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## Introduction

Chapter \_\_ concentrated on individual differences; the empirical and behavioral complexity associated what “good” people means. In the previous two chapters, we reviewed the traditional and non-traditional instruments that policy makers can use to change human behavior. We outlined the pros and cons of traditional intervention methods which focus mostly on motivation to comply (e.g. deterrence vs. morality) and non-traditional methods that focus on cognition (e.g. nudges vs. debiasing). In this chapter, we will focus on the enforcement dilemmas between the different interventions, meaning the more complex view of people’s motivations and perceptions toward the law.

# The purpose of this chapter is to examine how policy makers can make decisions on how to move forward with designing the optimal policy mixture of behavioral change, given all of these complexities. This would be done by taking all of the previous information on the ability to change the behavior of different people with different levels of cognition and motivation toward the law though formal and informal means, and to recognize the trade-offs between competing policy goals to strike the optimal balance. Despite taking an approach of optimization, the focus of this paper is not only on efficacy but takes a broader perspective.

It is important to differentiate between two additional concepts – behavioral trade-offs and behavioral enforcement dilemmas. The difference between them is subtle but important to recognize as we review examples that we believe to be crucial for the future of behavioral based regulation.

In **behavioral trade-offs** we refer to a normative decision that policy makers need to make with regard to the goals they would like to promote. The behavioral literature role in such context is to recognize contexts in which the behavioral advantages of one policy create a disadvantage for other aspects of the policy or for other segments of the population. For example, a normative decision that policy makers need to make is to what extent they are interested in making a long-term and/or a short-term effect on people’s behavior. The decision whether we care for the long term or the short term goal is a normative one, and might be influenced by the type of legal doctrine, the policy goals, etc.

The second concept is the **behavioral enforcement dilemma**, which usually follows the recognition of the existence of behavioral trade-offs. In the enforcement dilemma, the behavioral consequence of each legal intervention is considered relative to other relevant legal interventions after the knowledge on the trade-offs is known with regard to each intervention.

The difference between them is exemplified in the following context: the behavioral trade-off would examine the relative efficacy of using nudges which might have an effect on people even without their full awareness and interventions such as incentives which requires deliberation from people. For example, default rules might would work worse from a system 2 perspective in terms of long-term commitment, but might increase the number of people who decide to engage in a desirable behavior and vice versa[[1]](#footnote-2). The enforcement dilemma will ask whether to use default rules in the particular context of organ donation. The dilemma will be based on the need to balance the advantages and increase in the percentage of the people who would donate organs, relative to the fear that, in this context, the decline in long term commitment might have some inadvertent effects on the quality of the donation.

For example, an important factor to consider is sustainability, which examines not only the ability to change short-term behavior, but rather the durability of the behavioral change. This concept was examined by us in chapter \_\_ when discussing the ability of incentives to change behavior, as well as with regard to nudges. Another important trade-off that we will examine is related to whether the law should be announced as a proponent of the expressive law theory or hidden as per the nudge approach.

An additional tradeoff is related to the question of whether we need to care about peoples’ reasons compliance. For example, is it important whether people pay taxes out of patriotism or fear? Naturally an intervention like nudges doesn’t even attempt to care about people’s motivation. The behavior in question is likely to determine how much we should care. This might be one of the differences between corporations and states; corporations simply want people to cheat less and the state that wants people to pay taxes, whereas states might not just want to cause employers to hire more minorities, but rather actively overcome their biases and consciously respect the contribution of minorities to the workforce. Possibly, nudges should be saved for things 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 interventions such as legitimacy and fairness, we need to find the proper mixture between the type of legal incentives used and the type of methods that are aimed at people’s intrinsic motivation such as the legitimacy, procedural justice and morality. Given the current focus of the book on states’ attempt to deal with both deliberative and non-deliberative choices, the balance needs to account for an additional dimension and thus, becomes more challenging and complex.

The structure of this chapter is based on the premise that the balance between extrinsic and intrinsic motivation seems to have many similarities, albeit in some context their roles are reversed.

Regarding the intrinsic/extrinsic motivation debate, the state needs to know what the intrinsic motivation of the individual is, in order for it to know what legal instruments to use to target that type of motivation. However, when it comes to the explicit/implicit dimension characterizing the legal instrument, it seems that the main information that is needed is related to people’ state of awareness in the given situation.



In both cases, the state can have some effect on people, either through a process of education and internalization, or through processes of providing people with information and awareness to the consequences of their behavior. To solve the dilemma in an informed way, one would have to know the tradeoffs that each intervention creates and strike the ideal balance in each situation.

Combining the intrinsic/extrinsic motivational dimension with the awareness/unawareness cognitive dimension will be discussed further in the concluding chapters of the book. For example, the extent to which questions associated with intrinsic motivation to obey such as fairness and justice, are relevant for the effectiveness of nudges. From a different direction, it is very likely that instruments like incentives and punishments are likely to serve as accountability mechanisms which would make them affect the likelihood of people engaging in unethical biases, merely by forcing them to move from non- deliberative mind set to a deliberative one.

## Current research



The attempt to identify the behavioral trade-offs is far from new. A respected groups of scholars have identified some important tradeoffs in the behavioral regulation of behavior[[2]](#footnote-3).

For example, they discuss the optimal number of options given to participants, where more options are good for autonomy but bad for the ability of the individual to make choice[[3]](#footnote-4). When people have fewer choices, they are also more likely to be happy about the choices they do make afterwards[[4]](#footnote-5). Others examine the optimal amount information needed for people to make health plan choices[[5]](#footnote-6). This notion is highly related to the concept of simplicity advocated by Sunstein and more recent books on simplicity.

Sunstein and Tahler recognize that there is also an ability to take into account a differentiated approach to number of choice. They focus on the work of Reed et al[[6]](#footnote-7) who show that older people care less about choice and autonomy relative to younger adults.

