

ARTICLES

Are All Contractual Obligations Created Equal?

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At the core of the economic analysis of contract law lies the concept of options. According to this concept, parties are expected to perform their contractual duties if, and only if, the legal price of breach (that is, damages) is higher than the cost of performance. This Article challenges this concept and shows that people’s performance decisions are driven by noninstrumental forces such as moral commitments, social norms, and motivated reasoning. To demonstrate this point, this Article presents a series of three experimental surveys that measure and compare participants’ attitudes toward breaching a contract. Participants answered questions in the context of one of several variations of the same hypothetical scenario. While the expected cost of a breach was identical in every variation, they differed along several dimensions, such as the source of uncertainty regarding paying damages (uncertainty stemming from an ambiguous contract versus uncertainty stemming from lax enforcement) and the type of contract (negotiated contract versus standard-form contract). The results confirmed our hypothesis and showed that performance decisions are affected by a diverse set of variables aside from the monetary incentives set by the legal system. Based on these findings, the Article revisits some of the basic questions of contract law and sheds new light on an array of policy issues.

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INTRODUCTION

Contractual obligations are mere options. That is one of the basic assumptions of the economic analysis of contract law regarding the behavior of contracting parties.¹ In other words, parties are assumed to perform their contractual duties if, and only if, doing so enhances their personal welfare. In cases in which the legal price of breach is lower than the cost of performance,

1. For a recent reiteration of this insight, see Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1349–61 (2009) (presenting an option-based theory of contracts).

the promisor will choose to breach and pay that price (that is, damages).² Thus, as a positive matter, contractual obligations are viewed as if they lack any noninstrumental dimension that may affect the behavior of contracting parties.³

In a recent study, we introduced an empirical framework that could be used to measure the noninstrumental power associated with legal obligations.⁴ This framework was based on an experimental design which compared the effect of two types of uncertainty that are associated with legal liability. The first type, legal uncertainty, relates to uncertainty regarding the content of an obligation. In many cases, legal obligations are vague, and therefore, parties may not be sure, *ex ante*, whether liability will be attached to a certain type of behavior. The second type, enforcement uncertainty, relates to uncertainty regarding implementation of the legal norm. Violations of legal norms often do not entail any consequences due to problems such as lack of detection. Thus, parties again cannot be sure, *ex ante*, what will actually be the cost of violating the norm.

To the extent that legal compliance is driven by purely instrumental motivations, legal uncertainty and enforcement uncertainty are expected to affect behavior in a similar fashion. Whether the source of uncertainty stems from the content of an obligation or from its enforcement, potential violators will simply discount legal liability by the probability that it will actually be applied to them. To the extent legal obligations carry an expressive force that drives people to conform, however, the two types of uncertainty are expected to affect behavior distinctly. Specifically, legal uncertainty is expected to have a greater effect on the behavior of people than enforcement uncertainty because its introduction not only reduces the expected cost of noncompliance but also dilutes the expressive power of the legal norm. Thus, by comparing the effect of the two types of uncertainty on the way people treat different types of legal norms, we can ascertain the degree to which each type of norm carries an expressive power that brings about compliance that is not tied to instrumental calculations.

In our previous study, we focused on a regulatory–criminal setting in which the source of the legal norm was the state.⁵ We demonstrated that legislation carries an expressive power that induces compliance.⁶ Moreover, we showed that this power is sensitive to the type of legislation applicable and is stronger in

2. See, e.g., Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 635 (2010) (“[A]n economic prediction of human behavior says that when a promisor can make one extra dollar by breaching his contract, he will breach the contract.”).

3. This is not to say that law and economics scholars have argued that contractual compliance is driven by purely monetary incentives. Issues such as reputation and nonlegal sanctions have long since been incorporated into the economic analysis of contract law. See generally, e.g., David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373 (1990); Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. LEGAL STUD. 401 (2001).

4. Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980 (2009).

5. *Id.* at 997–99 (describing the composition of the study).

6. *Id.* at 999–1002 (reporting the results of the baseline study).

the context of criminal prohibitions.⁷ In this study, we wish to extend this analysis to obligations created by individuals rather than by the state. We explore whether contracts hold an expressive power that induces people to fulfill their promises irrespective of consequential considerations. In addition, we examine whether this power depends on different characteristics of the contractual obligation.

