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## Introduction

In the previous two chapters we examined the traditional and nontraditional instruments that policy makers can use to change human behavior. We reviewed the pros and cons of both approaches: traditional methods address the motivation to comply (e.g., deterrence and sanctions) and nontraditional methods target cognition (e.g., nudges and debiasing). In this chapter, we focus on the enforcement dilemmas arising from the different interventions. Its aim is to enable policy makers to design the optimal mix of behavioral change measures, given all of these complexities, while recognizing the tradeoffs between competing policy goals.

Before examining enforcement dilemmas, a discussion of behavioral tradeoffs is in order. When designing regulations and rules, policy makers need to make normative decisions about which goals they would like those regulations to achieve. Rarely does a policy affect all types of behavior in the same way in all contexts. Much more often the same policy will facilitate one type of desired behavioral change while discouraging another type of welcomed change. Some policies produce long-term change at the expense of short-term change. Others encourage more sustainable behavioral change but at the cost of being more restrictive. Some regulations make the desired behavioral change more explicit (the expressive effect of the law), while others rely on nudges, which work without people’s full awareness. Policy makers need to be aware of all of these effects and decide which are the most important to target and when.

In addition, people’s reasons for compliance may affect tradeoffs and the resulting enforcement dilemmas. In some contexts it is not important to know people’s motivations; for example, whether they pay taxes out of patriotism or fear, the important thing is that they pay their taxes. Indeed, the nudge intervention does not even address motivation. The targeted behavior is likely to determine how much we should care about reasons for compliance. The level of attention paid to reasons why people obey the law might be one of the distinguishing factors between corporations and states; for example, in the area of hiring discrimination, corporations may simply want to ensure that their workforce is diverse enough to meet legal requirements, whereas the state may want employers not only to hire more minorities but also to actively overcome their biases and consciously respect the contribution of minorities to the workforce. Possibly, nudges should be saved for behaviors like driving, where automaticity is needed and civic virtue is less critical.

As suggested in Chapter 4, which compared interventions such as deterrence and incentives to legitimacy and fairness, we need to align the type of legal incentives used with methods aimed at increasing people’s intrinsic motivation to comply, such as legitimacy, procedural justice, and morality—while dealing with both deliberative and nondeliberative choices. Ideally, the state should know what the intrinsic motivation of the individual is, so it can determine which legal instruments to use in targeting that type of motivation. More importantly, however, it must know people’s state of awareness in a given situation. By knowing both people’s intrinsic motivation and their level of awareness, the state will be most effective in creating behavioral change through processes of education and increasing awareness of the consequences of behavior. It needs to know the tradeoffs inherent in each intervention and strike the ideal balance in each situation.

When crafting regulations or legal doctrine, policy makers need to recognize these tradeoffs because it is their presence that creates behavioral enforcement dilemmas. Thus policy makers need to weigh the behavioral consequence of each legal intervention relative to other relevant legal interventions.

For example, let us consider the policy mix and the attendant tradeoffs that would encourage organ donation. Developing the most effective mix would begin with an examination of the relative efficacy of using nudges, which might affect behavior even without people’s full awareness, or of interventions such as incentives that require deliberation. Default rules might be less effective from a system 2 perspective in facilitating long-term commitment, but might increase the number of people who decide to engage in a desirable behavior and vice versa.[[1]](#endnote-1) The enforcement dilemma is how to increase the willingness to donate while recognizing that the decline in long-term commitment might have some inadvertent effects on the quality of the donation.

## BEHAVIORAL TRADEOFFS[[2]](#endnote-2)

A respected group of scholars have identified dimensions of important tradeoffs in the regulation of behavior.[[3]](#endnote-3)

Number of Choices

One area of great research interest has been the optimal number of options given to participants. More options are generally thought to increase autonomy, but reduce the ability of the individual to make a choice.[[4]](#endnote-4) Yet this effect has been shown to be dependent on age: Reed et al.[[5]](#endnote-5) found that older people care less about choice and autonomy than younger adults.

Researchers have studied the competing effects that complexity has on people[[6]](#endnote-6) and have found that, when people have fewer choices, they are more likely to be happy later about the decisions they do make.[[7]](#endnote-7) There is general agreement that most people would prefer not having many options, but instead would like to be only given several options, which will allow them to feel more confident that they are making a reasonable choice.

Others have examined the optimal amount of information needed for people to make sound health plan choices.[[8]](#endnote-8) This notion is closely related to the concept of simplicity advocated by Sunstein and more recent books on simplicity.

##

## Outcome vs. Process

A line of research has clearly demonstrated the great influence of default rules in steering people’s choices in the contexts of marketing,[[9]](#endnote-9) contributing to a pension fund,[[10]](#endnote-10) donating organs,[[11]](#endnote-11) and buying adequate amounts of insurance.[[12]](#endnote-12) However, such an approach completely ignores people’s motivations to comply. Yet, if we focus on making the process as meaningful as possible to increase the autonomous and expressive rationales for compliance, we might reduce the chance that people will make the choice we want them to make.[[13]](#endnote-13)

This outcome vs. process dilemma was examined in a 2013 paper by Sunstein with regard to default rules; he concluded, “In part for that reason, any kind of default rule, including a highly personalized one, may not create the kinds of motivation that can come from active choosing.”[[14]](#endnote-14) As discussed in more detail later in the chapter, this tradeoff is in many respects the key one faced by policy makers, and the balance between outcome and process should be based on the type of behavior that is targeted.

With short-term or relatively simple behaviors that follow from people’s initial choices, there is no need to build in any process of deliberation to enhance the endurance and sustainability of compliance. However, in behaviors that require intrinsic motivation, qualitative performance, and long-term commitment, there is greater need for explicit intervention to enhance people’s deliberation and ideally a change in intrinsic motivation toward the behavior in question. Greater focus on the durability of an intervention naturally leads to a preference for process-oriented interventions that allow for reflection by people, which is more likely to lead to sustainable change.

Long-Term vs. Short-Term Behavioral Change

A related tradeoff is that between the long- and short-term effects of regulatory interventions. This nudge approach ignores a choice’s subsequent impact on an individual’s long-term perceptions of that behavior and the sustainability of the policy goal in question. That is why Lobel and I criticized it, arguing that lower priority should be given to interventions that provide consumers increased access to information and more effort should be made to ensure that they arrive at the “right” decisions concerning financial and health practices.[[15]](#endnote-15)

Clearly, any attempt to change people’s intrinsic motivation will require a lengthier process of deliberation, which might face resistance. Yet, when there is a change in peoples’ intrinsic motivation, there is a greater chance that behavioral change will be sustainable.

Invisible vs. Expressive Law

Another tradeoff derived from the outcome vs. process argument relates to the optimal level of exposure of the general public to the legal instrument itself.

The expressive law approach holds that making the law visible and public will trigger various expressive mechanisms to change behavior to more closely reflect the norms and values of a given society. In contrast, the nudge approach is built on the invisibility of the law, arguing that it should operate behind the scenes to facilitate people’s nondeliberative choices in the direction of compliance.