They also take into account the competing effects that complexity would have on people[[7]](#footnote-8). They tend to believe that many people would like to receive no more than a few options which will allow them to feel that they are making a reasonable choice.

For example, one of the most successful lines of research in using people’s non-deliberative choice is related to the default rule argument which was shown in various contexts to be highly influential over people’s choices, as in the context of marketing[[8]](#footnote-9) pensions[[9]](#footnote-10), organ donation[[10]](#footnote-11) and insurance[[11]](#footnote-12)

## Behavioral Tradeoffs[[12]](#footnote-13):

# Outcome vs. Process

The basic outcome vs. process dilemma is that, when we focus on making the process as meaningful as possible to increase the autonomous and expressive rationales, we might reduce the chance that people might make the choice we are interested in.[[13]](#footnote-14) This dilemma was examined also in a 2013 paper by Sunstein with regard to default rules:[[14]](#footnote-15)

“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”

As will be developed in more detail toward the end of the chapter, This behavioral tradeoff between process and outcome, is in many aspects the central one and it could be decided based on the type of behavior we are trying to encourage.

When discussing behaviors in which policy makers are interested in encouraging people to make initial choices, and the behaviors that follow are either short term or relatively simple, there is no need for any process of deliberation about the endurance and sustainability of compliance. However, in behaviors, which require intrinsic motivation, qualitative performance and long term commitment, there is greater need for explicit intervention, people’s deliberation and ideally a change in peoples’ intrinsic motivation toward the behavior in question.

# Long term vs. short terms behavioral change

A derivative trade-off to outcome vs. process is therefore related to the difference between the long term and short effect of the regulatory interventions. Lobel and I criticized the nudge argument, arguing that less attention should be given to tools such as increased access to information and more effort should be made to ensure that consumers arrive at the “right” decisions concerning financial and health practices.[[15]](#footnote-16) This approach neglects the behavioral implications for long-term perceptions and sustainability of policy. With greater focus on high durability of an intervention, there is a natural emphasis of preferring a process-oriented intervention which allows for a reflection by people which is more likely to lead to a sustainable change.



Clearly, any attempt to change people’s intrinsic motivation might require a lengthier process, which might face resistance by people. On the other hand, with a change in peoples’ intrinsic motivation, there is a greater chance the behavioral change will be sustainable and with greater willingness to pay.

# Invisible vs. Expressive Law

Another trade-off, (discussed by Lobel and I) which could be seen as being derived from the outcome vs. process argument, is the question regarding the optimal level of exposure of the general public to the legal instrument.

The main debate between expressive law and the nudge approach is whether the law should be made public to people and hence trigger various expressive mechanisms to change and reflect the norms and values of a given society. An alternative approach is whether the law should be invisible; operate behind the scenes to facilitate people choices without them. In my work with Lobel on behavioral tradeoffs and nudges, we have examined the relationship between the visibility of the law and its ability to lead to an expressive effect.

The literature on expressive law and on social meaning see law’s language and visibility to the public as one of its most important tools[[16]](#footnote-17). They argue that making something into a law by using certain words and context can shape the meaning of important concepts such as parenthood, safe driving and good citizenship. The expressive function of the law can help people determine what the prevailing social norm is[[17]](#footnote-18), how your behavior will be viewed if you violate the law, the best course of action one needs to coordinate behaviors with others,[[18]](#footnote-19) and the reputation costs for engaging in certain behaviors[[19]](#footnote-20). A large portion of law and society literature focuses on the symbolic effects of law on society and the role of legality in social change. This view takes a macro perspective on the role of legality as it shapes cultural changes in society, using terms such as “social change,” “symbolic politics,” “evolution of social values” and “legal consciousness.” Some legal scholars focus on language advocated by scholars such as Anderson & Pildes[[20]](#footnote-21)and Adler.[[21]](#footnote-22) Recognizing the declarative and constitutive cultural powers of law, many legal scholars have suggested that when examining the effects of law, one should focus not only on its operational functions but also on its declarative purpose and responsibilities.[[22]](#footnote-23)Laws influence people both by making statements and by reproaching them, using the language of the law[[23]](#footnote-24). In other words, we use laws to affect social norms, and to change judgments and behavior.[[24]](#footnote-25)Language is an essential and creative role in social change and the legal language plays an important role in the struggle over power in the law and through it.[[25]](#footnote-26)



In contrast to the expressive law literature, the nudge based approach to regulation tends to focus on simplicity and flattening of policy messages. The law according to the nudge approach needs to be almost unnoticed, people need not even know that a given action is illegal. According to the nudge approach the role of law is not to shape people’s values but rather to lead people to make the right choices with as limited as possible deliberation and awareness to the fact that they are making a choice as well as to the fact that the law is behind these initiatives. For example, the first approach is to announce that cigarettes are bad for your health and place signs for them everywhere. The second approach is to hide cigarettes so that no one would see them or think about them. Naturally, one could think of limitation of the above arguments. 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]](#footnote-27).   
 Hence The simpler nudge approach advocated by Sunstein and others not only limits the participation process of people in determining the decisions they take, as the previous argument has suggested, it is also changes the function of law from shaping the social meaning of people’s behavior to simply altering their decision without them knowing that the law is even operating in the background. In areas such as health, consumerism, publicizing that the law is behind the choice might even harm people’s ability to make mindless choices.

A possible compromise, not without costs, is to create a public discourse on the usage of certain nudges. In theory, is such a way there is satisfaction of the expressive of law, since a public discourse is being launched beforehand. At the same time, the effect of hidden behavior is achieved as well, since in the immediate time prior to the action, there is less awareness to the nudge in the time that it happens. Indeed, recently a related discussion was raised by a few scholars on the whether informing people on the usage of nudges might harm their efficacy. On its face, if someone is being told that unhealthy food is purposefully being put in a certain place in a cafeteria, one would think that the efficacy of such move will be limited. Nonetheless, the current research on these topics seems to suggest a much more complex picture with limited impact of informing the nudge’s efficacy[[27]](#footnote-28).