In order to answer these questions, we designed a series of between-subject experimental surveys that measured and compared participants' attitudes toward contractual performance under conditions of uncertainty. In the scenarios given to participants, their chances of facing contractual liability were identical; we manipulated whether the source of uncertainty stemmed from the ambiguity of the contract or from the ability of the promisee to detect the breach. Overall, these studies confirmed our central hypothesis that people are less committed to complying with the terms of a contract when the source of uncertainty is in the contract itself versus when the source of uncertainty is in the enforcement of the contract (holding the expected liability constant in all cases). Thus, the findings indicate that contractual obligations carry an expressive power above and beyond their instrumental power. Furthermore, the results suggest that this power depends on the characteristics of the contractual obligation. For example, they demonstrate that negotiated contracts carry greater expressive power than standard-form contracts accepted on a take-it-or-leave-it basis.

This project is part of a growing body of literature that has turned to using empirical methods to deepen our understanding of contractual behavior.⁸ These studies include both qualitative projects that document contractual behavior in the field⁹ as well as experimental projects that study such behavior in stylized settings.¹⁰ Viewed as a whole, these studies have added richness and complexity to the way in which we model the behavior of contracting parties. More

7. *Id.* at 1002–05 (reporting the results of the study comparing criminal and civil sanctions).

8. For recent studies, see George S. Geis, *Automating Contract Law*, 83 N.Y.U. L. REV. 450, 456–60 (2008); Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. ILL. L. REV. 1033, 1034–49.

9. See generally Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006) (discussing approach to contracts in the auto-manufacturing industry); Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter Bernstein, *Diamond Industry*] (discussing prevalence of extralegal agreements in the diamond industry); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter Bernstein, *Cotton Industry*] (discussing alternative approach to contract enforcement in the cotton industry); Doron Teichman, *Old Habits Are Hard To Change: A Case Study of Israeli Real Estate Contracts*, 44 LAW & SOC'Y REV. 299 (2010) (discussing dollarization of real estate contracts in Israel).

10. See generally Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998) (providing experimental evidence that contractors prefer default rules); Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106 (2002) (providing experimental evidence of an “endowment effect” created by default rules); Wilkinson-Ryan, *supra* note 2 (providing experimental evidence that contractors are more likely to utilize efficient breach if contract includes liquidated-damages clause); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in*

specifically, it has demonstrated that forces such as the moral commitment to promise keeping, cognitive biases, and reputational concerns may affect contractual relationships.¹¹ This Article builds on these findings and adds to them along two different dimensions. First, it employs a novel methodology that permits measurement of noninstrumental motivations in a subtle and indirect way. This methodology enables us to distinguish between different types of contractual obligations and to compare their relative expressive power. Second, our focus on uncertainty brings the study closer to real-world settings that are inherently probabilistic. This focus allows us to evaluate different aspects of contract law that deal with uncertain contractual obligations such as the doctrines governing contract interpretation.

The Article is organized as follows: in Part I, we describe the background of the study. We review the traditional law and economics literature modeling the incentives of contracting parties. We then present several bodies of literature that suggest that parties may treat their contractual obligations in a noninstrumental fashion. Part II describes the design of the experiments and their results. Finally, in Part III, we explore potential implications of our results for policymakers as well as contracting parties and address the limitations of our study.

I. BACKGROUND

In this Part, we review the traditional economic literature that focuses on instrumental incentives for performance. Then, in order to introduce our hypothesis that contractual obligations carry an expressive power, we discuss the existing literature on the moral duty to perform, motivated reasoning, and social norms, each of which supports our hypothesis regarding the expressive power of contracts and helps explain our empirical findings.

A. THE ECONOMIC APPROACH TO CONTRACTUAL OBLIGATIONS

The traditional law and economics literature treats contractual obligations as mere options.¹² That is, as a positive matter, promisors are expected to perform their contractual obligations only when the cost of doing so is lower than the price that is attached to breach. If, as is commonly the case, the legal remedy for breach is expectation damages, then the promisor will perform the contract as long as the cost of doing so is lower than the expected damages. On the other hand, if the cost of performance—either actual cost (that is, a rise in production costs) or alternative cost (that is, a new lucrative offer)—is higher than the

Breach of Contract, 6 J. EMPIRICAL LEGAL STUD. 405 (2009) (providing experimental evidence that moral judgments affect people's perceptions of contract breach).

