy elicitation condition, a more in-depth description of the harm it had suffered as a result of the pandemic was provided. Second, in all versions, participants were presented with the *individual* condition. Third, we added a new independent variable of contract formation type. In the *formal* condition, a written contract was created by the sellers’ lawyer, and clause 6(b) regarding the agreed compensation was presented to participants in a formal, legal manner. In the *informal* condition, there was no mention of a lawyer or written contract, and the vignette simply stated that the parties had agreed on the compensation. Fourth, participants were explicitly informed that, according to the law, John was entitled to receive the agreed compensation of $1,000 (for the full text see Appendix A2).[[71]](#footnote-72)

**2. Results**

The results showed that 33% of the participants demonstrated economic maximization behavior, 52% loss-avoidance behavior, and 14% loss-sharing behavior. As shown in Figure 2 and Table 3, there was a significant negative association between empathy elicitation and *Self-interest* behavior, and no significant association between empathy elicitation and *Loss-sharing* behavior. In addition, an association was found between contract formation method and behavior. As shown in Figure 3 and Table 3, under the *formal* condition participants were significantly more inclined to *self-interest* behavior, and significantly less inclined to *loss-sharing* behavior. No interaction effects of contract formation and empathy elicitation on either *Self-interest* or *Loss-sharing* were found.

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| **Table 3:** *Logistic Regression Analysis of The Effect of Empathy and Contracting Party on Behavior in Study 2* (N=168) | | | | | | |
|  | **DV: *Self-interest*** | | | **DV: *Loss-sharing*** | | |
|  | **M1** | **M2** | **M3** | **M1** | **M2** | **M3** |
| Empathy Elicitation | -0.66\* |  | -1.07\*\* | -0.07 |  | -0.08 |
| Formation |  | -0.92\*\* | -1.19\*\* |  | 1.02\* | 1.07\* |
| Empathy Scale |  |  | -0.31\* |  |  | 0.44 |
| Political Worldview |  |  | 0.01 |  |  | 0 |
| Academic Training |  |  | -0.07 |  |  | 1.5\* |
| Age |  |  | -0.02 |  |  | 0.01 |
| Female |  |  | -0.39 |  |  | 0.85 |
| **R2** | 0.01 | 0.03 | 0.12 | 0 | 0.03 | 0.15 |
| + *p* < 0.1. \* *p* < 0.05. \*\* *p* < 0.01. \*\*\* *p* < 0.001. | | | | | | |

Table 4 shows that a large portion of participants who reported avoiding harm and exhibiting loss-sharing behavior believed that they were not legally bound to do so (77% and 87%, respectively). Furthermore, half of those demonstrating loss-avoidance and a majority of those showing loss-sharing behavior (61%) thought that their actions should not be required by law.

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| --- | --- | --- | --- | --- | --- | --- |
| **Table 4:** *Participants’ Reported Behavior by Their Expected Judgment and Personal Attitude in Study 2* (n=168) | | | | | | |
|  | **Expected Judgment** | | | **Desirable Judgment** | | |
|  | **S.I.** | **L.A.** | **L.S.** | **S.I.** | **L.A.** | **L.S.** |
| **Self-interest** | 86% | 12% | 2% | 89% | 11% | 0% |
| **Loss-avoidance** | 77% | 20% | 2% | 50% | 47% | 3% |
| **Loss-sharing** | 48% | 39% | 13% | 22% | 39% | 39% |

**4. General Discussion**

Study 2 also shows that most participants behaved altruistically and did not demand the agreed compensation, even if they believed they were legally entitled to it. Additionally, 14% of the participants in Study 2 reported that they would agree to absorb some of the losses they incurred to help the struggling party. In contrast to Study 1, the empathy elicitation significantly reduced *Self-interest* behavior, showing that contractual empathy affected the degree of altruistic behavior. Additionally, the association between the manner of contract formation and altruistic behavior demonstrated that engaging in a formal relationship decreases empathetic inclinations.

Both studies share several limitations. The first limitation pertains to external validity. The fact that most participants expressed their intention to behave altruistically and refrain from maximizing their compensation does not necessarily translate to real-life behavior. Simply put, it is one thing to say you are an altruistic person and quite another to act like one—and therefore our findings might potentially overstate altruistic behavior. Furthermore, in real life, people may express an intention to take legal action, but may not do so when faced with the need to follow through. Therefore, the specific percentage of participants claiming altruistic behavior cannot be considered an accurate estimate of actual conduct. Nevertheless, it does suggest that such behavior is anticipated to be significant, even if not to the same extent for every participant. Additionally, while the magnitude of the effect may vary, the anticipated direction of the impact stemming from the type of contractual party and contract formation is expected to remain consistent.

Another limitation pertains to the issue of generalizability. The specific circumstances leading to economic hardship for the company in the above vignettes are distinctive. The COVID-19 pandemic was a highly unusual event experienced globally, resulting in widespread and profound economic consequences. While we acknowledge the challenge of directly extrapolating behavior from difficulties arising from the pandemic to other challenges in contract performance, it does underscore the significant role empathy plays in contractual behavior. It is reasonable to anticipate that empathy will influence behavior in different contexts, albeit to varying extents.