# Enforcement dilemmas

Following the discussion on the actual effect of an intervention choice demonstrated on, what was defined as, behavioral trade-offs, enforcement dilemmas put the trade-off in a context in which we prefer to emphasize one aspect of the trade-off over others.

## Changing peoples’ common non-deliberative decisions or on peoples’ deliberative but uncommon changes?

The most basic enforcement dilemma, which is based on the above trade-offs between process and outcome, is related to what do we want to achieve? To change the behavior of the situational wrong-doing of more people or of the deliberative and presumably more severe misconduct associated with fewer “bad” people. For example, in the ethical context, states might need to decide what to prioritize in their enforcement practices; should a state make a decision to change harsher misconducts or more benign misconducts? Presumably on average, the first type of misconduct, especially if it is a more elaborate action and is likely to raise more awareness, is more likely to be conducted intentionally. In contrast, minor and less blatant misconducts are more plausibly conducted by people without full awareness of the wrong-doing of their behavior. Thus, for example, an implicit legal instrument is more likely to be effective when dealing with subtle unethical behaviors which are likely to be performed by situational wrong-doers with limited awareness[[28]](#footnote-29). The behavioral ethics theories we have reviewed predict that when the conflict of interests is blunt, good people are less likely to engage in motivated reasoning. Hence, the dilemma the state faces is whether to focus more on the common type of things that situational wrong-doers are more likely to do or on the more severe but rare misconducts that intentional wrong-doers are likely to engage in.

The basic intuition of the legal policy maker, is to invest more in monitoring as the misconduct is more severe (given its likely correlation with greater harm to society). Based on works with Lobel, it seems that in areas where the misconduct is likely to be viewed, at least by some of the 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 herself. The same argument seems to apply in a greater sense with regard to the good/bad people dichotomy where greater focus on extrinsic measures should be used in areas where more percentages of the population are unlikely to explicitly be interested in pursuing the behavior for internal reasons. In crime prevention, we focus on the worse person, as it is too costly if even one person will commit the crime (e.g. murder), even though the majority of the population will restrained from doing it based on their moral constrains. For those few we must have the most severe punishments. However, when we speak about incentivizing whistleblowers, we don't focus on the worst members of society but rather on better ones. Furthermore, in many cases incentivizing one individual to behave in a cooperative way is enough. For example, we have seen from the research with Halali on regulation of conflict of interest[[29]](#footnote-30), people were less corrupt where, although they had more to gain from corruption, they faced higher penalties if caught. We raised a similar argument in the context of the corrupting effect of money, where good people would know to avoid the effect of money but not the effect of prestige, albeit the legal policy maker would invest more resources in the enforcement of monetary based corruption.

The above argument could be rephrased using different words to suggest the following: The more we are interested in preventing the genuinely bad behaviors, where people intuitively recognize their wrongness, the more we are likely to focus on behaviors that fewer people are actually likely to engage in. This is true for all three types of mindsets. For the calculative mindset, wrong-doing behavior are more likely to be enforced and punished. For the situational wrong doers it is harder to come up with justifications for straightforward morally bad behaviors. For erroneous mindless mindset, it is more likely that such behavior will raise the alarm and prevent the blind spot from continuing.

## Uniform vs. differentiated regulation:

An even broader enforcement dilemma that lies at the heart of the law is how the regulator can make sure he is helping as many people with the regulation initiatives while harming as little of the population as possible. The question is whether we should attempt to regulate both good and bad people using the same policy or whether to engage in differentiated regulation. In chapter \_\_\_, which focuses on individual differences, we have examined various relevant individual differences and the extent that they could help us create a policy which will be sensitive to these differences. However, at this point we would like to focus only on the one dimension which is more context specific – the level of commitment of individuals toward a given policy maker.



On one hand, if we focus on the lowest common denominator, where we assume that all people have the same motivation, we decrease uncertainty as we ensure some minimal compliance. However, by adopting such policy, we might crowd out the motivation of those intrinsically motivated people. The lowest common denominator approach supports the one policy fits all approach. On the other hand, much of the literature and arguments, we have made so far, suggest that there are many types of motivations and levels of awareness toward compliance, proposing that a unified approach might be destructive to some of the people with more intrinsic motivations to comply.

Should the variation in people’s motivation lead us to take an across-the-board approach where we focus on the motivation, or should we invest the required energy in finding approaches which will be sensitive to the specific motivation of individuals? Who should be targeted - those who are internally committed or those who are not? The connection between differentiated regulation and enforcement dilemmas has been explained based on the lack of or even destructive effect of regulations on certain people (e.g. crowding out).

As evident from the above discussion, an important part of the enforcement dilemma is its varied effect on the different functions of the individual, as well as on different segments of the population. When it comes to different segments of the population, the question that we need to ask is whether a differentiated regulation is possible and would improve the situation relative to a uniform regulation.



In many accounts, the laws’ inability to determine whether we are dealing with good or bad people is one of the major enforcement puzzles which puts a huge shadow over the ability to use the knowledge presented so far in the book in a constructive way. The argument which we advocate for is that understanding the behavioral effects of law on different segments of the population and recognizing the pros and cons of each regulatory approach is likely to increase the ability to analyze in a more predictable way the effect of law on a given population.

Below we will examine the possibility that, by creating ambiguous rules that make it hard for bad people to evade the law,[[30]](#footnote-31) we might be responsible for making good people move to the bad side. Furthermore, in many contexts, the good people are those who are more likely to suffer from an approach of law which originally focused on bad people. Being able to build mechanisms which will target both type of populations would highly advance the field.