11. See Bernstein, *Cotton Industry*, *supra* note 9 (demonstrating the importance of reputational concerns); Ben Depoorter & Stephan Tontrup, *Contract Entitlement* (U.C. Hastings Legal Theory, Working Paper No. 8, 2011) (on file with authors); Korobkin, *supra* note 10 (studying cognitive biases and contracting); Wilkinson-Ryan & Baron, *supra* note 10 (studying moral motivations to perform).

12. See, e.g., George S. Geis, *Economics as Context for Contract Law*, 75 U. CHI. L. REV. 569, 584–88 (2008) (reviewing the literature on contracts and option theory).

expected damages, then the promisor is expected to breach and pay damages.¹³

This positive claim goes hand in hand with the normative claim regarding efficient breach.¹⁴ According to the efficient-breach theory, the promisor ought to breach the contract when the utility gained from performance is smaller than its cost. Breaching in such situations, so the argument goes, maximizes the contractual surplus and therefore reflects the ex ante preference of *both* contracting parties. Promisors can be induced to make efficient-breach decisions by setting the cost of breach at the expectation interest of the promisee. Such a system could cause promisors to internalize the full cost of their choices and incentivize them to breach only if that choice enhances the contractual surplus.¹⁵ Thus, breaching and paying expectation damages should be viewed as worthy contractual behavior. As Steve Shavell recently argued, “[B]reach should not be characterized as immoral when expectation damages are paid for breach.”¹⁶

B. A NONINSTRUMENTAL APPROACH TO CONTRACTUAL OBLIGATIONS

Although the economic model of contractual behavior offers important insights regarding how contracting parties are expected to behave, we argue that it offers an incomplete account of their motivations. Contracting parties care about the cost of breach. Yet this still leaves the question of whether this is the *only* factor that they care about. Several bodies of literature lead us to reject the purely instrumental approach and cause us to conjecture that noninstrumental motivations will also affect the behavior of contracting parties.

13. See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 304–05 (2004) (describing the incentive to breach in light of the legal remedy).

14. For an early exposition of the theory, see Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284–86 (1970) (arguing that breaches that lead to Pareto improvements should not be discouraged). More recently, the theory was defended (though in a somewhat lighter version) in Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 442–50 (2006) (arguing that given contractual incompleteness, breaching and paying full expectation damages is moral).

15. See, e.g., Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 478 (1980) (arguing that expectation damages can lead to optimal performance incentives). To be sure, the analysis in the text only refers to efficiency from the perspective of the parties’ performance decisions. Incorporating other considerations into the analysis may lead to the conclusion that other measures of damages are optimal. See, e.g., Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CALIF. L. REV. 1, 11–19 (1985) (arguing that expectation damages may lead to inefficient reliance); A. Mitchell Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J. LEGAL STUD. 427, 433–36 (1983) (noting that the expectation remedy would be optimal from the perspective of the allocation of risk only if the buyer is risk averse and the seller is risk neutral).

16. Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1574 (2009) (emphasis omitted). The modern concept of efficient breach builds to a large degree on the view presented by Justice Holmes on the nature of expectation damages. See O.W. Holmes, Justice, Supreme Judicial Court of Mass., *The Path of the Law*, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 462 (1897) (noting that “[t]he duty to keep a contract at common law means . . . that you must pay damages if you do not keep it,—and nothing else”).

1. Moral Obligation

Legal philosophers have argued that breaching a contract is a moral violation. Building on theories of promise keeping, these theorists have claimed that a “contract must be kept because a promise must be kept.”¹⁷ According to this line of thought, breach represents a type of “moral harm” and is therefore impermissible notwithstanding its actual effects on the promisee.¹⁸ This view has trickled into the rhetoric of contract law. For example, the Restatement of Contracts refers to the “sanctity of contract and the resulting moral obligation to honor one’s promises.”¹⁹

To be sure, just as one cannot derive from observing how people behave an answer to the question of how they ought to behave, there is no necessary connection between how people ought to behave and how they actually behave. Nevertheless, we assume that there might be a correlation between commonly perceived concepts of morality and actual behavior. This correlation may rest on two causal mechanisms. First, individuals may find guidance in normative claims regarding how they should behave. Thus, their behavior will tend to converge with the dictates of moral rules. Second, despite the normative–positive dichotomy, philosophers may build some of their insights on commonly held intuitions regarding desired human behavior.²⁰ In that way, entrenched patterns of behavior may manifest themselves in moral reasoning.