Another limitation concerns the reasons underlying altruistic behavior. Our findings may suggest that the participants behaved altruistically due to empathy. Study 2 establishes a causal relationship between empathy elicitation and behavior. Furthermore, the contracting party and the contract formation were correlated with the empathy score. Thus, the casual relations that were found between these factors and behavior also indicate that empathy prompted participants’ reported behavior. However, in Study 1, empathy manipulation did not affect behavior, raising the possibility that behavior affected the empathy score rather than vice versa. Additionally, at least part of the variance in behavior could be attributed to factors other than empathy. For instance, participants may have felt compelled to assist the struggling party even without empathizing with them. An entirely different mechanism prompting this behavior could be linked to the perceived administrative burden.

Thus, it might be the case that participants had an aversion to protecting their rights in courts due to concerns over the administrative burden. Administrative burdens are construed as imposing three distinct yet interconnected categories of costs: learning, compliance, and psychological costs.[[72]](#footnote-73) Learning costs pertain to the process whereby individuals acquire the necessary knowledge to navigate procedural intricacies. Compliance costs are associated with obtaining requisite documentation and fulfilling financial obligations, while psychological costs involve factors such as stigma, stress, and frustration. Hence, we cannot rule out the possibility that our participants to agree to compromise due to an aversion to costly and unpleasant bureaucratic procedures, and independent of any empathy felt towards their contractual counterparts.[[73]](#footnote-74) Finally, we cannot dismiss the possibility that individuals who claimed they would act to avoid losses might have been influenced by the compromise effect, leading them to opt for a middle-of-the-road alternative.[[74]](#footnote-75)

**V. Normative Implications**

Thus far, we have elucidated the dual nature of empathy, highlighting its advantages and associated risks. Also, we have observed that contractual parties exhibit varying degrees of empathy across different contexts. However, the implications for legal policy remain complex, contingent upon diverse factors that vary in different contexts. While our objective is not to provide a definitive policy, this chapter endeavors to discuss the multifaceted considerations surrounding two policy inquiries: the prospect of increasing empathy through the expressive function of the law and enhancing pro-social behavior through the coercive function of the law.

**1. Increasing empathy**

In the above scenarios, most participants were empathetic to the struggling party. However, a noteworthy proportion did not exhibit altruistic behavior—42% in Study 1 and 53% in Study 2. Can this result be altered? Empathy is first and foremost an issue of education, whether in schools, communities, or at home. Hence, fostering empathy can be achieved through educational initiatives. Strengthening social connections within business communities could also enhance empathy.[[75]](#footnote-76) Another avenue involves the use of legal mechanisms, where legal rules have an impact on the extent of empathy individuals feel for one another through the expressive function of the law. Individual preferences are intertwined with legal frameworks, and the law holds the capacity to mold individual preferences, attitudes, and values.[[76]](#footnote-77) Consequently, the law may have the potential to enhance empathy and thereby promote pro-social conduct even in the absence of legal sanctions. While the idea of creating a more empathetic world holds evident merit, it also holds some risks.

***The optimal level of empathy.*** Determining the optimal level of empathy presents a nuanced challenge. As previously discussed, empathy offers advantages, such as facilitating cooperation, encouraging renegotiation, promoting efficient and fair loss-sharing, and enhancing social capital more broadly. However, empathy is not without its drawbacks. It can be exploited, leading individuals to take inefficient risks. It can also impose undue costs on empathetic parties and lead to unfair loss-sharing. Unjust distributive outcomes may also arise, with empathetic parties bearing disproportionate losses compared to their unempathetic counterparts. Finally, empathy generates negative emotions that, at least in certain instances, it would be preferable to avoid.

Consequently, establishing the ideal level of empathy becomes a complex task. Trying to influence people’s emotions requires a grounded approach based on evidence. If accuracy in emotional manipulation cannot be assured, refraining from intervention may be the prudent course of action. The challenge extends beyond a lack of knowledge about the desired magnitude of induced empathy; it also involves an inherent inability to predict how various means of influence will impact empathy in society. The effects of legal mechanisms on preferences are complex, challenging to anticipate, and contingent upon context.[[77]](#footnote-78)

***Playing with people’s emotions.*** Manipulating people’s emotions also demands careful consideration. Even if we possessed knowledge about the optimal level of empathy in specific cases and could accurately predict the outcomes of our subtle interventions, the impact of negative emotions will inevitably vary among individuals, given that it is complex and difficult to predict how emotion functions in a collective institutional context.[[78]](#footnote-79) Even if empathy yields positive externalities and even if it provides overall benefits to empathetic individuals, there certainly are instances where these negative emotions may not serve the well-being of the individual experiencing them. This could potentially lead to exploitation, as individuals might feign a distressing situation to leverage someone’s empathy. Therefore, to justify interventions that induce empathy, we must weigh whether the overall increase in social welfare justifies the potential harm to specific individuals for whom empathy does not serve their best interests.