The literature on expressive law and on social meaning argues that law’s language and visibility to the public are among the most important tools to ensure compliance.[[16]](#endnote-16) Laws influence people both by making statements on what is good behavior and by reproaching them for engaging in bad behavior through the language of the law.[[17]](#endnote-17) In other words, laws affect social norms and change judgments and behavior.[[18]](#endnote-18) Making certain behaviors into a law can shape the meaning of key aspects of social and family life, such as parenthood, safe driving, and good citizenship. The expressive function of the law can help people determine what the prevailing social norm is,[[19]](#endnote-19) how their behavior will be viewed if they violate the law, the best course of action for coordinating their behavior with others,[[20]](#endnote-20) and the reputation costs for engaging in certain behaviors.[[21]](#endnote-21)

Much of the literature on law and society focuses on the symbolic effects of law on society. It takes a macro perspective on legality’s role in shaping cultural and societal changes, using terms such as “social change,” “symbolic politics,” “evolution of social values,” and “legal consciousness,” as advocated by scholars such as Anderson, Pildes,[[22]](#endnote-22) and Adler.[[23]](#endnote-23) Language plays an essential and creative role in social change, and legal language has an important role in the struggle over power in the law.[[24]](#endnote-24) Recognizing the declarative and constitutive cultural powers of law, many legal scholars have suggested that, in crafting laws, one should focus not only on their operational functions but also on their declarative purpose and responsibilities.[[25]](#endnote-25)

In contrast to the expressive law literature, the nudge-based approach to regulation tends to focus on simplifying and flattening policy messages. Its advocates argue that the law should be almost unnoticed and that it is not necessary for people to even know that a given action is illegal. Thus, according to the nudge approach the role of law is not to shape people’s values, but rather to lead them to make the right choices, limiting maximally their deliberation, their awareness that they are making a choice, and their awareness that the law is behind these initiatives. For example, to reduce cigarette smoking, the first step in the nudge approach is to spread information as widely as possible that cigarettes are bad for one’s health—through pamphlets, posters, and TV advertisements. The second step is to screen cigarettes from public view so that no one would see them or be tempted to smoke them. The distinction between nudges and expressive law is sometimes blurred; for example, it is possible that nudges, by leading to a behavioral change, might gradually lead to an internalization process even without full deliberation.[[26]](#endnote-26)
 Yet the simpler nudge approach advocated by Sunstein and others not only limits the process of people’s participation in decision making, but also changes the function of law from shaping the social meaning of people’s behavior to simply influencing their decisions, without them even knowing that the law is operating in the background.

One way to blend the expressive law and nudge approaches is to create a public discourse on the usage of certain nudges close to the time they are implemented. This would not only satisfy the expressive function of law by having a public discussion, but would also achieve the effect of hiding the law because it would occur soon before the nudge is to be implemented, thereby limiting awareness of it. Indeed, recently scholars have addressed the question whether informing people about the presence and use of nudges might harm their efficacy. On the face of it, telling someone that unhealthy food is purposefully being put in a less accessible place in a cafeteria might reduce the efficacy of such a move. In areas such as health and consumerism, publicizing that the law is behind their choices might even cause people to make harmful decisions or those that are not in their best interests. Current research suggests a very complex picture of the impact on efficacy of providing information about the nudge.[[27]](#endnote-27)



ENFORCEMENT DILEMMAS

## Changing Peoples’ Commonly Made Nondeliberative Decisions vs, Their Deliberative but Uncommon Decisions

The key enforcement dilemma, which derives from the tradeoff between process and outcome, is related to what we want the enforcement strategy to achieve. Do we want it to change the behavior of the situational wrongdoing engaged in by the larger population of “good” people or to target the deliberative, and presumably more severe, misconduct associated with the smaller number of “bad” people? For example, states might decide to prioritize their enforcement practices so they either target harsher forms of misconduct or more benign misbehavior. Presumably, the more serious misconduct is more likely to be engaged in intentionally; minor and less blatant misconducts are more plausibly done by people without full awareness of the wrongdoing of their behavior. Thus, an implicit legal instrument is more likely to be effective when dealing with subtle unethical behaviors that are likely to be performed by situational wrongdoers with limited awareness.[[28]](#endnote-28)

The basic intuition of the legal policy maker is to invest more in monitoring misconduct that is more severe (given its likely correlation with greater harm to society). Based on studies conducted with Lobel, it seems that when misconduct is likely to be viewed, at least by some people, as severe, there is less rather than more need to use rewards, which carry both monetary costs for the state and some social cost for the whistleblower him- or herself. The same argument seems to apply with greater strength to the good/bad people dichotomy, where there should be an increased focus on extrinsic measures when higher percentages of the population are unlikely to be interested explicitly in pursuing the behavior for internal reasons. For example, in crime prevention, we focus most attention and levy the most severe punishments on the “worst” people, because the cost of even one person committing a crime such as murder is so high. We maintain this focus, even though the majority of the population will refrain from committing a crime based on their moral constraints.

However, when we incentivize whistleblowers, we are not focusing on the worst members of society. Furthermore, in many cases incentivizing even one individual to behave in a cooperative way is sufficient. For example, as seen from my research with Halali on regulation of conflicts of interest,[[29]](#endnote-29) people were less corrupt when they faced higher penalties if caught, even if they had more to gain from corruption. Similarly, good people are more aware of the corrupting effect of money and to need to shield themselves from it, but are less aware of the corrupting effects of prestige; thus the legal policy maker should invest more resources in the enforcement of monetary-based corruption.

Therefore, the more we are interested in preventing genuinely bad behaviors, for which people intuitively recognize their wrongness, the more we are likely to focus on behaviors in which fewer people are actually likely to engage. This is true for three types of mindsets. Those with a calculative mindset are aware that wrongdoing is more likely to be enforced and punished. Situational wrongdoers find it harder to come up with justifications for clearly morally bad behaviors. In the case of an erroneous mindless mindset, it is more likely that such behavior will raise the alarm and eliminate the blind spot.

##

## Uniform vs. Differentiated Regulation

An even broader enforcement concern that lies at the heart of the law is how to ensure that regulatory initiatives facilitate compliance among as many people as possible while reducing law-abiding behavior among as few as possible. Is it even possible to regulate the behavior of both good and bad people using the same policy, or is differentiated regulation needed?

If we focus on the lowest common denominator and assume that all people have the same motivations, we decrease uncertainty and ensure some minimal compliance. Yet, much of the literature and research suggests that there are many types of motivations and levels of awareness affecting compliance, proposing that a unified approach might be destructive to some people with more intrinsic motivations to comply. Such a one-size-fits-all policy might crowd out the motivation of those intrinsically motivated people. The key to developing effective enforcement, then, is to recognize its differential effect on different motivations, as well as on different segments of the population.

Taking this further, given the variations in people’s motivation, should we take an across-the board approach in focusing on motivation in general, or should we invest the required energy needed to fine-tune approaches to be sensitive to the specific motivation of individuals? And who should be targeted—those who are internally committed to comply or those who are not?

In many accounts, the law’s inability to determine whether it is dealing with good or bad people is one of the major factors that reduce its ability to use the knowledge presented so far in the book in a constructive way. Understanding the behavioral effects of law on different segments of the population and recognizing the pros and cons of each regulatory approach are likely to increase the ability to analyze more accurately the effect of law on a given population.

There are many studies showing the ill effects of a one-size-fit-all policy. It may be possible that, by creating ambiguous rules that make it difficult for bad people to evade the law,[[30]](#endnote-30) we might be responsible for moving some good people to the bad side. Furthermore, in many contexts, good people are those who are more likely to suffer from an approach to law that was originally designed to target bad people. As demonstrated in much research, when people have a strong intrinsic motivation, external interventions are not as important in influencing their behavior. In contrast, for those who are not very capable of making choices themselves and have a very weak internal locus of control, behavioral interventions that are rooted in paternalism may be the only effective means to facilitate their compliance.[[31]](#endnote-31) A final argument against a uniform policy can be gleaned from the work of Costa and Kahn on energy conservation. They showed that informing people about their relative energy consumption had a different effect based on their political views: liberals were likely to decrease their usage, whereas conservatives were more likely to increase their usage.[[32]](#endnote-32)

## Intrinsic vs. Extrinsic Motivation Dilemma

With the growing recognition that strengthening intrinsic motivation is likely to lead to improved compliance, policy makers face the challenge of finding the right balance between targeting the internal motivation to obey and avoiding creating greater evasion of the law.