Another example for the fact that there is no one-size-fits-all policy could come from the interaction between the choice architecture and people’ strength of preferences. As seen in many of the other studies we have conducted, when people have a strong intrinsic motivation, external interventions are not as important. In that regard, one could say that the arguments against behavioral interventions which are rooted in paternalism are somewhat moderated by the fact that it is the only strong argument for those who are not very capable of actually making the choices themselves[[31]](#footnote-32).

Finally, an additional example for the no one-size-fits-all policy argument, could be seen in the work of Costa and Kahn on energy conservation, where informing people of their relative energy consumption had a different approach on people based on their political views. Liberals were likely to decrease their usage while Conservatis were more likely to increase their usage.[[32]](#footnote-33)

## The Intrinsic vs. extrinsic motivation dilemma.

With the growing recognition that intrinsic motivation is likely to lead to improved results, the policy maker is challenged to identify how to find the right balance between using the right motivation and avoiding creating greater evasion.

An important area within the psychology literature investigates the interplay between extrinsic and intrinsic motivation.[[33]](#footnote-34) People often vary in their internal level of commitments to ethical behavior.[[34]](#footnote-35) Intrinsic motivation is the sense of morality inherent within the individual while extrinsic motivation relies on incentives and rewards.[[35]](#footnote-36)

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 the regulatory incentives, the crowding out theory predicts that external incentives that utilize monetary rewards or punishments may undermine intrinsic motivations.[[36]](#footnote-37) 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 eroding altruistic blood donations.[[37]](#footnote-38)

Deci found that tangible rewards undermine intrinsic motivation for a range of activities.[[38]](#footnote-39)Many of the studies on the crowding out effect of incentives and on enforcement are summarized by Bowles (2008).[[39]](#footnote-40) Along those lines, Falk and Kosfeld (2006), demonstrated this broader point using a principal-agent experiment in which participants could either let the agent decide the goods production amount or set a lower boundary. In settings in which a lower boundary was set, agents produced less than in those in which the principal left the decision about the production amount entirely in the hands of the agents. In *post hoc* questioning, agents said that they regarded the lower boundary as a sign of distrust and were therefore less cooperative.

Following the “W effect” described by Frey et al[[40]](#footnote-41) with regard to magnitude, there is room to expect that with varying levels of intrinsic motivations among individuals, various sums of money will have different effects on each subgroup. In a previous work with Lobel on how to incentivize whistle-blowers[[41]](#footnote-42) we demonstrated that those who were intrinsically motivated were not significantly affected by the framing of legal incentives, while those who were low on intrinsic motivation, were affected by it. A somewhat different finding regarding the differences in perception of incentives by those with high and low motivation comes from work with Perez where we have demonstrated that those who were low on intrinsic motivation were more likely to prefer deposits to fines, while the opposite was true for those who were high on intrinsic motivation[[42]](#footnote-43).



In the last chapter of the book, we will focus on the taxonomies of different regulation and will use the different factors discussed here to offer some tentative solutions regarding which type of intervention will preferred in specific contexts. These decisions will be made based on the proportion of cooperators needed, the level of intrinsic motivation and more.

# Taxonomies

The above discussion focused on the different tradeoffs and enforcement dilemmas, particularly when it comes to the unified vs. differentiated approach. Now I will focus on offering a set of taxonomies and techniques with which to advance the ability of psychology to offer legal policy makers with a set of considerations to take into account when designing legal policy.

Overall, the book proposes a framework for a taxonomy of some of the relevant factors that must be accounted for when attempting to implement and enforce a policy initiative (e.g., type of regulated behavior, target population, the cost of enforcement, the cost of non-compliance, and proportion of the population whose cooperation is required for successful implementation of the mechanism). It seems a natural continuation of the book on behavioral ethics that we match the instrument to the behavior in question[[43]](#footnote-44).

### What is the nature of the 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 the need for sustainability, given the high cost of enforcement? We have discussed the importance of taking into account the behavior the policy-maker wishes to promote. The quality of the behavioral dimension makes the intrinsic motivation a more important factor. In that regard, one cannot excel in recycling or even in organ donation[[44]](#footnote-45); for the most part, we care only about one’s activity level and willingness to pay. In various other legal contexts, however, the quality of the behavior is more important. As in whistle-blowing or even blood donation, where the level of commitment to the behavior is critical, we might give more weight to the decision process and not just the outcome. Furthermore, in legal contexts, where 'extra-role' activity is desired, the cost of harming intrinsic motivation increases and one should be more cautious in introducing extrinsic motives or nudges which are less likely to lead to an internal change in one’s motivation.

### What’s the needed durability of the behavioral change, legal policy makers try to change.

Following the argument about the quality of the behavior, the nature of the decision making, whether it involves a one shot choice or choices repeated over time, behavior will help determine the spot on the spectrum. In contexts like a pension plan, where once the decision has been made, people are less likely to reverse it. Sustainability is less important and hence getting people to make the right choice (outcome being the dominant focus) might be more important than in areas like health or nutrition, where choices need to be reaffirmed on a daily basis.

### Cooperation of what portion of the target population do we need?[[45]](#footnote-46).

One of the most important factors to take into account is the type of population, whether it is a population which is likely to have intrinsic motivation toward the behavior, the legal policy attempts to regulate it differently. This is naturally becoming more challenging in areas where we don’t know enough about how much of the target population we need when the level of intrinsic motivation is heterogeneous[[46]](#footnote-47). With higher percentage of the population holding a high intrinsic motivation, the policy maker could rely on non-coercive explicit measures on an increase in the proportion of softer types of implicit intervention on the other hand.