***Risk of becoming a social norm.*** In addition, if empathy became the norm rather than the exception, this could create pressure on contractual parties to forgive unjustified breaches.[[79]](#footnote-80) Our original aim was to examine the benefit to society of situations where people might demonstrate flexibility towards a party to a contract in cases where the circumstances so justify. The creation of a social norm will create expectations for such behavior every time[[80]](#footnote-81)and reduce the social meaning of empathy and kindness, since to exhibit such responses would be to do nothing more than what was expected.[[81]](#footnote-82)

**2. Mandate compassionate behavior**

Using the law to promote empathy is just one way to foster pro-social behavior. An alternative approach involves making such behavior obligatory. Currently, there are legal rules that, in practice, require parties to exhibit consideration towards the other party when encountering challenges in contract performance, excusing them from contractual obligations in certain instances. However, the question arises: is it advantageous to enforce mandatory consideration, and should we intensify or relax such requirements? Like the ambiguity surrounding the optimal level of empathy, determining the ideal degree of considerate behavior is complex. Yet, disparities exist between augmenting empathy and mandating compassionate behavior, calling for careful consideration when mandating pro-social conduct in cases where difficulties in performing the contract emerge.

***The advantages of the voluntary nature of empathy.*** As discussed in Section III, the benefits derived from empathetic behavior are closely tied to its voluntary nature. In disputes arising from contractual conflicts, parties typically possess more pertinent information about the dispute, the breach, and the involved parties than do judges—and certainly more than do legislators. Consequently, the parties themselves are better positioned to ascertain whether to demonstrate compassionate behavior, and, if so, to what extent. For example, a party involved in a dispute is more likely to identify false representations of dire situations than is the court. Furthermore, the positive effects that increased empathy brings to social capital, trust, renegotiations, and cooperation are predominantly attributable to the voluntary nature of the behavior. Altruistic actions resulting from genuine empathy contribute to these outcomes. Conversely, when compelled to act “compassionately,” the other party perceives this not as a voluntary, altruistic gesture to which they are not entitled, but as a right they deserve, akin to any other contractual entitlement. Moreover, when the promisee’s compassionate response is not assured, it is less likely that the promisor will take inefficient risks or unnecessarily breach the contract. Imposing mandatory rules that require overlooking breaches or exhibiting consideration makes it easier for cynical parties to exploit the situation. This, in turn, incentivizes actions that reduce expected social welfare.[[82]](#footnote-83)

***Reduces inequality between empathetic and non-empathetic people.*** Enforcing mandatory compassionate behavior offers an advantage in mitigating the unjust disparity between empathetic and non-empathetic individuals. As discussed earlier, in a voluntary system, individuals who lack concern for others do not bear the financial burdens of struggling parties. This dynamic ultimately results in the transfer of wealth from empathetic to non-empathetic parties. Conversely, by imposing a uniform standard of compassionate conduct on everyone, the potential for this wealth transfer is alleviated.

***Crowding-out.*** Finally,addressing the potential merits and drawbacks of including empathy requirements in contracts, we must also consider a behavioral aspect associated with the crowding-out theory. This paradigm suggests that external incentives, such as legal sanctions, can crowd out, or displace, intrinsic motivations such as empathy. Consequently, making compassionate behavior mandatory could potentially lead individuals to change their attitudes towards such actions (such as in terms of receiving recognition, feeling that such actions are rewarding, and more). Their revised attitudes could reduce their motivation to behave compassionately. The anticipated results according to this crowding-out approach are quite contrary to the positive effects of mandating empathy, that expressive law theories advocate. These highlight the constructive impact of law as strengthening, rather than disrupting, pre-existing social norms and values.

In an attempt to address this dilemma in the context of mandating procedural justice in organizations, Feldman and Tyler[[83]](#footnote-84) empirically compared the two approaches and found that, at least with regard to procedural justice, the effect of mandating voice procedure was associated with greater satisfaction by employees. Nonetheless, this finding is not necessarily helpful in the context of mandating contractual empathy. In this context, we focus on the effect of the law not on the recipient of procedural justice or empathy, but rather on the contracting party who must decide how they want to behave towards the other contracting party.

Understanding which prediction is likely to be stronger is indeed complex. It may be meaningful to account for the behavioral mechanisms that drive the crowding-out phenomenon when trying to understand how strong the crowding-out effect is likely to be in contractual contexts. Elsewhere, Feldman[[84]](#footnote-86) has offered a taxonomy of nine types of crowding-out processes divided into two main categories—behavioral and social. In the behavioral category, one can find, for example, over-justification for “doing the right thing,”[[85]](#footnote-87) thus shifting the attention from the other party to compliance with the law,[[86]](#footnote-88) control, and trustworthiness, all of which are undermined when a person performs these behaviors simply “because it is the law.”[[87]](#footnote-89) Harming the spontaneity of social behavior[[88]](#footnote-90) and creating cognitive dissonance also fall into the behavioral category.[[89]](#footnote-91) While with regard to the social aspects of crowding-out, we can account for a decline in virtue signaling,[[90]](#footnote-92) as is evident in the negative effect of monetary incentives in increasing the social virtue of whistle-blowing.[[91]](#footnote-93) The bureaucratization of behavior might reduce people’s inclinations to “do the right thing” as they see fit[[92]](#footnote-94) in reaction to what is perceived as intrusive and illegitimate intervention in the freedom of contracts[[93]](#footnote-95) (such as the provocative effect of law[[94]](#footnote-96)) and turning social relations into market relations (for example, “a fine is a price”[[95]](#footnote-97)). By accounting for the likelihood that these different mechanisms will occur if empathy is mandated in a contractual relationships, we can better determine whether transforming the process of spontaneous empathy into a legal obligation might inadvertently lead to a reduction in empathy.