An important field within the psychology literature investigates the interplay between extrinsic and intrinsic motivation.[[33]](#endnote-33) Intrinsic motivation is the sense of morality inherent within the individual, whereas extrinsic motivation relies on incentives and rewards.[[34]](#endnote-34) People often vary in their internal level of commitment to ethical behavior.[[35]](#endnote-35)

Most generally, the crowding-out literature suggests that when people attribute their behavior to external rewards, they discount any moral incentives for their behavior, thereby lowering the perceived effect of intrinsic motivation. As applied to regulatory incentives, crowding-out theory predicts that external incentives that use monetary rewards or punishments may undermine intrinsic motivations to comply.[[36]](#endnote-36) For instance, paying people in return for donating their blood might lead donors to view the event as a transaction rather than a charitable act, thereby reducing the number of altruistic blood donations.[[37]](#endnote-37)

Bowles (2008) has provided a summary of many of the studies on the crowding-out effect of incentives and on enforcement, but here are some notable examples.[[38]](#endnote-39) Deci found that tangible rewards undermine intrinsic motivation for a range of activities.[[39]](#endnote-40) Following the “W effect” described by Frey et al.[[40]](#endnote-41) with regard to magnitude, it is likely that, with varying levels of intrinsic motivations among individuals, various sums of money will have correspondingly different effects on each subgroup. In a previous work with Lobel on how to incentivize whistle-blowers[[41]](#endnote-42) we demonstrated that those who were intrinsically motivated were not significantly affected by the framing of legal incentives, whereas those who were low on intrinsic motivation were affected by it. In my study with Perez, we found a direct relationship between the perception of incentives and intrinsic motivation levels: those who were low on intrinsic motivation were more likely to prefer deposits to fines, whereas the opposite was true for those who had high levels of intrinsic motivation[[42]](#endnote-43).

Another issue addressed by the research on the intrinsic–extrinsic dimension that affects the ethicality of good people is the extent to which the behavior that the state is attempting to regulate is within the moral consensus of the population.[[43]](#endnote-44) In the study with Lobel described earlier, we highlighted the relationship between the severity of the misconduct and the regulatory mechanisms to prevent it: the greater the individual’s perception of the severity of illegality, the less important was the choice of enforcement mechanism. In our analysis, we used severity of misconduct as a proxy for internal motivation.[[44]](#endnote-45) In the group of participants who viewed the illegality as highly offensive, and hence had high levels of internal motivation to report it, the type of mechanism available to them to do so was largely irrelevant. Respondents expected the reporting levels of themselves and others to remain consistently high across all categories of legal mechanisms. However, when illegalities witnessed by potential enforcers were perceived as less severe, the use of high rewards and fines produced considerably higher levels of reporting than did low rewards. These findings suggest the importance of legal mechanism selection in instances where individuals do not have an ethical stake in compliance.

TAXONOMIES

Based on the behavioral tradeoffs and enforcement dilemmas just reviewed, this section offers a taxonomy that will facilitate the use of psychological and cognitive factors in the design, implementation, and enforcement of legal policy. Use of this taxonomy will make it easier to match legal policy to what we know about the behaviors, cognitions, and motivations of individuals to which it is addressed.[[45]](#endnote-46)

A taxonomy for regulatory initiatives should include the following relevant factors: type of regulated behavior, desired durability of the behavioral change, proportion of the target population whose cooperation is required for successful implementation of the mechanism, cost of enforcement, and cost of noncompliance. Let us examine each factor in turn.

###

###  Nature of the Regulated Behavior

The first question that we need to address is what type of behavior we are looking to change. Is it the kind of behavior in which we need to rely on intrinsic motivation for people to perform well or is sustainability of key importance, given the high cost of enforcement? Do we want to increase the quantitative aspects of the regulated behavior—the extent to which one engages in it—as in recycling?[[46]](#endnote-47) Or is the qualitative nature of the behavior more important, as in whistle-blowing or even blood donation, where the level of commitment to the action is critical? In the latter types of behaviors, we might give more weight to the decision process than the outcome. Furthermore, in legal contexts where 'extra-role' activity is desired, the likelihood of reducing intrinsic motivation increases, and one should be more cautious in introducing extrinsic motives or nudges that may crowd out internal motivation.

### Durability of the Behavioral Change

Whether the sought-after behavior requires a one-time decision or choices repeated over time will help determine the appropriate type of regulatory mechanism. In contexts such as enrolling in or choosing a pension plan, people are less likely to reverse their decision once they have made it. Sustainability is less important, and hence getting people to make the right choice (outcome, being the dominant focus) is more important than in areas like health or nutrition, where choices need to be reaffirmed on a daily basis.

### What Proportion of the Target Population Needs to Cooperate[[47]](#endnote-48)

In designing legal policy one of the most important factors to take into account is whether the population is likely to have high levels of intrinsic motivation to comply with the regulated behavior. This is naturally more challenging when not much is known about the target population or when their level of intrinsic motivation is heterogeneous.[[48]](#endnote-49) When a large proportion of the population has high levels of intrinsic motivation, policy makers can rely on noncoercive explicit measures or on softer types of implicit intervention.

Costs of Enforcement and Compliance

My earlier work has focused on divulging trade secrets, whistle-blowing and recycling. This section illustrates the costs of compliance in these three behavioral contexts.

In the area of trade secrets, everyone needs to be motivated to keep information confidential for the secret not to be disclosed, because if only a few people will be subject to legal consequences for disclosure, keeping company knowledge proprietary may be a futile endeavor.[[49]](#endnote-50) Regulation should be designed to facilitate the cooperation of 100% of the target population, from those with the highest level of intrinsic motivation to those with the lowest level. In that context, policy should focus on the lowest common denominator, meaning those with the lowest level of intrinsic motivation to be loyal to the company. Since having a low level of motivations is likely to increase the chance of making mistakes, and mistakes are costly, a greater emphasis should be placed on obtaining, at the very least, minimal compliance. Therefore, the price of harming the intrinsic motivation of committed employees might be secondary to making sure that even those without intrinsic motivation will be loyal to their employers.

The context of whistle-blowing is the exact opposite, where we only need the cooperation of some of the employees, who will go forward when some illegal activity occurs within the organization. Therefore, we mainly care about those who are high on intrinsic motivation.[[50]](#endnote-51) We might not even want to incentivize those without intrinsic motivation, for fear of generating false reports from bounty hunters, who are only interested in any rewards they might receive from exposing wrongdoing,

Finally, in the context of recycling, we are interested in long-term aggregate outcomes or a situation where as many people as possible will recycle as much as possible. In that context, there is no preference for either high or low intrinsically motivated individuals, and therefore, the balancing consideration made by the policy maker is whether or not to use extrinsic motivation and through which types of incentives. In addition, though the ultimate goal may be to move as many people as possible toward environmentally responsible behaviors, the costs of private noncompliance are not very high. In other words, in this context, the failure of a regulation to increase recycling is not costly since the goal is to increase the average level of recycling among the population.