The connection between moral intuitions and contractual behavior has recently been studied empirically by Tess Wilkinson-Ryan and Jonathan Baron.²¹ Using questionnaires, they presented subjects with dilemmas regarding breach of contract. Subjects were then asked to express their views regarding the legal, economic, and moral implication of breach. The findings demonstrated that people view breach as immoral.²² Furthermore, issues that are irrelevant from an economic perspective but relevant from a common-sense, morality perspective, such as the motivation for breach (forgoing a gain in an alternative deal compared to avoiding a loss in the current deal), affected the way in which subjects evaluated the breach decision.²³ People viewed breach aimed at avoiding losses as less objectionable and worthy of a mitigated legal reaction. These

17. CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 17 (1981).

18. See Wilkinson-Ryan, *supra* note 2, at 639–40 (viewing breach “as a moral harm irrespective of the availability of damages for the promisee”). To be sure, there are other deontological theories of contracts that offer a more nuanced view on the topic. For a review, see EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 260–61 (2010).

19. RESTATEMENT (SECOND) OF CONTRACTS, ch. 16, intro. note (1981). For a recent analysis of the differences between promises and contract law, see Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 719–29 (2007).

20. Recent findings in the area of evolutionary ethics suggest that many moral intuitions are in fact a result of a long process of evolutionary adaptation. See generally Philip Kitcher, *Biology and Ethics*, in THE OXFORD HANDBOOK OF ETHICAL THEORY 163, 163–85 (David Copp ed., 2006) (discussing three projects attempting to connect biological fact to theories of morality).

21. See Wilkinson-Ryan & Baron, *supra* note 10.

22. *Id.* at 412–20 (describing the results of the study).

23. *Id.* at 414 (describing the results of experiment one).

findings led Wilkinson-Ryan and Baron to conjecture that “[p]eople’s moral intuitions about contract law may make breach less frequent than is economically efficient.”²⁴

In light of these findings, we hypothesize that the introduction of contractual uncertainty will bring about more selfish behavior when compared to the introduction of enforcement uncertainty. Whereas both types of uncertainty reduce the expected cost of selfish behavior, the former also affects the noninstrumental motivations of individuals as it may erode the power of the contractual obligation itself. Arguably, breaching a clear contract is more immoral than breaching an ambiguous contract that can also be read as if it permits the self-interested behavior in question.

2. Motivated Reasoning

Whereas the previous subsection dealing with the philosophical literature suggests that people’s performance decisions are driven by an internal commitment to fulfill a promise, the psychological literature suggests that additional forces may be at play. A significant body of scholarship has documented the tendency of people to engage in motivated reasoning.²⁵ According to this scholarship, decision makers attempt to make choices that they believe can later be justified to a dispassionate observer.²⁶ In other words, people’s self-interest affects how they think they ought to behave. Thus, they strategically cling to uncertainty associated with their choices in order to portray those choices as worthy and just rather than as immoral or dishonest.²⁷

Several concrete examples of this type of behavior can be found in recent studies that added elements of uncertainty to the dictator game.²⁸ In the dictator game, participants (dictators) are asked to choose between an option that maximizes their payoff and an option that offers them a lower payoff yet serves the interests of the other player. For example, the dictator might be asked to choose between an option in which she receives a payoff of 100 and the opposing player receives nothing and an option in which both she and the opposing player receive a payoff of 75. Whereas rational-choice theory predicts

24. *Id.* at 422.

25. For a review of this literature and a description of the various mechanisms underlying motivated reasoning, see Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990).

26. *See, e.g., id.* at 493.

27. *See* Nina Mazar & Dan Ariely, *Dishonesty in Everyday Life and Its Policy Implications*, 25 J. PUB. POL’Y & MARKETING 117, 121–22 (2006) (analyzing role of self-deception in dishonest behavior); Nina Mazar et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MARKETING RES. 633, 634 (2008) (noting the importance of self-perception). For a demonstration of this effect in a legal context, see Yuval Feldman & Alon Harel, *Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule vs. Standard Dilemma*, 4 REV. L. & ECON. 81 (2008).