**V. Conclusion**

A *homo economicus* perspective predicts that individuals will act in a self-interested manner, displaying *homo homini lupus—*man is wolf to man*—*behaviors.[[96]](#footnote-98) In theoretical discussions of contractual relationships, self-interest often takes center stage. However, the findings from our empirical research challenge this prevailing assumption. The participants in our two studies frequently made contractual decisions based on concerns other than purely self-interested motives. When confronted with a contractual breach stemming from difficulties experienced by the contracting partner, a substantial number of participants demonstrated a remarkable willingness to assist, rather than exploit, the struggling party. Remarkably, some even voluntarily relinquished contractual rights and absorbed losses to aid the party in breach of the contract. We contend that this behavior is significantly influenced by empathy and compassion, demonstrating the importance of understanding the neglected role of empathy and compassion in contractual behavior.

Empathy, often underestimated in contract theory, emerges as a potent force within contractual relationships. Our findings highlight its role in reducing transaction costs, promoting cooperation, and fostering equitable loss-sharing. However, this nuanced attribute also presents challenges. While empathetic tendencies enhance trust and collaboration, they simultaneously create openings for exploitation by cynical parties. Hence, in this paper, we explored the delicate balance between the benefits and potential pitfalls of empathy, including how heightened awareness of empathetic inclinations can lead to both fair outcomes and inefficiencies. Moreover, we examined the unwarranted allocation of resources and the unintended sentiments that empathy may evoke in commercial contexts.

The optimal role of empathy within the legal framework, especially in contract law, remains an open question. Should we fully embrace empathy, actively enhance it, or maintain a clear separation between its influence on human behavior and legal outcomes? This policy dilemma hinges on moral perspectives and empirical evidence. Our hope is that this paper contributes to the ongoing discourse, stimulating further research that refines how contract law grapples with the multifaceted role of empathy. Future empirical and legal research can contribute to crafting a more nuanced and effective legal framework—one that harmonizes compassion with sound contractual policies.