### The effort needed to change people’s motivation

The connection between intrinsic motivation and our discussion of dual reasoning will be further developed in the next sub-section that focuses on the increased importance of changing peoples’ intrinsic motivation. According to the approach for which we are advocating, where we are interested in curbing not just deliberative and calculated behavior, but also the more automatic and subtle misconducts. There are also some similarities and differences between focusing on extrinsic motivation and focusing on people automatic reasoning through nudges. In both cases, there is no attempt to convince the individual or change their preferences or intrinsic motivation. However, for extrinsic motivation, people usually deliberate and are likely to gain also some expressive messages on social meaning and on right and wrong. This is not the case when it comes to nudges, especially those whom you are not aware of.

OPTIMIZING FREEDOM OF CONTRACTS FROM A BEHAVIORAL PERSPECTIVE

In this section, we return to the tradeoff between process and outcome through a psychological and behavioral analysis of contracting behavior.[[51]](#endnote-52)

The earliest research on the interaction between psychology and contracting focused on people’s cognitive limitations. A whole array of studies in the 1990s addressed paternalism and the legitimacy and efficacy of limiting people’s contractual choices; this research advocated the use of nudges.[[52]](#endnote-53) As the argument went, since people are not good at making decisions about themselves, greater state intervention might improve outcomes.

In an early work I took the opposite approach, focusing on the therapeutic effect of the freedom of contracts.[[53]](#endnote-54) I examined the importance of people’s voice and active participation in making contractual decisions and those elements’ impact on shaping behavior in publicly desirable ways. My theory held that the more control that people had over the decision-making process, the better off they would be.

The direct relationship between control and well-being seems to be straightforward. Thompson summarizes it this way: when we have more control, “we feel better about ourselves, we are physically healthier, perform better under adversity, and are better able to make desired behavioral changes if we have a sense of behavioral control."[[54]](#endnote-55) Thus, giving individuals more control of contractual terms increases their level of well-being.[[55]](#endnote-56)

The social cognition literature highlights the important impact on well-being of daily activity aimed at achieving future goals—which is referred to as "the implicit agency of daily life.”[[56]](#endnote-57) For example, Taylor and Pham claimed that the ability to form a mental representation of one's goals has a positive influence on one's ability to cope with difficulties encountered while working toward those objectives.[[57]](#endnote-58)Applying this concept to the value of personal involvement in the bargaining process supports the advantages of using personally negotiated contracts and not prewritten form contracts, collective contracting, or state-mandated regulations.

It has been shown that civic participation enhances and empowers citizens’ feelings of efficacy and belief in their ability to be part of the democratic process.[[58]](#endnote-59) Public policy that undermines the focus on awareness and deliberation and supplants personal judgment and active involvement may undermine these positive processes.[[59]](#endnote-60)

 One cornerstone of the procedural justice literature is that the perception of a policy’s fairness is crucial to the parties' willingness to accept the outcome of that policy. The work by Tyler and Greenberg has brought the implications of procedural justice into discussions in many areas of legal policy.[[60]](#endnote-61) Two factors that may increase one's sense of procedural justice are having one's voice being heard and having perceived control over the process.[[61]](#endnote-62) Naturally, being involved in negotiations over a specific contractual term is likely to increase both of those factors, especially in comparison to the default rule[[62]](#endnote-63) —especially so in the context of standard-form contracts in which one party holds complete control over the terms of the contract.[[63]](#endnote-64)  Consequently, it is quite plausible that negotiations will raise the sense of procedural justice and thus increase the tendency of people to respect the allocation of risks agreed to in the contract.

An additional psychological mechanism that is likely to support greater adherence to negotiated contract terms is cognitive dissonance. This theory suggests that when people actively choose to behave in a certain way, they are more likely to adapt their attitudes to their choice.[[64]](#endnote-65) In other words, the mere fact that people choose to participate in an activity when no external justification is present causes them to feel more committed to that activity.[[65]](#endnote-66) Presumably, the process of contracting, so long as it is the outcome of free choice, could lead to a deeper commitment to the contract’s terms. Thus, the active choices that people make during negotiations are expected to decrease the likelihood that they will interpret the ambiguity in their own self-interest. In contrast, because in standard-form contracts people lack free choice with regard to the terms, no dissonance is created.[[66]](#endnote-67) Indeed, in an article with Teichman[[67]](#endnote-68)—titled “Are All Contractual Obligations Created Equal”—we showed the increased efficacy of negotiated contracts over standard-form contract in strengthening people’s intrinsic motivation to abide by the contractual terms.


## ADVANTAGES AND DISADVANTAGES OF SPECIFICITY

## To maximize the effect of a legal policy on behavior, its level of legal uncertainty should be determined based on the target population’s different levels of intrinsic motivation and level of awareness toward legal compliance.[[68]](#endnote-69)

## Regulations and contracts can be written along a spectrum of specificity, ranging from vague standards to more detailed and specific rules with particular examples. Behavioral and legal studies have reached conflicting conclusions about the optimal degree of specificity with which laws should be designed. From a behavioral standpoint, specificity is important to help people understand their goals and use their cognitive resources in a focused manner. At the same time, ambiguity in the law can encourage good people to engage in creative interpretations of legal requirements, allowing them to justify unethical behavior, with limited awareness of the meaning of that behavior. By contrast, theories of crowding out, trust, and cooperation suggest that specificity can create resentment and lead to undercompliance and underperformance.

In legal scholarship, much of the debate on the optimal specificity of law has been influenced by the “rules versus standards” paradigm, in which standards are vaguer than rules; broadly speaking, rules are costlier to create, but cheaper to enforce. Kaplow’s (1992) seminal paper on this topic and many follow-up studies have translated the notion of “optimal specificity” as the “optimization of information costs.”

 Some economic analyses point to the benefits of vagueness, but these benefits are often the flip-side of the costs. Thus, vagueness can smooth out the liability function, which may reduce the cost of errors in selecting the point at which the sanction sets in (Craswell and Calfee 1986). Contracting parties often include vague terms in their contracts, which can serve as a commitment device that increases the cost of litigation (Choi and Triantis 2010, Cooter 1984).

An additional perspective comes from the multitasking paradigm that focuses on the problems that occur when some aspects of one’s work are easier to monitor than others. According to the rational choice prediction, agents focus most of their work on the tasks for which they can be given an incentive (Holmstrom and Milgrom 1991).

 An additional line of research in law and economics focuses on the chilling effect of vagueness, which leads to a form of overcompliance. Ferguson and Peters (2000) argue, "The optimal amount of vagueness in a rule strikes a balance between the costs of loopholes, the chilling effect on economic activity, and the inefficiency created in the legal system." Under a vague standard, uncertainty can cause damages to rise more quickly than social harms, leading people to reduce the expected liability by inefficiently overcomplying. For example, Kyle Logue (2007) and others have noted how risk-adverse agents, when paying taxes, tend to overcomply with a vague law to avoid penalties for not complying. Calfee and Craswell (1986) showed that even risk-neutral agents are subject to two contrasting behavioral effects of legal uncertainty: uncertainty reduces deterrence because of the prospect of escaping liability wrongfully (a false negative), but in a variety of contexts, this effect is overshadowed by a tendency toward overcompliance, as in tax law.

An additional way in which the behavioral literature contributes to the rational choice discussion is by emphasizing the distinction between compliance and performance (see Feldman and Smith, 2014). Compliance is following the letter of the law, whereas performance measures whether people are making an extra effort to fulfill the spirit of the law (see Garcia). There are also intermediate levels of behavior between compliance and performance that are sometimes called “beyond compliance” or “extra role behavior” (see e.g. Kim & Mauborgne, 1996).