28. *See, e.g.,* Jason Dana et al., *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 ECON. THEORY 67 (2007); Emily C. Haisley & Roberto A. Weber, *Self-Serving Interpretations of Ambiguity in Other-Regarding Behavior*, 68 GAMES & ECON. BEHAV. 614, 617–24 (2010).

that dictators are expected to maximize their own welfare while disregarding the consequences to the opposing player (that is, they will choose to take the payoff of 100), a voluminous body of literature has demonstrated that dictators systematically diverge from this prediction and opt for the altruistic option (that is, they are willing to forgo 25 to bring about an egalitarian outcome).²⁹ This altruistic tendency, however, diminishes significantly once uncertainty is introduced into the game.

In a recent study, Emily Haisley and Roberto Weber altered the classic dictator game and introduced uncertainty with respect to the adverse effect caused by a selfish decision made by the dictator.³⁰ One group of dictators were asked whether they would agree to forgo part of their payment in order to give the opposing player \$1.75 rather than a 50% chance to win \$0.50.³¹ The second group of dictators faced a similar choice, yet instead of the clear 50% chance, they were informed that the chance that the opposing player would win \$0.50 was equally distributed between 0% and 100%. (Thus, from an objective perspective both options are identical.)³² Interestingly, dictators in the second group displayed a greater tendency to behave in a selfish manner.³³ As Haisley and Weber note, the lack of knowledge regarding the precise implications of their choices allowed players to engage in “moral wiggling” and “behave self-interestedly without explicitly appearing so to themselves or others.”³⁴

In a study more closely tied to this Article, Maurice Schweitzer and Christopher Hsee explored the way in which motivated reasoning may affect contractual negotiations. They demonstrated that, in a negotiation setting in which the costs and benefits to the parties were held constant, the parties’ decision to disclose private information to the opposing side was influenced by what Schweitzer and Hsee term the “elasticity” of the private information—that is, its level of uncertainty.³⁵ In one study, they examined the willingness of parties to disclose harmful, privately held information when negotiating the sale of a car.³⁶ Sellers were informed that the odometer of the car being sold had been disconnected but that buyers would believe them if told that the actual mileage was 60,000.³⁷ Sellers were then divided into two groups: the low-elasticity group was told that the actual number of miles that the car had been driven was between 74,000 and 76,000, and the high-elasticity group was told that the

29. See generally Werner Güth, *On Ultimatum Bargaining Experiments—A Personal Review*, 27 J. ECON. BEHAV. & ORG. 329 (1995) (reviewing the literature on dictator and ultimatum games).

30. See Haisley & Weber, *supra* note 28.

31. *Id.* at 617–18.

32. *Id.*

33. *Id.* at 620–21.

34. *Id.* at 623.

35. Maurice E. Schweitzer & Christopher K. Hsee, *Stretching the Truth: Elastic Justification and Motivated Communication of Uncertain Information*, 25 J. RISK & UNCERTAINTY 185, 189–98 (2002) (providing evidence of strategic use of elastic information by participants in series of four studies).

36. *Id.* at 189–92.

37. *Id.* at 190.

number was between 60,000 and 90,000 (with equal probabilities within the range for each group).³⁸ According to a rational-choice model of pure self-interest, sellers from *both* control groups are expected to tell the other party that the mileage is only 60,000 because no cost will be incurred for doing so.³⁹ Yet Schweitzer and Hsee reported that the parties tended to disclose values higher than 60,000 and, more importantly for our purposes, that the average mileage claimed by the low-elasticity group was significantly higher than that claimed by the high-elasticity group.⁴⁰ These results demonstrate the importance of motivated reasoning and self-serving justifications: members of the low-elasticity group could not represent to buyers a mileage figure below 74,000 without knowing for certain that they were deceiving them; members of the high-elasticity group, on the other hand, could claim that the mileage was only 60,000 by convincing themselves that stating this figure was not a misrepresentation. Therefore, in this setting, higher uncertainty regarding the actual mileage of the car allowed sellers to claim a lower mileage that would better serve their own self-interest.