1. \* Ori Katz is Assistant Professor at Bar-Ilan University and Yuval Feldman is the Mori Lazarof Professor of Law and Associate Dean for Research at Bar-Ilan University. For valuable comments on previous drafts of this paper, we are grateful to Shoham Choshen-Hillel, Eyal Zamir … and the participants of the Chicago/Michigan Psychology & Lab Studies group and of the Law and Economic Workshop at The Hebrew University. We also thank Shira Gelb for her excellent research assistance. The study was supported by ERC Grant number: 101054656 / Project acronym: VCOMP. [↑](#footnote-ref-2)
2. *See* Louis Kaplow & Steven Shavell, Fairness Versus Welfare (2002) *at* 155; Tore Ellingsen & Magnus Johannesson, *Promises, Threats and Fairness*, 114 Econ. J. 397 (2004) *at* 397. [↑](#footnote-ref-3)
3. *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement* 148 U. Pa. L. Rev. 1503 (1999); Richard H Mcadams, The Expressive Powers Of Law: Theories And Limits (2015); Cass R Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1995). [↑](#footnote-ref-4)
4. Christoph Vanberg, *Why Do People Keep Their Promises? An Experimental Test of Two Explanations*, 76 Econometrica 1467 (2008) *at* 1467–1468. [↑](#footnote-ref-5)
5. C. Daniel Batson et al, *Empathic Joy and the Empathy-Altruism Hypothesis,* 61 J. Person. Soc. Psych. 413 (1991) *at* 413. [↑](#footnote-ref-6)
6. In general, transactional contracts are short-term and specific (such as placing an order with a supplier), while relational contracts are characterized by long-term commitments and a high level of trust between the parties, e.g., parents enrolling their child in daycare. *See* David Frydlinger, et al., *A Comparison of Transactional and Relational Contract Models*, *in* Contracting in the New Economy: Using Relational Contracts to Boost Trust and Collaboration in Strategic Business Relationships (David Frydlinger, et al. eds., 2021) *at* 93. [↑](#footnote-ref-7)
7. See *infra* note 31 and accompanying text. [↑](#footnote-ref-8)
8. See *infra* notes 33-39 and accompanying text. [↑](#footnote-ref-9)
9. See *infra* notes 39-41 and accompanying text. [↑](#footnote-ref-10)
10. See *infra* notes 43-51 and accompanying text. [↑](#footnote-ref-11)
11. See *infra* notes 50-55 and accompanying text. [↑](#footnote-ref-12)
12. Paul Bloom, Against Empathy: The Case for RationalCompassion (2017). [↑](#footnote-ref-13)
13. Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. Leg. Stud. 115 (1992). [↑](#footnote-ref-14)
14. Bernstein, *supra* note 12; Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract Essay*, 47 Wake Forest L. Rev. 843 (2012) *at* 863–865. [↑](#footnote-ref-15)
15. Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance,* 89 J. Pol. Econ. 615 (1981); George Baker, et al., *Subjective Performance Measures in Optimal Incentive Contracts,* 109 Q. J. Econ. 1125 (1994); Jonathan Levin, *Relational Incentive Contracts,* 93 Am. Econ. Rev. 835 (2003). [↑](#footnote-ref-16)
16. Joyce Berg, et al., *Trust, Reciprocity, and Social History,* 10 Games Econ. Behav. 122 (1995); Noel D. Johnson & Alexandra A. Mislin, *Trust Games: A Meta-Analysis,* 32 J. Econ. Psych. 865 (2011). [↑](#footnote-ref-17)
17. Gary Charness & Martin Dufwenberg, *Promises and Partnership*, 74 Econometrica 1579 (2006). [↑](#footnote-ref-18)
18. Vanberg, *supra* note 3. [↑](#footnote-ref-19)
19. Charness & Dufwenberg, *supra* note 16. [↑](#footnote-ref-20)
20. Florian Ederer & Alexander Stremitzer, *Promises and Expectations,*106 Games Econ. Behav. 161 (2017); Dorothee Mischkowski, et al., *Promises, Expectations, and Social Cooperation,* 62 J. Law Econ. 687 (2019). [↑](#footnote-ref-21)
21. David A Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. Chi. L. Rev. 395 (2013). [↑](#footnote-ref-22)
22. Tania Singer & Nikolaus Steinbeis, *Differential Roles of Fairness- and Compassion-Based Motivations for Cooperation, Defection, and Punishment*, 1167 Ann. N. Y. Acad. Sci. 41 (2009). Here, the authors contrast between fairness-based and compassion-based motivations, and empirically demonstrate the advantages and disadvantages of both motivations in the context of cooperation. In theory, if individuals view contractual promises as commitments to exert their best efforts, then when the promisor is without fault, there is no breach of contract, and it should not erode trust between the parties. However, in situations where individuals perceive obligations as guaranteeing a specific outcome, or if they believe the promisor is at fault for the breach, a reduction in trust is anticipated. *See also:* Richard A. Epstein, *The Many Faces of Fault in Contract Law: Or How to Do Economics Right, Without Really Trying,* 107 Mich. L. Rev. 1461 (2009); George M. Cohen, *The Fault That Lies within Our Contract Law,* 107 Mich. Law Rev. 1445 (2008) (arguing that fault plays an inherent part within the framework of contract law); *infra* note 30. [↑](#footnote-ref-23)
23. Batson, et al., *supra* note 4; Inbal Ben-Ami Bartal, et al., *Empathy and Pro-Social Behavior in Rats*, 334 Science 1427 (2011); Shoham Choshen-Hillel, et al., *Physicians Prescribe Fewer Analgesics During Night Shifts Than Day Shifts,*119 Proc. Natl. Acad. Sci. e2200047119 (2022); Jean Decety, et al., *Empathy as a Driver of Prosocial Behaviour: Highly Conserved Neurobehavioural Mechanisms Across Species,* 371 Philos. Trans. R. Soc. B 20150077 (2016); Tom Gordon-Hecker, et al., *Empathy for the Pain of Others: Sensitivity to the Individual, Not to the Collective,* 110 J. Exp. Soc. Psych. 104561 (2024), Martin L. Hoffman, *Empathy and Prosocial Behavior*, 3 Handbook Of Emotions 440 (2008). [↑](#footnote-ref-24)
24. Mark H. Davis, *Empathy, Compassion, and Social Relationships*, *in* The Oxford Handbook of Compassion Science (Emma M Seppälä et al, eds, 2017) *at* 300. [↑](#footnote-ref-25)
25. *Id.* *at* 303–304. [↑](#footnote-ref-26)
26. Paul Ekman & Eve Ekman, *Is Global Compassion Achievable?,* *in* The Oxford Handbook Of Compassion Science (Emma M Seppälä, et al. eds, 2017) *at* 41–43. [↑](#footnote-ref-27)