To Be Specific or Not to Be Specific

Another way to determine the optimal level of specificity is to categorize the relevant factors into individual, situational, and doctrinal. Regarding individual factors, people who are risk lovers might be more likely to exploit ambiguity and misbehave more; in contrast, for risk-adverse people, ambiguity might create a chilling effect, inducing overcompliance. People who are high on the ethical scales measuring morality are less likely to look for loopholes and exploit ambiguity than people who are less ethical. Finally, regulations that target people who might be able to engage in deliberate reasoning may allow for more ambiguity.

Situational factors include the costs to society of individual misconduct: the higher the costs, the more that specificity is needed to prevent that misbehavior. In relatively simple, predictable situations, it might be appropriate to have more specific instructions. Another consideration is the degree of alignment between legal norms and morality or other forms of intrinsic motivation. If they are closely aligned, then we should choose less specificity because people are likely to interpret the law in a way consistent with the law. In addition, the higher the enforcement cost, the greater the need to be specific.

In areas where expertise and moral or consensual power are very relevant, using invisible law[[69]](#endnote-70) might outweigh the costs of informing people that the choice architecture presented to them is based on law. In social issues in which preferences for process are strong and the solutions contested, more weight should be given to process.

**Behavioral Advantages of Specificity**

In this section and the following one, we present the beneficial and adverse effects of specificity in producing desirable behavior in a more analytical way.

The main psychological construct in the behavioral literature that supports the importance of specificity is its effect on goal setting. The theory, which is highly influential in the management literature, claims (and data have shown) that specific, challenging goals result in higher performance than vague ones, such as “do your best.” For example, Locke et al. (1987) reported 24 field experiments which found that individuals with specific, challenging goals either outperformed others or outperformed their own past performance when they had merely been instructed to simply "do their best.” Latham and Yukl (1975) reviewed earlier studies of performance and similarly concluded that people perform better when given specific, complex goals. A classic study conducted by Seijts and Latham (2001) compared the effect of giving people “do your best” instructions versus assigning distal and proximal goals, and found that the combination of goals led to better performance than the former approach. However, the “do your best” approach produced better performance than did the assignment of distal goals only. Therefore, this line of research seems to suggest that when specificity helps provide clear instructions and when it increases feelings of self-efficacy, it is superior to ambiguous standards or instructions. However, it should be noted that even the goal-setting paradigm recognizes contexts in which specific instructions can cause underperformance compared with ambiguous ones. For example, Zhou and Shalley (2004) argued, “It is possible that goals that direct individuals’ attention toward completing more task units would simultaneously direct their attention away from coming up with creative ideas about their work.”

As suggested earlier, when considering the behavioral advantages of specificity, we must account not only for its cognitive but also its motivational effects. Indeed, behavioral research, particularly in behavioral ethics, has found a correlation between a preference for ambiguity and a desire to justify one’s morally questionable behavior. Haisley and Weber (2010), for example, found that people prefer ambiguous risks, when such ambiguity allows them to justify their unfair behaviors, and Dana et al. (2007) found that people are less generous in situations in which they can appeal to moral ambiguity to explain their selfish behaviors. Similarly, Hsee (1995) found evidence that people make choices that satisfy their own preferences at the cost of not completing an assigned goal if they can exploit existing ambiguity about what decision could be considered to achieve the assigned goal (see also Ayal and Gino 2011).

**Behavioral Disadvantages of Specificity**

Much of the literature on the negative effects of specificity on compliance focuses on the attendant level of measurement and monitoring that such specificity enables. Even though the classic study by Lazear (2000) shows that the piece-rate approach, in which people are evaluated based on how many units they produce, results in higher performance than a fixed-wage approach, aspects of the work that are not easily measured suffer from poor performance. workcrowd outse (Bowles, 2008). These inadvertent effects of measurement, such as the measurement paradox and the related multitasking effects problem, are exemplified in other leading theories of empirical economists (Holmstrom and Milgrom 1991, Prendergast 1999).

 Similarly, Falk and Kosfeld (2006) demonstrated the effect of specificity on the principal-agent relationship in experiments in which the principal could either let an agent decide a production amount (ambiguous instruction) or the principal could set a lower limit for production (specific instruction). When a specific lower limit was set, agents produced less than when the principal left the production levels to the agent’s discretion. In post hoc questioning, agents stated that they saw the specified lower limit as a signal of distrust and therefore behaved less cooperatively. Specific instructions also give individuals less room for discretion, creating a situation in which they must be constantly looking for external instructions.

Along those linesChou et al. (2011) showed how feelings of distrust, triggered by an overly specific contract, can lead people to low performance in a long-term contract and serve as an obstacle between the two sides in maintaining a cooperative long-term relationship. These researchers cite a long list of negative psychological mechanisms, mostly related to motivation, which could be triggered when parties create a contract. Their conclusion is that, when there is a less specific contract, employees will exert greater effect, strive for greater efficiency, and act in a more trustworthy way. The authors support these theoretical predictions with a series of experiments in which participants who were given a highly specific contract performed more poorly than those given a less specific contract. For example, the authors compared the effect of a specific versus a nonspecific contract requirement: “notify within one hour” vs. “notify as soon as possible.” The specific term –- “within an hour” – is not just clear and informative but is also framed in a way that completely limits choice; in comparison, the less specific condition—“as soon as possible”—is not only flexible but also gives the other party a very strong signal of respect. It has been suggested that adding some detailed examples of work performance to a vague standard may be a way of achieving the best of both worlds (see Parchomovsky and Stein 2014).

 The most prominent debate regarding the inadvertent cognitive effects of specificity is over the efficacy of using checklists to ensure compliance (Gibbons and Henderson 2013). Most of the literature deals with the checklist as a way to reduce human error, especially in aviation and hospitals, by helping staff maintain self-control in stressful situations. The checklist has gained its fame mainly in the cockpit, where pilots found their routine missions too long and complex to remember. Although the efficiency of the checklist is no longer contested, the way to use and build checklists is still being debated. By making tasks automatic, using a checklist on a daily basis can result in poor performance. Depending on how it is structured, a checklist can impair quality, reduce the expediency of services, and interfere with professional judgment


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## Our Experimental Study

These conflicting views about the effects of specificity serve as the background for our experimental project. We attempted to advance the understanding of optimal specificity by examining its effects on behavior in response to a directive that shares important features with legal policy. First, we examined the effect of specificity on compliance (when a person either does or does not follow a directive) versus performance (when a person acts above and beyond a minimum threshold). Second, we distinguished the controlling, limiting effects of specificity from its instructive, informative effects by comparing the interaction between specificity and monitoring with the interaction between specificity and good faith. We hypothesized that the combination of specificity and monitoring enhances the effect of specificity on compliance but harms performance and trust, whereas the combination of specificity and good faith enhances both the informative goal-setting aspects of specificity and people’s sense of commitment.

To test these hypotheses, we used a 2x2x2 experimental design in which participants were instructed to edit a document (a) either with general or detailed instructions, (b) either with a reference to good faith or without it, and (c) either with monitoring (through sanctioning) or without it. The assignments were designed in such a way that people could engage in various levels of editing (required and above what is required, reasonable and more-than-reasonable care), allowing us to measure both compliance and performance. When participants require information and guidance, as in the case of editing a document, we found that specificity increases performance even beyond what was required of them relative to the vague standard condition.

The dilemma of whether or not to nudge, is highly related to the dilemma of whether or not to use extrinsic motivation

To nudge or not vs. intrinsic / extrinsic

Similar in staying away from intrinsic

Different in its limitations and advantages:

Deterrence (for both good and bad, predictable, costly, resentment)

Nudge (mostly for the unware, predictable, cheaper, less resentment)

Both effects are multi-facets:

E.g. Nudge might change social norm

E.g. Deterrence might change morality

Removed stuff relatied to the psychology of contracts – consider whether I want to discuss that in this chapter

Wegner and bargh (137)

Robert white, *Motivation Reconsidered: the Concept of Competence*, 66 PSYCHOL. REV. 297 (1959).