In some of my previous studies I have focused on three types of activities: recycling, whistle–blowing, and divulgence of trade secrets. These three examples will be used to help us think about the importance of being aware of legal contexts when the policy-maker attempts to decide how to change the behavior of a given population with regard to the a given doctrine.



In the area of trade secrets[[47]](#footnote-48) everyone needs to be motivated in order for the secret not to be disclosed, as the few people who will not be affected by the legal instrument may make it futile to keep company knowledge proprietary. In that context, we have to focus on the lowest common denominator, meaning that those with the lowest level of intrinsic motivation to be loyal to the company should be the focus of the regulation. Since variation in motivations is likely to increase the chance of making mistakes, and mistakes are costly in such direction, a greater emphasis should be given to making sure that at the least we get minimal compliance by people.

A counter example might be seen in the area of environmental protection. Outcomes are important but they are long-term and aggregate. While the ultimate goal may be to move as many people as possible towards environmentally responsible behaviors, the costs of some private non-compliance are not very costly. In other words, in this context making few mistakes in motivations is not as costly since the effort is to increase the average recycling.



### The gap between the law and the prevailing consensus



Another point which derives from the above mentioned research on the intrinsic–extrinsic dimension and translates into the regulation of the ethicality of good people, is the concept of the extent to which the behavior which the state attempts to regulate is within the moral consensus of the population[[48]](#footnote-49).

In a paper with Lobel mentioned above, I have pointed to major variation in the importance of regulatory design in relation to different illegalities. The greater the perception of severity of the misconduct, the less important the choice among the regulatory mechanisms. In our analysis, we used severity of the misconduct as a proxy for internal motivation.[[49]](#footnote-50) In the group of participants that viewed the illegality as highly offensive, and hence had high levels of internal motivation for reporting, the type of mechanism available to informants 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 the use of low rewards. These findings suggest the importance of legal mechanism selection in instances where individuals do not have an ethical stake in compliance.

## 

### 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.



## The behavioral trade-offs and the idea of taxonomies suggested above, are demonstrated in the following two case studies, optimal specificity and the freedom of contracts:

# Optimizing freedom of contracts from a behavioral perspective

In the following paragraphs, we will demonstrate the tradeoff between process and outcome through earlier works on the context of a behavioral analysis of contracting behavior[[50]](#footnote-51).

# Psychology of contracting

The earliest research on the interaction between psychology and contracting focused on peoples’ cognitive limitations. This has created a whole array of research papers which focused on paternalism and the increased legitimacy toward limiting peoples’ contractual choices[[51]](#footnote-52).

In an early work on the therapeutic effect of the freedom of contracts,[[52]](#footnote-53) I have examined some of the effects of active participation of people in making contractual decisions and the importance of voice and participation in shaping people’s behavior in ways that are publicly desirable. While in a similar way to the nudge approach, the early work on behavioral economics and law have called in the area of contracts for greater restrictions on peoples’ freedom of contract. From an outcome perspective, much of the literature in the late nineties has called for limitations on peoples’ freedom of contracts. As the argument goes, since people are bad in making decisions about themselves, to improve outcomes it might be better if there was a greater state intervention. However, the focus on optimizing contractual outcomes obviously misses the advantages of contracting process, even if not optimal.

## The process advantages of freedom of contracts:

## Sense of control and happiness

The theory regarding the relationship between control and well being seems to be straightforward. Thompson summarizes this relationship in the following way "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"[[53]](#footnote-54). According to this perspective, when individuals are given more control of contract terms, their level of well being from dealing with this contract is improved.[[54]](#footnote-55)

The improvement in personal well-being through an increase in the dominance of contracts in our everyday activity could be shown from a different perspective as well. Some researches take the position that one's daily activity aimed at achieving future goals (referred to as "the implicit agency of daily life") has an important value for one's well-being.[[55]](#footnote-56) Translating this concept to the value of personal involvement in the bargaining process supports the therapeutic advantages of using personally negotiated contracts, and not prewritten form contracts, collective contracting, or state regulations.

## Mental representation and the importance of the contracting process

The importance of self-involvement in the contracting process is highly supported by social cognition literature. For example, Taylor and Pham claim that the ability to form a mental representation of one's goals has a positive influence on one's ability to cope with difficulties while working toward those objectives[[56]](#footnote-57). In that paper, I have argued that the focus on getting the best contractual outcome with limited respect for the advantages that derive from people’s active engagement in the contracting process is misguided. I have argued for a list of relevant theories which support that view. For example, 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.[[57]](#footnote-58) Public policy that undermines the focus on awareness and deliberation and focuses more on supplementing personal judgment and active involvement may undermine these positive processes from happening.[[58]](#footnote-59)



## Procedural justice

Procedural justice literature usually positions the perception of fairness of the state policy as crucial to parties' ability to accept the outcome of that policy. Due to the work by Tyler, Greenberg and others, and implications of procedural justice are discussed in many areas of legal policy[[59]](#footnote-60). 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[[60]](#footnote-61). Naturally, negotiation over a specific term is likely to increase the perceived control, especially in comparison to default rule[[61]](#footnote-62). Arguably, personal involvement in contractual negotiations is likely to increase both perceived control and the level of voice. This is especially so in the context of standard-form contracts in which one party holds complete control over the terms of the contract.[[62]](#footnote-63) Consequently, it is quite plausible that negotiations will raise the sense of procedural justice and thus elevate the tendency of people to respect the allocation of risks agreed to in the contract.