27. This is an example of a relational contract, which is expected to yield a higher sense of empathy, *cf.* *supra* note 4. Nevertheless, transactional contracts could also elicit empathy, as demonstrated in our empirical findings in Section IV below. [↑](#footnote-ref-28)
28. Olga Klimecki, et al., *Empathy Promotes Altruistic Behavior in Economic Interactions*, 6 Sci. Rep. 1 (2016). [↑](#footnote-ref-29)
29. Ori Katz, *Mapping the Diversity of Thought - An Attitude Theory of Contract Law*, 31 S. Cal. Interdisc. L. J. 49 (2021) *at* 59–62. [↑](#footnote-ref-30)
30. *See also* George Wallach, *Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 Notre Dame L. Rev. 203 (1979). John D. Wladis, *Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law*, 75 Geo. L. J. 1575 (1986); Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration,* 1 J. Leg. Anal. 207 (2009). [↑](#footnote-ref-31)
31. Andrew A. Schwartz, *Contracts and COVID-19*, 73 Stan. L. Rev. Online 48 (2020) *at* 49. This does not imply that contracts inherently establish strict liability, which is often not the case. *See also* George M. Cohen, *The Fault That Lies within Our Contract Law,* 107 Mich. L. Rev. 1445 (2008); Robert A. Hillman, *The Future of Fault in Contract Law,* 52 Duq. L. Rev. 275 (2014); Omri Ben-Shahar & Ariel Porat, *Foreword: Fault in American Contract Law*, 107 Mich. L. Rev. 1341 (2009). Nonetheless, often parties are expected to fulfill the contract even when it is challenging, and fault is not always necessary to establish contractual liability. [↑](#footnote-ref-32)
32. Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract,* 6 J. Empir. Leg. Stud. 405 (2009); Uriel Haran, *A Person-Organization Discontinuity in Contract Perception: Why Corporations Can Get Away with Breaking Contracts but Individuals Cannot,* 59 Man. Sci. 2837 (2013); Uriel Haran, et al., *Formal and Social Enforcement in Response to Individual Versus Corporate Transgressions*, 13 J. Empir. Leg. Stud. 786 (2016). [↑](#footnote-ref-33)
33. However, empathy can serve as a signal to the promisor, potentially leading them to perceive a legal entitlement to breach the contract. This increased perception of entitlement may elevate the likelihood of pursuing litigation. For example, if the kindergarten teacher were to receive half the payment from the parents without any legal action, she might believe that she is entitled to the entire sum. [↑](#footnote-ref-34)
34. Anna Dreber. et al., *Winners Don’t Punish*, 452 Nature 348 (2008). [↑](#footnote-ref-35)
35. Ann C. Rumble, et al., *The Benefits of Empathy: When Empathy May Sustain Cooperation in Social Dilemmas,* 40 Eur. J Soc. Psych. 856 (2010); Walter G. Stephan & Krystina Finlay, *The Role of Empathy in Improving Intergroup Relations,* 55 J. Soc. Iss. 729 (2008). [↑](#footnote-ref-36)
36. Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts,* 75 Calif. L. Rev*.* 2005 (1987). [↑](#footnote-ref-37)
37. Peter Oomsels, et al., *Functions and Dysfunctions of Interorganizational Trust and Distrust in the Public Sector*, 51 Adm. Soc. 516 (2019); Koen Verhoest, Martino Maggetti, Bastiaan Redert, *Strengthening Trust by Design* **preliminary draft, do not cite yet** (“too much trust can become ‘blind trust’, allowing the trustee to behave opportunistically”) [↑](#footnote-ref-38)
38. C. Daniel Batson & Tecia Moran, *Empathy-Induced Altruism in a Prisoner’s Dilemma*, 29 Eur. J. Soc. Psychol. 909 (1999). [↑](#footnote-ref-39)
39. C. Daniel Batson & Nadia Ahmad, *Empathy-Induced Altruism in a Prisoner’s Dilemma II: What if the Target of Empathy Has Defected?* 31 Eur. J. Soc. Psychol 25 (2001). [↑](#footnote-ref-40)
40. Simon Gächter, *Human Prosocial Motivation and the Maintenance of Social Order*. *In* The Oxford Handbook of Behavioral Economics and the Law (Eyal Zamir & Doron Teichman eds., 2014) *at* 28, 45 (“One important lesson from the research… is that the only way a cooperator can avoid being ‘suckered’ is to reduce his or her cooperation, thereby punishing everyone, even other cooperators”); Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 Nature 137 (2002). [↑](#footnote-ref-41)
41. John A. Sautter, et al., *A Dual-Edged Sword: Empathy and Collective Action in the Prisoner’s Dilemma*, 614 Annals Am. Acad. Pol. 154 (2007). [↑](#footnote-ref-42)
42. On the other hand, one might argue that to promote fair loss-sharing, an external, impartial perspective is essential, given that the involved parties are prone to displaying self-serving biases. [↑](#footnote-ref-43)
43. Dreber, et al., *supra* note 34. [↑](#footnote-ref-44)
44. Yehonatan Givati, et al., Excuse 2.0 (2023). [↑](#footnote-ref-45)
45. Kristin Layous, et al., *What Triggers Prosocial Effort? A Positive Feedback Loop Between Positive Activities, Kindness, and Well-Being,* 12 J. Pos. Psych*.* 385 (2018). [↑](#footnote-ref-46)
46. Armin Falk & Urs Fischbacher, *A Theory of Reciprocity*, 54 Games Econ. Behav*.* 293 (2006). [↑](#footnote-ref-47)
47. Jetske Bouma, et al., *Trust and Cooperation: Social Capital and Community Resource Management,* 56 J Environ. Econ. Manag. 155 (2008); Paul Condon & David DeSteno, *Compassion For One Reduces Punishment For Another*, 47 J. Exper. Soc. Psych. 698 (2011). [↑](#footnote-ref-48)
48. Paul Gilbert, *Compassion: From its Evolution to a Psychotherapy*, 11 Front. Psychol. 3123 (2020). [↑](#footnote-ref-49)
49. Anthony M Clohesy, Politics of Empathy: Ethics, Solidarity, Recognition (2013). [↑](#footnote-ref-50)
50. Jinjuan Feng, et al., *Empathy and Online Interpersonal Trust: A Fragile Relationship*, 23 Behav. Inf. Technol. 97 (2004). [↑](#footnote-ref-51)
51. Tom Gordon-Hecker, et al., *Cognitive Empathy Boosts Honesty in Children and Young Adolescents*, 241 J. Exp. Child Psychol. 105869 (2024). [↑](#footnote-ref-52)
52. Florencia Torche & Eduardo Valenzuela, *Trust and Reciprocity: A Theoretical Distinction of the Sources of Social Capital*, 14 Eur. J. Soc. Theory 181 (2011). [↑](#footnote-ref-53)
53. Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain,* 115 Yale L. J. 1930 (2005). [↑](#footnote-ref-54)