Keith D. Markman et al., *The impact of perceived control on the impregnation of better and worse possible worlds,* 21 PERS. & SOC. PSYCHOL. BULL. 588 (1995).

Jerry M. Burger, *negative reactions to increases in perceived personal control,* 56 J. PERS. & SOC. PSYCHOL. 246 (1989).

Susan M. Miller, *why having control reduces stress: if I can stop the roller coaster, I don't want to get off,* in HUMAN HELPLESSNESS: THEORY AND APPLICATIONS 71, 80 (Judy Garber & Martin E. P. Seligman eds. Academic Press 1980).

Unconsciousability

In fact, according to some commentators, the use of substantive unconscionability is in major decline in the U.S. *see* Craig Horowitz, *Reviving the law of substantive unconscionability: applying the implied covenant of good faith and fair dealing to excessively priced consumer credit contracts,* 33 UCLA. L. REV. 940 (1986) (reviewing the law of substantive unconscionability).

*The landlords and tenant act 1927,* 19, *see* ATIYAH (s.n 35).

The industrial relation act (1971) (eng.).

For the proposed United States rule, see *model employment termination act*, reprinted inMARK ROTHSTEIN AND LANCE LIEBMAN, EMPLOYMENT LAW 208-19 (1997) (Statutory Supplement).

*See* Steven R. Salbu, *the decline of contract as a relationship management form,* 47 RUTGETS L. REV. 1271 (1995).

C.V

## Unconsciousability

76- Robert A. Hillman, *Debunking some myths about unconcionabillity: A new framework for U.C.C section 2-302*, 67 CORNELL L. REV. 1 (1981).

(Arguing that understanding historic background in the common law would lead to a completely different understanding of the power courts received from this section).

77- Arthur A. Left, *unconcionabillity and the code- the employer's new clause*, 115 U. PA. L. REV. 485 (1967). Though, note that all scholars do not accept this distinction. For a review of this disagreement, see Michael J. Philips, *unconcionabillity and the article 2 implied warranty disclaimers,* 62 CHI-KENT L. REV. 199 (1985)

78- Trudy Nobles Sargent*, unconcionabillity redefined: California imposes new duties on commercial parties using form contracts*, 35 HASTINGS L.J. 161, 163-66 (1983).

79- In fact, one could argue safely that most commentators tend to favor procedural over substantive unconscionability for this obvious reason. For a complete analysis of the rationale behind a distinctive approach to unconscionability, see Richard A. Epstein, *unconscionability, critical reappraisal*, 18 J.L & ECON. 293 (1975).

80- See Harry G. Prince, unconcionabillity in California: A need for restraint and consistency, 46 HASTINGS L. J. 459, 554 (1995) (reviewing the various opinions for and against unconcionabillity

1. This is based on George Lowenstein’s words at a conference at Harvard, May 2015. [↑](#endnote-ref-1)
2. Some of the text in this section is based upon work with Orly Lobel Feldman, Y., & Lobel, O. (2015). Behavioral Tradeoffs: Beyond the Land of Nudges Spans the World of Law and Psychology. In nudge and the law a European Perspective [↑](#endnote-ref-2)
3. Johnson, Eric J., Shu, Suzanne B., Dellaert, Benedict G. C. Fox, Craig, Goldstein, Daniel G., Häubl, Gerald, Larrick, Richard P., Payne, John W., Peters, Ellen, Schkade, David, Wansink, Brian & Weber, Elke U. (2012). *Beyond Nudges: Tools of a Choice Architecture.* [↑](#endnote-ref-3)
4. Schwartz, B. (2004). *The Paradox of Choice: Why More is Less*. New York: Harper. [↑](#endnote-ref-4)
5. Reed, A., Mikels, J. A., & Simon, K. I. (2008). Older Adults Prefer Less Choice Than Young Adults. *Psychology and Aging*, 23, 671–675 s. [↑](#endnote-ref-5)
6. Scheibehenne, B., Greifeneder, R., & Todd, P. M. (2010). Can There Ever be Too Many options? A Meta-Analytic Review of Choice Overload. *Journal of Consumer Research,* 37, 409–425. [↑](#endnote-ref-6)
7. Iyengar, S. S., & Lepper, M. R. (2000). When choice is Demotivating: can one desire too much of a good thing? *Journal of Personality and Social Psychology*, 79(6), 995–1006. [↑](#endnote-ref-7)
8. Kling, J. R., Mullainathan, S., Shafir, E., Vermeulen, L., & Wrobel, M. V. (2011). *Misprediction in Choosing Medicare Drug Plans*. Cambridge, England: Harvard University Press. [↑](#endnote-ref-8)
9. Johnson, E. J., Bellman, S., & Lohse, G. L. (2002). Defaults, Framing, and Privacy: Why Opting in is Not Equal to Opting Out. *Marketing Letters,* 13,5 –15. [↑](#endnote-ref-9)
10. Madrian, B. C., & Shea, D. F. (2001). The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior. *Quarterly Journal of Economics*, 116, 1149–1187. [↑](#endnote-ref-10)
11. Johnson, E. J., & Goldstein, D. G. (2003). Do defaults save lives? Science, 302, 1338–1339. [↑](#endnote-ref-11)
12. Johnson, E. J., Hershey, J., Meszaros, J., & Kunreuther, H. (1993). Framing, Probability Distortions, and Insurance Decisions. *Journal of Risk and Uncertainty*, 7, 35–53. [↑](#endnote-ref-12)
13. I explored this dilemma in an earlier paper on the optimal freedom of contract, which is summarized toward the end of this chapter. [↑](#endnote-ref-13)
14. Sunstein, Cass R. (2013). Deciding by Default." *U. Pa. L. Rev.* 162 p.53. ‏ “In addition, passive choice will, almost by definition, decrease choosers’
feelings of identification with the outcome. In part for that reason, any kind
of default rule, including a highly personalized one, may not create the
kinds of motivation that can come from active choosing. Suppose that
choice architects seek to promote healthy behavior. They might use something
akin to default rules of certain kinds (involving, for example, portion
size and easy availability of certain foods). Such an approach may be
effective, but it may not have certain benefits associated with active choosing,
such as increased self-monitoring and stronger intrinsic motivations.”
 [↑](#endnote-ref-14)
15. Ben-Shahar, Omri & Schnider, Carl E. (2011). The Failure Mandated Disclosure. *University of Pennsylvania Law Review* (647), 159. [↑](#endnote-ref-15)
16. Sunstein defines the expressive function of the law as follows: “At least for purposes of law, any support for a statement should be rooted not simply in the intrinsic value of the statement, but also in plausible judgment about *its effect on social norms*” (emphasis added). *See* Sunstein, Cass R. (1996).On the Expressive Function of the Law. *University of Pennsylvania Law Review.* 144(5), 2021, 2045.