An additional psychological mechanism which is likely to support greater adherence to negotiated contract terms is the phenomenon of 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.[[63]](#footnote-64) In other words, the mere fact that people freely choose to participate in a certain activity when no external justification is present, causes them to feel more committed to that activity.[[64]](#footnote-65) Presumably, the process of contracting, so long as it is the outcome of free choice, could lead to a deeper commitment to the contracts’ 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 contract terms, no dissonance is expected to be created.[[65]](#footnote-66)Indeed, in work done with Doron Teichman[[66]](#footnote-67) -- named “are all contractual obligations created equal”, we have shown the advantages of negotiated contracts over standard form contract in terms of changing people’s morality toward contractual performance. In that paper, we have examined the expressive power of contracts and the likelihood that will end up interpreting the clauses in that contract in a fair way and non-self-driven way.



## Optimal Specificity

## A second example of a behavioral trade-off will be done through the optimal usage of legal uncertainty to regulate people with different levels of intrinsic motivation and level of awareness toward legal compliance[[67]](#footnote-68).

## In a joint work with Bossalis and Smith (2017) we have attempted to deal experimentally with the competing prediction regarding the optimal specificity of law[[68]](#footnote-69).

Regulations or 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 scholarship present conflicting views 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 even 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 under-compliance and under-performance.

In legal scholarship, much of the debate on the optimal specificity of law comes from the “rules versus standards” paradigm, where standards are vaguer than rules. Kaplow’s (1992) seminal paper on this topic, and many follow-up studies, have translated the notion of “optimal specificity” into “optimization of information costs.” Kaplow includes various costs and benefits of rules versus standards in his model, but broadly speaking, rules are costlier to create but cheaper to enforce.

Some economic analyses point to the benefits of vagueness, but these benefits are often the flip-side of 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 multi-tasking paradigm that focuses on the problems, which occur when some aspects of one’s own work are easier to monitor than others. According to the rational choice prediction, the agent focuses most of his work on the tasks for which he can be given an incentive (Holmstrom and Milgrom 1991).

An additional line of research in law and economics focuses on the chilling effect, a form of over-compliance. Ferguson and Peters (2000) argue that "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." Economic analyses focuses on how risk-neutral agents would over-comply with a vague law, if the law is built around the optimal standard, albeit vaguely. For example, Kyle Logue (2007) and others have noted that risk-averse taxpayers would over-comply with an uncertain legal rule coupled with high penalties. Calfee and Craswell (1986) showed that risk-neutral agents would be subject to two behavioral effects of legal uncertainty: uncertainty would reduce deterrence because of the prospect of escaping liability wrongfully (a false negative), but in a variety of contexts, this effect would be dominated by a tendency toward over-compliance, which has been recognized, for example, in tax law. Under a vague standard, uncertainty can cause damages to rise more quickly than social harm around the optimal point, leading the actor to reduce the expected liability by inefficiently over-complying.

An additional way in which the behavioral literature contributes to the rational choice discussion, is by emphasizing the distinction between compliance and performance. Elsewhere we have demonstrated the importance of this dichotomy for legal theory (see Feldman and Smith, 2014). While in compliance, we focus on people doing exactly as required, in performance we measure whether people making an extra-effort to fulfil the spirit of the request (see Garcia. There are also various intermediate level of behaviors, that were sometimes called in the literature beyond compliance or extra role behavior (see e.g. Kim & Mauborgne, 1996)

In the following paragraphs we will develop these conflicting views in the literature in a clearer and more analytical way.

**2.2.1 Behavioral Advantages of Specificity**

The main psychological theory that challenges the negative views of specificity in the behavioral literature is ‘goal setting’. The theory, which is highly influential in the management literature, claims (and data have shown) that challenging goals lead to higher performance than vague ones, such as “do your best.” For example, Locke et al. (1987) reported 24 field experiments that found that individuals with specific, challenging goals either outperformed others or outperformed their own past performance when they had been instructed to simply "do their best.” Latham and Yukl (1975) reviewed earlier studies of performance and similarly concluded that when people are given specific, complex goals they perform better than when being asked to simply “do their best.” A classic study conducted by Seijts and Latham (2001) compared giving people “do your best” instructions versus assigning distal and proximal goals, and found that the combination of goals led to better performance than did the “do your best” 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) have argued that “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 the cognitive but also 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 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)

**2.2.2 Behavioral Disadvantages of Specificity**

At the same time, we have found a counter direction in the literature**.** Much of the literature about the negative effect of specificity on compliance focuses on the attendant level of measurement and monitoring that such specificity enables. For example, a 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. These studies also argue that employees react only to measurable metrics, especially in situations in which it is difficult to determine who does what. By contrast, aspects of the work that are not easily measured suffer from poor performance. Thus, people’s intrinsic motivation to perform well is crowded out by the relationship between performance, measurement, and payment (Bowles, 2008). These inadvertent effects of measurement, such as the measurement paradox and the related multi-tasking effects problem, are exemplified in other leading theories of empirical economists (Holmstrom and Milgrom 1991, Prendergast 1999). According to these theories, over time, the accuracy of measurement decreases as people concentrate their effort strictly on the measured components of an activity, resulting in a decline in the overall quality of their performance. Therefore, specificity combined with monitoring that focuses only on given measurable components (the letter of the law) seems to produce a straightforward effect of crowding out intrinsic motivation and decreasing overall performance.

A similar view is supported by the work of Falk and Kosfeld (2006), who 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 specific 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 the individual must constantly look for external instructions.



**Along those lines** Chou et al. (2011) have applied the concept to the area of contract specificity and shown 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 long-term relationships. Chou et al. rely on a long list of negative psychological mechanisms, mostly related to motivation, which could be triggered when the parties create a contract. Here the overall prediction is that, with 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 were less likely to perform well relative to those who were given a less specific contract. For example, the authors compared the effect of “notify within one hour” with that of “notify as soon as possible” as part of a comparison between specific and less specific contract terms. The specific term –- “within an hour” – is not just clear and informative. It is also framed in a way which completely limits one’s choice, especially relative to what has been defined as a less specified condition – “as soon as possible” – which is not just flexible but also give the other party a very strong signal of respect. The approach we will take to examine the effect of specific rules is different. We are not constraining people’s choices but rather adding to the vague standard some detailed examples (see Parchomovsky and Stein 2014).