54. Tom Baker, *On the Genealogy of Moral Hazard*, 75 Tex. L. Rev. 237 (1996). [↑](#footnote-ref-55)
55. For further discussion of this point, *see* Yuval Feldman & Shahar Lifshitz, *Behind the Veil of Legal Uncertainty,* 74 Law & Contemp. Probs*.*133 (2011). [↑](#footnote-ref-56)
56. Nancy Folbre & Julie A. Nelson, *For Love or Money—or Both?,* 14 J. Econ. Perspect*.* 123 (2000). [↑](#footnote-ref-57)
57. *See* Michael D. Gilbert & Thomas Hayashi., Law and Economics for Empaths, *not published* p. \*\*\*. *See also* the discussion by the same authors about strategic mortgage defaults, where people who feel morally obligated not to default when it is financially beneficial for them will subsidize those who feel comfortable making strategic defaults. [↑](#footnote-ref-58)
58. Bloom, *supra* note 11. [↑](#footnote-ref-59)
59. Tehila Kogut & Ilana Ritov, *The “Identified Victim” Effect: An Identified Group, or Just a Single Individual?,* 18 J. Behav. Decis. Making 157 (2005). [↑](#footnote-ref-60)
60. Brian Mullen, et al., *Ingroup Bias as a Function of Salience, Relevance, and Status: An Integration*, 22 Eur. J. Soc. Psychol*.*103 (1992). [↑](#footnote-ref-61)
61. Zoë Fowler, et al.*, Against Empathy Bias: The Moral Value of Equitable Empathy*, 32 Psych. Sci. 766 (2021). [↑](#footnote-ref-62)
62. Generally, Gilbert and Hayashi argue that inculcating empathy creates newcosts, and since we wish to prevent both the cost of empathy and the cost of the aggrieved party, the law would still need to shift costs from the aggrieved party. [↑](#footnote-ref-63)
63. Haran, *supra* note 30. [↑](#footnote-ref-64)
64. Tage S. Rai & Daniel Diermeier, *Corporations are Cyborgs: Organizations Elicit Anger but Not Sympathy When They Can Think but Cannot Feel*, 126Organ. Behav. Hum. Decis. Process. 18 (2015). [↑](#footnote-ref-65)
65. Heather M. Gray, et al., *Dimensions of Mind Perception*, 315 Science 619 (2007). [↑](#footnote-ref-66)
66. Jennifer Aaker, et al., *Nonprofits are Seen as Warm and For-Profits as Competent: Firm Stereotypes Matter,* 37 J. Consum. Res. 224 (2010). [↑](#footnote-ref-67)
67. Simone Tang & Kurt Gray, *Feeling Empathy for Organizations: Moral Consequences, Mechanisms, and the Power of Framing,* 96 J. Experim. Soc. Psychol. 104147 (2021). [↑](#footnote-ref-68)
68. See pre-registration for Study 1 here: <https://aspredicted.org/P2C_V14>. [↑](#footnote-ref-69)
69. To assess the participants’ perspectives on contracts as either business transactions or promises, we used two methods of assessment. The first was an implicit measurement using the word fragment completion task, introduced by Uriel Haran (2013), and the second was an explicit measurement consisting of six statements. However, due to the low reliability of both measurements (α=0.44, 0.51, respectively), they were not included in the analysis. [↑](#footnote-ref-70)
70. See pre-registration for Study 2 here: <https://aspredicted.org/LSC_4HY>. [↑](#footnote-ref-71)
71. Here, we used a different version of the explicit measurement (*see* *supra* note 63) consisting of nine statements. Again, due to the low reliability of the measurement (α=0.31), it was not included in the analysis. [↑](#footnote-ref-72)
72. Donald Moynihan, et al., *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions,* 25 J. Public. Adm. Res. Theory 43 (2015). [↑](#footnote-ref-73)
73. Erhard Blankenburg, *The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Legal Behavior in the Netherlands and West Germany*, 28 Law & Soc’y. Rev. 789 (1994). [↑](#footnote-ref-74)
74. Eyal Zamir & Doron Teichman, Behavioral Law and Economics(2018) *at* 83–85. [↑](#footnote-ref-75)
75. *See* Bernstein, *Opting out of the Legal System*, *supra* note 12. [↑](#footnote-ref-76)
76. *See generally* Robert Cooter, *Expressive Law and Economics*, 27 J. Leg. Stud. 585 (1998); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 Va. L. Rev. 1577 (2000); Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1 Duke L. J. 4 (1990) (arguing that criminal punishment intends to shape preferences and promote various social norms), *see* also *supra* note 2. [↑](#footnote-ref-77)
77. \*\*\* [↑](#footnote-ref-78)
78. \*\*\* Maxim Voronov & Klaus Weber, *The Heart of Institutions: Emotional Competence and Institutional Actorhood*, 41 Acad. Manage. Rev. 456 (2016). [↑](#footnote-ref-79)
79. Kevin Burchell, et al., *Marketing Social Norms: Social Marketing and the ‘Social Norm Approach’*, 12 J. Consum. Behav*.* 1 (2013), [↑](#footnote-ref-80)
80. Cristina Bicchieri, et al., *Social Norms*, *in* The Stanford Encyclopedia of Philosophy (Edward N. Zalta & Uri Nodelman eds., 2023); Cristina Bicchieri, *Norms, Conventions, and the Power of Expectation*s, *in* Philosophy of Social Science: A New Introduction (Nancy Cartwright & Eleonora Montuschi eds., 2014) *at* 208. [↑](#footnote-ref-81)
81. Tobias Pret & Sara Carter, *The Importance of ‘Fitting In’: Collaboration and Social Value Creation in Response to Community Norms and Expectations*, 29 Entrep. Reg. Dev. 639 (2017). [↑](#footnote-ref-82)
82. This discussion pertains to the debate over the roles of compassion and good faith in relational contracts. Evidently, in relational contracts, which are long-term and depend on a high degree of mutual trust, parties often demonstrate greater trust and cooperation compared to transactional contracts (see *supra* note \*\*\*. Nevertheless, there is scholarly contention regarding the translation of these norms into legal obligations. MacNeil advocates that the naturally more trustworthy and cooperative behavior witnessed in parties of relational contracts should affect judges when applying the law. Conversely, Kidwell and like-minded scholars argue for maintaining a formalistic approach in contract law, even within the context of relational contracts, leaving the fostering of trust and cooperation to other societal mechanisms (John Kidwell, *A Caveat*, Wis. L. Rev. 615 (1985); Ian R. MacNeil, *Relational Contract Theory: Challenges and Queries,* 94 Nw. U. L. Rev. 877 (2000); Robert E. Scott, *The Death of Contract Law*, 54 U. Toronto L.J. 369 (2004).