It should be recognized that there are scholars who adopt a language-based approach to what expressive function of the law means. [↑](#endnote-ref-16)
17. Fox, Dov. & Griffin Jr., Christopher L. (2009). Disability-Selective Abortion and the Americans with Disabilities Act. *Utah Law Review.* 845. [↑](#endnote-ref-17)
18. Sunstein, Cass R. *On the Expressive Function of Law*, *supra note* 41 at p. 2025 [↑](#endnote-ref-18)
19. *See* McAdams**,** Richard H. (2000). An Attitudinal Theory of Expressive Law (New and Critical Approaches to Law and Economics). *Oregon Law Review.* (79), 339. *See also* Dharmapala, Dhammika & McAdams, Richard H. (2003). The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law. *American Law & Economic Review 1.* 5(1), 1. [↑](#endnote-ref-19)
20. *See* McAdams, Richard. (2001). *A Focal Point Theory of Expressive Law*. *Virginia Law Review.* 86(8), 1649, 1650-63. For empirical evidence *see* McAdams, Richard H. & Nadler, Janice. (2005). Testing the Focal Point Theory of Legal Compliance: Expressive Influence in an Experimental Hawk/Dove Game. *Journal of Empirical Legal Studies.* 2(1),87, 87-96. [↑](#endnote-ref-20)
21. A typical example of the cost-related account of social norms can be found in Cooter’s analysis: “With group pressures, an increase in an act’s popularity lowers its cost. Imposing a non-legal sanction on someone often involves a risk of retaliation, which decreases as more people obey the norm. The risk of a non-legal sanction often increases as more people obey the norm, thus *lowering the relative costs of conforming to the norm.*” (emphasis added), *see* Cooter, Robert. (2000).Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms. *Virginia Law Review*. 86(8), 1577, 1585.. *See also* Kahan, Dan M. (1997). Social Influence, Social Meaning, and Deterrence. *Virginia Law Review,* 83(2), 349, 352-361. [↑](#endnote-ref-21)
22. In a comprehensive attempt to define the expressive function of the law, Anderson and Pildes propose that: “Expression refers to the ways that an action or a statement (or any other vehicle of expression) manifest a state of mind.” *See* Anderson, Elizabeth S. & Pildes, Richard H. *Expressive Theories of Law: A General Restatement*, *supra note* 41 at p. 1506. [↑](#endnote-ref-22)
23. *See* Adler, Matthew D, *Expressive Theories of Law: A Skeptical Overview, supra note 41* for a thorough discussion of the expressive function of the language of the law. Adler thinks that the work of LEN scholars on norms cannot be defined as expressive, since they do not focus on the language of the law. [↑](#endnote-ref-23)
24. Mertz, Elizabeth E. (1995). Legal Language: Pragmatics, Poetics, and Social Power. *Annual Reviw of Anthropology.* (23),435. [↑](#endnote-ref-24)
25. This approach has been used in a wide variety of legal doctrines. *See* Anderson &Pildes, *infra* note 41, at p. 1532. Its most practical relevance is in the contexts of employment and constitutional law where courts strike down laws that express unconstitutional purposes or attitudes. Other notable areas in which the expressive functions of the law have been taken into account include voting rights, *see* Pildes, Richard & Niemi, Richard. (1993). Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno. *Michigan Law Review.* 92(3); laws regarding homosexuality, (*see* Van Der Burg, Wibren. (2001). The Expressive and Communicative Functions of Law. *Law & Philosophy.*  20(1), 31.) especially with regard to signaling moral standing of the state through existing, though not enforced, laws and anti-discrimination laws. Another interesting and important area in which expressive theories of law have been featured is criminal punishment. Significant in this field is the work of Kahan at *supra note 44* regarding the expressive meaning of criminal sanctions (For an historic perspective, *see* Feinberg**,** Joel. (1965). *The Expressive Function of Punishment.* Oxford, England:Oxford University Press. This forms the foundation of his theory highlighting the importance of shaming in criminal punishment. According to the shaming theory, fines and community service are problematic as criminal punishments because they carry no shaming factors. [↑](#endnote-ref-25)
26. For a review of the literature on social norms and its effect on intrinsic motivation, see Yuval Feldman, The expressive function of Trade Secrets Law JELS 2009 [↑](#endnote-ref-26)
27. Steffel, M., Williams, E. F., & Pogacar, R. (2016). Ethically Deployed Defaults: Transparency and Consumer Protection Through Disclosure and Preference Articulation. *Journal of Marketing Research*, 53(5), 865–880; Loewenstein, G., Bryce, C., Hagmann, D., & Rajpal, S. (2015). Warning: You are about to be Nudged. *Behavioral Science & Policy*, 1(1), 35–42. [↑](#endnote-ref-27)
28. But see Feldman, Y., & Halali, E. Regulating “Good” People in Subtle Conflicts of Interest Situations. *Journal of Business Ethics*, 1-19, which demonstrates the greater efficacy of explicit measures, even in subtle contexts. [↑](#endnote-ref-28)
29. See supra note \_\_ [↑](#endnote-ref-29)
30. See Feldman, Y., & Smith, H. E. (2014). Behavioral Equity. *Journal of Institutional and Theoretical Economics JITE*, *170*(1), 137-159, for a discussion of the advantage of ambiguity in deterring opportunistic individuals. [↑](#endnote-ref-30)
31. Fox, C. R., Bardolet, D., & Lieb, D. (2005). Partition Dependence in Decision Analysis, Resource Allocation, and Consumer Choice. In: R. Zwick, & A. Rapoport (Ed.). *Experimental business research*, volume III. Springer, Dordrecht, 3:229–251 [↑](#endnote-ref-31)
32. Costa, D. L., & Kahn, M. E. (2010). Energy conservation nudges and environmentalist ideology: evidence from a randomized residential electricity field experiment. National Bureau of Economic Research, Inc, Cambridge, MA. (NBER Working Paper No. 15939 [↑](#endnote-ref-32)
33. Harackiewicz, J.M. & Sansone, C. (2000). *Rewarding Competence: The Importance of Goals in the Study of Intrinsic Motivation*, *in* Sansone & Harakiewicz (Eds.) *Intrinsic and Extrinsic Motivation: The Searhc for Optimal Motication and Performance* (p. 79103); Deci, Edward L. and Ryan, Richard.M. (2000). The “What” and the “Why” of Goal Pursuits: Human Needs and the Self-Determination of Behavior. *Psychology Inquiry* 11(4), 227. [↑](#endnote-ref-33)
34. Deci, Edward L., Koestner, Richard, and Ryan, Richard M. (1999). A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation. *Psychological Bulletin.* 125(6), 627; Kasser, Tim & Ryan, Richard M. (1996). Further Examining the American Dream: Differential Correlates of Intrinsic and Extrinsic Goals. *Personality and Social Psychology Bulletin*, (22) 280. [↑](#endnote-ref-34)
35. Feldman, Y., & Lobel, O. (2009). The incentives matrix: The comparative effectiveness of rewards, liabilities, duties, and protections for reporting illegality. *Tex. L. Rev.*, *88*, 1151. [↑](#endnote-ref-35)
36. *See, e.g*., Ernst Fehr & Simon Gachter, *Do Incentive Contracts Undermine Voluntary Cooperation?* Univ. of Zurich, Inst. for Empirical Research in Econ., Working Paper No. 34, Available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=313028; Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46(4-5) European Economic Review 687, 724 (2002); Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 Nature 137 (2003). For a general review *see*Bruno S. Frey, *Not* Just for the Money: An Economic Theory of Personal Motivation (1997); George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97(4) the Quartelyjournak of Economics 543 (1982); Bruno S. Frey &RetoJegen, *Motivation Crowding Theory: A Survey of Empirical Evidence* Ctr. for Econ. Studies & Info Inst. for Econ. Research, Working Paper No. 245 (2000) Available at SSRN: [http://ssrn.com/abstract=203330](http://ssrn.com/abstract%3D203330). [↑](#endnote-ref-36)
37. Richard M. Titmus, The Gift of Relationship: From Human Blood to Social Policy (1971) argues that monetary payments to givers of blood could diminish the amount of blood given voluntarily. [↑](#endnote-ref-37)
38. *See also* Feldman, for Love or Money (2011). [↑](#endnote-ref-39)
39. Deci, Koestner and Ryan at *supra* note 65*See also* Feldman (2011).