Possibly the most advanced line of research involving the inadvertent cognitive effects of specificity concerns the debate around 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 errors, especially in aviation and hospitals, by helping the 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 not contested anymore, the way to use and build checklists is still debated. Using a checklist on a daily basis can result in overuse, leading to low performance by making tasks automatic. Depending on its nature, a checklist can impair quality, reduce the expediency of services, and interfere with professional judgment



## Our experimental study



These conflicting views about the effects of specificity serve as the background for this experimental project. We attempt to advance the understanding of optimal specificity by examining its effects on behavior in response to a directive that shares important features with the law. 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 with 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, either with general or detailed instructions, either with a reference to good faith or without it, and 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 (both required and above what is required, reasonable and more-than-reasonable care), allowing us to measure distinctly 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.

1. *See*Radin (1987)at1851arguingthatthelinebetweenalienabilityandinalienabilityshouldbedrawnbasedonthe“conceptofhumanflourishing”ratherthanonpureeconomicanalysis.
2. Gneezy&Rustichini (p. 13-14, 2000)presentingresearchindicatingthatsmallpenaltiesforundesirablebehaviormayincreasetheincidenceofsuchbehavior;Deci,Koestner&Ryan (1999);*seealso*Dagan (p. 131-133, 2009)demonstratinghowinthetaxlawcontext,onecantakethecommodificationliteratureintoaccountwithoutgoingallthewaytofulldelegalizationofnon-marketrelationships.

The example of ambiguity is interesting because it allows an examination of the different factor which would tip the trade-off in one direction or another.

It is possible to divide the relevant factors to individual, situational and doctrinal. In individual factors, in line with some of the factors that were discussed in the chapter on the individual differences, we can think about in terms of what will be the likely outcome if state will use more ambiguous and uncertain standards. For example, people who are risk lovers might be more likely to exploit ambiguity relative to people who are risk seekers, where for them, ambiguity might create a chilling effect. People who are high on the ethical scales such as propensity to morally disengage and moral identity we discussed in chapter \_\_ are less likely to look for loopholes and exploit ambiguity relative to people who are people who are less ethical. In addition to the individual related factors, there are situational level factors that could affect the usage of legal ambiguity.

In situational factors, we can take into account factors such as the Costs to society mistakes by the individual, where with high costs to society we might want to have more specificity to avoid mistakes by people. In situations which are relatively easy to predict, we might want to have more specific instructions. In addition, the factors might become more complex. For example, how aligned are the legal norms with morality or other forms of intrinsic motivation. If the legal norms are aligned with moral ones, then we can choose to have less specificity as people are likely to interpret the law in a way consistent with the law. Based on the dual reasoning approach, we might conclude that people who might be able to engage in deliberate reasoning might be more likely to allow for ambiguity.

There are also enforcement related factors that we can take into account. For example, with higher enforcement costs there is more point to be specific.



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 unconcionabillity for this obvious reason. For a complete analysis of the rationale behind a distinctive approach to unconcionabillity, see Richard A. Epstein, *unconcionabillity, 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

Based on previous arguments, we would like to suggest that among the factors that governments need to consider when attempting to regulate behavior, in which at least part of it is a response to a variation in the situation and is done with limited awareness, we need to account to the following factors, which are likely to affect the importance that needs to be allocated to this the integrated approach, relative the traditional one. A related dilemma, expressive versus invisible law, will also be dependent on context. In areas where the expertise of the state, its moral or consensual power, is highly relevant, using invisible law[[69]](#footnote-70) might outweigh the costs of informing people that 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.

# 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

Here, we can use the three contexts suggested above. In the context of trade secrets, we need the cooperation of 100% of the target population, from those with the highest level of intrinsic motivation to those with the lowest level of intrinsic motivation. 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. So we mainly care about those who are high on intrinsic motivation with the policy-maker’s focus on that population.[[70]](#footnote-71) For various reasons, we might not even want to incentivize those without intrinsic motivation due to a fear of false reports by bounty hunters. Finally, in the context of recycling, we are interested in averaging, or, in a situation where as many people as possible will recycle as much as possible. In such a situation, we have 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.



On the motivational side, behavioral research focuses on aspects such as work morale, and resentment that may view specificity as a sign of mistrust and as a signal to extrinsic rather than intrinsic motivation (i.e crowding out) . Through the “cognitive lenses”, it views specificity as over-attention paid to detailed instructions and even an availability bias , leading to unintended ignorance of other unspecified aspects. On the positive side of specificity, the cognitive side, literature such as that of goal-setting suggests that specificity may increase work focus better than “do your best” and for the motivational literature on motivated reasoning and self-concept maintenance, specificity might reduce the option for self-serving biases.