The bias towards interpreting one's own behavior as moral suggests a distinction between the effects of enforcement uncertainty and those of contractual uncertainty. We hypothesize that contractual uncertainty allows people to deceive themselves and discount their internal fear of behaving inappropriately because such behavior can be justified as an honest mistake (a misinterpretation of the contract) and not be seen as the result of an inappropriate or immoral rational decision-making process. By contrast, the threat of enforcement does not appeal to such a bias, so we can expect enforcement uncertainty to have less effect on people's behavior than contractual uncertainty. Thus, we are again drawn to the hypothesis that people will be more likely to behave selfishly when the source of uncertainty is the content of the contract rather than the mechanisms of its enforcement.

3. Social Norms

Social norms may be another factor that could lead contracting parties to behave differently from the predictions of the traditional economic model. Since the seminal work of Stewart Macaulay,⁴¹ legal scholars and social scientists have demonstrated the central role social norms play with respect to contractual behavior.⁴² These studies have shown that contracting parties routinely disregard the incentives set forth by the legal system and adhere to the dictates of the

38. *Id.*

39. *Id.*

40. *Id.* Specifically, the average mileage claimed by the low-elasticity group was 70,764, while the average mileage claimed by the high-elasticity group was only 68,354. *Id.*

41. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

42. For some more recent examples of this line of literature, see sources cited *supra* note 9.

applicable social norm.⁴³

A central social norm that governs contractual relations is the norm of performance. According to this norm, parties are prohibited from viewing the relationship in purely instrumental terms. Rather, they are expected to perform their duties under the contract even if breach is a more profitable option. Bernd Irlenbusch recently demonstrated the strength of this norm in a quantitative fashion.⁴⁴ In his study of sales contracts, participants were randomly assigned into two groups.⁴⁵ The contracts of the first group were binding, and the contracts of the second group were nonbinding. (That is, there was no penalty for breach under the experiment.)⁴⁶ Interestingly, the two groups did not differ significantly with respect to performance.⁴⁷ Irlenbusch argues that these findings “provide strong evidence that . . . the norm to keep promises . . . play[s] a decisive role in contract exchange relationships.”⁴⁸ Taking a qualitative approach, Lisa Bernstein documented the dominance of the performance norm in discrete contracting communities.⁴⁹ According to her findings, parties are expected to perform their duties under the contract and are not free to exercise the breach option.⁵⁰ As one of the market players she interviewed noted, “[Y]ou do not just breach and pay. This is not done.”⁵¹

The existence of a performance norm is important to our study because of the enforcement mechanisms associated with such a norm. Generally, the literature distinguishes between two types of motivations to comply with a social norm. First, norms are enforced by a set of nonlegal sanctions that are applied to violators.⁵² Such sanctions are usually calibrated to the type of violation and can range from mild gossip to severe violence.⁵³ Second, norms are often internalized by members of the community.⁵⁴ In this regard, norm violators are

43. See Macaulay, *supra* note 41, at 61 (noting that “[d]isputes are frequently settled without reference to the contract or potential or actual legal sanctions”).

44. See Bernd Irlenbusch, *Relying on a Man's Word? An Experimental Study on Non-Binding Contracts*, 24 INT'L REV. L. & ECON. 299, 318–20, 319 tbl.10, 320 tbl.11 (2004).

45. *Id.* at 308–10 (describing the composition of the experiment).

46. *Id.*

47. *Id.* at 316.

48. *Id.* at 300.

49. See generally Bernstein, *Diamond Industry*, *supra* note 9; Bernstein, *Cotton Industry*, *supra* note 9.

50. See Bernstein, *Diamond Industry*, *supra* note 9, at 145–48 (describing the performance norm in the diamond industry); Bernstein, *Cotton Industry*, *supra* note 9, at 1754–56 (describing the performance norm in the cotton industry).

51. Bernstein, *Cotton Industry*, *supra* note 9, at 1755.

52. See, e.g., Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355, 358–62 (2005) (describing the forces driving the creation of nonlegal sanctions).

53. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 56–59 (1991) (describing the different types of nonlegal sanctions used in Shasta county).

54. See Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 958–68 (1997) (presenting a model of social norms based on personal commitment); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 376–81 (1997) (arguing that some social norms are internalized).

expected to feel guilt and remorse notwithstanding the detection of the violation by others.⁵⁵

In light of the possibility that people have internalized a performance norm, we expect that contractual uncertainty will generate more noncompliance than will enforcement uncertainty. Although contractual uncertainty may undermine the performance norm as it raises doubts regarding whether the norm was actually breached, enforcement uncertainty leaves the full force of the norm intact. Furthermore, we suspect that the internalization of the compliance norm may differ between distinct types of contractual obligations. Thus, all things being equal, we expect to observe different levels of noncompliance when legal uncertainty is introduced with respect to various types of contractual obligations.