*See also* Uri Gneezy& Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115(3) *The Quarterly Journal of Economics*791 (2000). [↑](#endnote-ref-40)
40. *See also* Uri Gneezy& Aldo Rustichini, supra note 68.

94In this case, intrinsic motivation was measured on a scale of environmental commitment as well as sensitivity to the distance from one’s home to a recycling bin.>Where does this cite belong?> [↑](#endnote-ref-41)
41. *See* Feldman, Yuval and Lobel, Orly. (2010). The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality. Texas Law Review,88(6), 1151. [↑](#endnote-ref-42)
42. Feldman, Y., & Perez, O. (2009). How law changes the environmental mind: An experimental study of the effect of legal norms on moral perceptions and civic enforcement. *Journal of law and society*, *36*(4), 501-535. [↑](#endnote-ref-43)
43. Connect here to the work on the context of moral identity [↑](#endnote-ref-44)
44. These included factors such as moral outrage, legitimacy, and perceived risk from the misconduct in this factor. [↑](#endnote-ref-45)
45. Compare with Milkman, Chugh & Bazerman (2009), who propose the idea that there is a need to match the automaticity of the intervention and the automaticity of the underlying process that you attempt to modify. [↑](#endnote-ref-46)
46. But this is not the case with regard to blood donation. [↑](#endnote-ref-47)
47. Discuss Tirrole; Benabu. [↑](#endnote-ref-48)
48. Refer to discussion above. [↑](#endnote-ref-49)
49. It should be noted that, when speaking about trade secrets, the focus here is on the narrow definition of trade secrets, focusing on the core proprietary knowledge of a given company. Elsewhere, [one of us Orly Lobel, Talent Wants to be Free (2013)] has argued for the importance of information spillover between firms. In that regard we wish to narrow our argument for the core knowledge of a firm, rather than the types of information which would be better off shared among companies. See also, YuvaL Feldman, " The Expressive Function of the Trade Secret Law: Legality, Cost, Intrinsic Motivation and Consensus" 6(1) Journal of Empirical Legal Studies, 177 (2009). [↑](#endnote-ref-50)
50. This argument is obviously oversimplified and some tuning is highly needed here. [↑](#endnote-ref-51)
51. Some of the text in the following section is based on earlier work on the therapeutic approach to contracts. [↑](#endnote-ref-52)
52. 20- Melvin A. Eisenberg, *The Limits of Cognition and the limits of contracts,* 47 Stan L. REV. 211 (1995) (attempting to draw an underlying theory of contract theory which takes into account human limits of calculating risk as a source for limiting freedom of bargaining and phrasing individualistic terms in several kinds of contracts).

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 Richard P. Latrick, *motivational factors in Decision Theories: The Role of Self-Protection,* PSYCHOL. BULL. 133, 440 (1993).

Russel korobkin, *inertia and preference in contract negotiation: The Psychological Power of Default Rules and Form Terms,* 51 VAND. L. REV. 1583 (1998).

Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of litigation behavior,* 1999 U. ILL. L. REV. 43. [↑](#endnote-ref-53)
53. Therapeutic approach to the freedom of contracts Touro law review 2002) [↑](#endnote-ref-54)
54. Suzanne C. Thompson, *Naturally Occurring Perception of Control: A Model of bounded flexibility*, in control motivation and social cognition 74-93 (Gifford Weary et al eds., 1993) [hereinafter control motivation and social cognition]. [↑](#endnote-ref-55)
55. Suzanne Folkman, *The personal control and stress and coping processes: A theoretical analysis*, 46 j. pers. &soc. psycho. 839 (1984). [↑](#endnote-ref-56)
56. [↑](#endnote-ref-57)
57. 100- for an application of the above claim to some more specific circumstances, see Inna D. Rivkin& Shelley E. Taylor, the effects of mental simulation on coping with controllable stressful events, 25 PERS. & Soc. PSYCHOL. Bull. 1451 (1999).

104- Suzanne C. Thompson, *will it hurt less if I can control it? A complex answer to a simple question.* 90 PSYCHOL. BULL. 89 (1981). [↑](#endnote-ref-58)
58. Russell J. Dlton, *Citizenship Norms and the Expansion of Political Participation*, 56(1) Political Studies 76(2008). [↑](#endnote-ref-59)
59. Edward L. Deci& Richard M. Ryan, *self- determination Theory: when Mind Mediates Behavior*, 1 Journal of Mind& Behavior 33 (1980); Myles I. Friedman & George H. Lackey, Jr., The Psychology Of Human Control: A General Theory Of Purposeful Behavior (1991). [↑](#endnote-ref-60)
60. [↑](#endnote-ref-61)
61. [↑](#endnote-ref-62)
62. [↑](#endnote-ref-63)
63. The case of default rules studied in the previous experiment also entails a situation in which rights are allocated without negotiations. Nevertheless, we assume that the lack of control in the standard-form setting is more extreme because in this case, control is shifted to the opposing party, whereas in a default-rule setting, control is shifted away from both parties to a third entity. Furthermore, unlike the case of default rules, there is no practical way to contract around a term in a standard-form contract. [↑](#endnote-ref-64)
64. The originator of this theory is Leon Festinger in his seminal book *A Theory of Cognitive Dissonance*. For a broader account*,* seeAlbert Bandura, Social Foundations of Thought and Action: A Social Cognitive Theory, 469–70 (1986) (reviewing his pioneering work on the intersection between self-autonomy and motivation).For a conceptual discussion of the contribution of choice to factors such as goal performance and persistence, see Richard M. Ryan & Edward L. Deci,*Self-Regulation and the Problem of Human Autonomy: Does Psychology Need Choice, Self-Determination, and Will?*,74J. Personality 1557,1562–68(2006). [↑](#endnote-ref-65)
65. In the original study by Festinger, participants who received little compensation for engaging in a boring activity were more likely to think that the activity was interesting and rewarding in comparison to those who were highly compensated for the activity and hence did not need to justify to themselves their choice to engage in that activity. Leon Festinger& James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. Abnormal & Soc. Psychol. 203, 207–08 (1959). For extensions of the theory to other domains of decision making, see, for example, William M. Goetzmann&NadavPeles, *Cognitive Dissonance and Mutual Fund Investors*, 20 J. Fin. Res. 145, 147–50 (1997) (discusses investors’ misperceptions of the past performance of their mutual funds as a personal justification for inaction). [↑](#endnote-ref-66)
66. *Cf., e.g.*,Cary Coglianese, Response, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. Envtl. L.J. 386, 435–36 (2001) (discusses how cognitive dissonance may improve evaluation of a law when community members have set forth effort towards its framing). [↑](#endnote-ref-67)
67. Are all contractual obligations created Georgetown law journal 2010. [↑](#endnote-ref-68)
68. Based on my work with Smith and Boussalis, Regulation and Governance 2017. [↑](#endnote-ref-69)
69. Steffel, M., Williams, E. F., & Pogacar, R. (2016). Ethically deployed defaults: Transparency and consumer protection through disclosure and preference articulation. Journal of Marketing Research, 53(5), 865–880. Loewenstein, G., Bryce, C., Hagmann, D., & Rajpal, S. (2015). Warning : You are about to be nudged. Behavioral Science & Policy, 1(1), 35–42. [↑](#endnote-ref-70)