1. These are based on George Lowenstein words in a conference in Harvard May 2015 [↑](#footnote-ref-2)
2. 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.* [↑](#footnote-ref-3)
3. Schwartz, B. (2004). *The Paradox of Choice: Why More is Less*. New York: Harper. [↑](#footnote-ref-4)
4. 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. [↑](#footnote-ref-5)
5. Kling, J. R., Mullainathan, S., Shafir, E., Vermeulen, L., & Wrobel, M. V. (2011). *Misprediction in Choosing Medicare Drug Plans*. Cambridge, England: Harvard University Press. [↑](#footnote-ref-6)
6. Reed, A., Mikels, J. A., & Simon, K. I. (2008). Older Adults Prefer Less Choice Than Young Adults. *Psychology and Aging*, 23, 671–675 s. [↑](#footnote-ref-7)
7. 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. [↑](#footnote-ref-8)
8. 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. [↑](#footnote-ref-9)
9. 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. [↑](#footnote-ref-10)
10. Johnson, E. J., & Goldstein, D. G. (2003). Do defaults save lives? Science, 302, 1338–1339. [↑](#footnote-ref-11)
11. Johnson, E. J., Hershey, J., Meszaros, J., & Kunreuther, H. (1993). Framing, Probability Distortions, and Insurance Decisions. *Journal of Risk and Uncertainty*, 7, 35–53. [↑](#footnote-ref-12)
12. some of the text in this section is based upon work with Orly Lobel Feldman, Y., & Lobel, O. (2015). Behavioral Trade-Offs: Beyond the Land of Nudges Spans the World of Law and Psychology. In nudge and the law a European Perspective [↑](#footnote-ref-13)
13. I explored this dilemma in an earlier paper on the optimal freedom of contract, which is summarized toward the end of this chapter. [↑](#footnote-ref-14)
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.”  
     [↑](#footnote-ref-15)
15. Ben-Shahar, Omri & Schnider, Carl E. (2011). The Failure Mandated Disclosure. *University of Pennsylvania Law Review* (647), 159. [↑](#footnote-ref-16)
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 take on the language based approach to what expressive function of the law means. [↑](#footnote-ref-17)
17. *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. [↑](#footnote-ref-18)
18. *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. [↑](#footnote-ref-19)
19. 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 costsof 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. [↑](#footnote-ref-20)
20. 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. [↑](#footnote-ref-21)
21. *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. [↑](#footnote-ref-22)
22. 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 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. [↑](#footnote-ref-23)
23. Fox, Dov. & Griffin Jr., Christopher L. (2009). Disability-Selective Abortion and the Americans with Disabilities Act. *Utah Law Review.* 845. [↑](#footnote-ref-24)
24. Sunstein, Cass R. *On the Expressive Function of Law*, *supra note* 41 at p. 2025 [↑](#footnote-ref-25)
25. Mertz, Elizabeth E. (1995). Legal Language: Pragmatics, Poetics, and Social Power. *Annual Reviw of Anthropology.* (23),435. [↑](#footnote-ref-26)
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 [↑](#footnote-ref-27)
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. [↑](#footnote-ref-28)
28. But see Feldman, Y., & Halali, E. Regulating “Good” People in Subtle Conflicts of Interest Situations. *Journal of Business Ethics*, 1-19.who demonstrated the greater efficacy of explicit measures even in subtle contexts. [↑](#footnote-ref-29)
29. See supra note \_\_ [↑](#footnote-ref-30)
30. See Feldman, Y., & Smith, H. E. (2014). Behavioral Equity. *Journal of Institutional and Theoretical Economics JITE*, *170*(1), 137-159.discussion of the advantage of ambiguity in deterring opportunistic individuals. [↑](#footnote-ref-31)
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35. 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. [↑](#footnote-ref-36)
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>. [↑](#footnote-ref-37)
37. Richard M. Titmus, The Gift of Relationship: From Human Blood to Social Policy (1971) arguing that monetary payments to givers of blood could diminish the amount of blood given voluntarily. [↑](#footnote-ref-38)
38. 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). [↑](#footnote-ref-39)
39. *See also* Feldman, for Love or Money (2011). [↑](#footnote-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.. [↑](#footnote-ref-41)
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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. [↑](#footnote-ref-43)
43. Compare with Milkman, Chugh & Bazerman (2009) 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. [↑](#footnote-ref-44)
44. But this is not the case with regard to blood donation. [↑](#footnote-ref-45)
45. Discuss Tirrole; Benabu. [↑](#footnote-ref-46)
46. Refer to discussion above. [↑](#footnote-ref-47)
47. It would 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 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). [↑](#footnote-ref-48)
48. Connect here to the work on the context of moral identity [↑](#footnote-ref-49)
49. These included items as moral outrage, legitimacy and perceived risk from the misconduct in this factor. [↑](#footnote-ref-50)
50. Some of the text in the following section is based on earlier work on the therapeutic approach to contracts. [↑](#footnote-ref-51)
51. 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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    Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of litigation behavior,* 1999 U. ILL. L. REV. 43. [↑](#footnote-ref-52)
52. Therapeutic approach to the freedom of contracts Touro law review 2002) [↑](#footnote-ref-53)
53. 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]. [↑](#footnote-ref-54)
54. Suzanne Folkman, *The personal control and stress and coping processes: A theoretical analysis*, 46 j. pers. &soc. psycho. 839 (1984). [↑](#footnote-ref-55)
55. [↑](#footnote-ref-56)
56. 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). [↑](#footnote-ref-57)
57. Russell J. Dlton, *Citizenship Norms and the Expansion of Political Participation*, 56(1) Political Studies 76(2008). [↑](#footnote-ref-58)
58. 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). [↑](#footnote-ref-59)
59. [↑](#footnote-ref-60)
60. [↑](#footnote-ref-61)
61. [↑](#footnote-ref-62)
62. 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. [↑](#footnote-ref-63)
63. 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). [↑](#footnote-ref-64)
64. 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) (discussing investors’ misperceptions of the past performance of their mutual funds as a personal justification for inaction). [↑](#footnote-ref-65)
65. *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) (discussing how cognitive dissonance may improve evaluation of a law when community members have set forth effort towards its framing). [↑](#footnote-ref-66)
66. Are all contractual obligations created Georgetown law journal 2010. [↑](#footnote-ref-67)
67. Based on my work with Smith and Boussalis, Regulation and Governance 2017. [↑](#footnote-ref-68)
68. The following paragraphs are based on our joint paper published in Reg and Gov 2017 [↑](#footnote-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. [↑](#footnote-ref-70)
70. This argument is obviously oversimplified and tuning is highly needed here. [↑](#footnote-ref-71)