    [↑](#footnote-ref-83)
83. Yuval Feldman & Tom R. Tyler, *Mandated Justice: The Potential Promise and Possible Pitfalls of Mandating Procedural Justice in the Workplace,* 6 Regul. Gov. 46 (2012). [↑](#footnote-ref-84)
84. Yuval Feldman, Can We Trust the Public?, (2024). [↑](#footnote-ref-86)
85. Mark R. Lepper & David Greene, *Overjustification Research and Beyond: Toward a Means—Ends Analysis of Intrinsic and Extrinsic Motivation*, *in* The Hidden Costs of Reward, (Mark R. Lepper & David Greene, eds., 2015) *at* 109-148. [↑](#footnote-ref-87)
86. Matthew Chao, *Demotivating Incentives and Motivation Crowding Out in Charitable Giving*, 114 Proc. Nat’l. Acad. Sci. 7301 (2017). [↑](#footnote-ref-88)
87. Armin Falk & Michael Kosfeld, *The Hidden Costs of Control*, 96 Am. Econ. Rev. 1611 (2011). “Control Partly Crowds Out Agents’ Motivation” [↑](#footnote-ref-89)
88. Erik Gråd, et al., *Do Nudges Crowd Out Prosocial Behavior?,* 8 Behav. Public Policy 107 (2024). [↑](#footnote-ref-90)
89. Andrew J. Elliot & Patricia G. Devine, *On the Motivational Nature of Cognitive Dissonance: Dissonance as Psychological Discomfort*, 67 J. Pers. Soc. Psychol. 382 (1994). *See* Daphna Lewinsohn-Zamir, *The Importance of Being Earnest: Two Notions of Internalization,*65 U. Toronto L. J. 37 (2015). [↑](#footnote-ref-91)
90. Bruno S. Frey, *Institutions and Morale: The Crowding-out Effect*, *in* Economics, Values and Organizations (Avner Ben-Ner & Louis Putterman eds., 1998). [↑](#footnote-ref-92)
91. Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 Tex. L. Rev*.* 1151 (2009). [↑](#footnote-ref-93)
92. Rinat Hilo-Merkovich et al., *Affidavit Aversion: Public Preferences for Trust-Based Policy Instruments*, Regul. Gov. (2024). [↑](#footnote-ref-94)
93. Sharon S. Brehm & Jack W. Brehm. Psychological Reactance: A Theory of Freedom and Control (2013). [↑](#footnote-ref-95)
94. Netta Barak‐Corren, et al., *The Provocative Effect of Law: Majority Nationalism and Minority Discrimination,* 15 J. Empir. Leg. Stud*.* 951 (2018). [↑](#footnote-ref-96)
95. Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. Leg. Stud. 1 (2000). [↑](#footnote-ref-97)
96. *See* Thomas Hobbes, Leviathan (J.C.A Gaskin ed., 2008) Some discussion of this perspective on human nature could be seen in the writings of Jacques Derrida, e.g., *see* Jacques Derrida, The Beast and the Sovereign, Volume I (2010). [↑](#footnote-ref-98)