* * *

In conclusion, there are two competing perceptions of contractual behavior. On the one hand, rational-choice theory suggests that promisors behave in a purely selfish manner to further their own goals. On the other hand, an array of alternative theories argues that the motivation for performance is far richer and more complex and is driven by a range of internal and external forces. With these two hypotheses in hand, we now turn to describe our experiments.

II. THE EXPERIMENTS

A. PARTICIPANTS AND DESIGN

To test our propositions, we conducted an experimental survey study using situational vignettes in a between-subject design on a student population. A total of 484 law students at Bar-Ilan University, The Hebrew University of Jerusalem, The College of Management, and Tel-Aviv University were sampled.⁵⁶

Participants were randomly assigned to one of several equally sized groups and given a questionnaire structured around one of several variations on the following legal dilemma: acting as a promisor who is obligated to paint a house, would you or would you not decide to use a new, generic paint, which will increase your profits by 2,000 Shekels (approximately \$500 at the time the survey was conducted), given that you know it is of inferior quality? Participants were asked questions regarding their personal evaluations of the dilemma, intended behavior in the depicted scenario,⁵⁷ perception of social norms regard-

55. Kaushik Basu, *Social Norms and the Law*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 476, 477 (Peter Newman ed., 1998) (noting that people avoid stealing wallets due to the social norm involved and not due to potential legal liability).

56. Specifically, Study I was conducted at the Hebrew University and included 100 students (40.6% male); Study II was conducted at Bar-Ilan University and Tel-Aviv University and included 187 students (39.5% male); Study III was conducted at Bar-Ilan University and The College of Management and included 197 students (36.6% male).

57. Aside from focusing on people's intended behavior, we also measured factors such as morality and perceived social norms. These factors were measured to broaden our understanding of people's attitudes towards breach and to avoid focusing merely on people's intention. This approach is based on

ing such decisions, and willingness to forgo profits in order to abstain from using the low-quality paint. These questions were used to construct independent variables—uncertainty type (in all three studies), source of obligation (in the second study), and the existence of negotiations (in the third study)—and to analyze their effect on the dependent variables.⁵⁸

B. VARIABLES

1. The Independent Variables

In all three studies, we examined the effects of two different types of uncertainty: contractual uncertainty and enforcement uncertainty. Participants in the “Contractual Uncertainty” subgroup were told that the questionable action (using a low-quality paint) may or may not be deemed a breach of a contractual obligation to use “reasonable” materials; if the action is considered a breach, however, enforcement is certain because the promisor will be able to detect the quality of the paint used. Participants in the “Enforcement Uncertainty” subgroup were told that using the low-quality paint clearly constitutes a breach but successful enforcement is unlikely, as there is only a small chance that the promisor will be able to detect the quality of the paint used. Participants in both subgroups were told that the overall likelihood of contractual liability (the probability of a determination of breach multiplied by the probability of successful prosecution) was ten percent. In order to avoid considerations regarding reputation, participants were asked to assume that the contract reflected a one-shot summer job and that they had no intention to ever paint a house again.

The second and third studies, unlike the first, examined two independent variables, each of which had two levels.⁵⁹ The second study compared contractual terms created by the parties and default rules that were incorporated into the contract, along with the effects of different types of uncertainty. Participants in the “Contract Term” subgroup were told that they agreed to the contract term in question. Participants in the “Default Rule” subgroup were told that the contract was silent on the point of paint quality and therefore the reasonable-quality requirement set forth in the local contract law will apply.

For the third and final study, we examined the effect of negotiations in addition to the effects of the different types of uncertainty described above. In

the widely used paradigm of planned behavior, common in attitude studies. See Icek Ajzen, *From Intentions to Actions: A Theory of Planned Behavior*, in *ACTION CONTROL: FROM COGNITION TO BEHAVIOR* 11, 29–35 (Julius Kuhl & Jürgen Beckmann eds., 1985) (suggesting that performance of intended behavior depends on certain factors “only partly under volitional control,” including willpower, ability to control factors that may prevent performance, attitudes, subjective norms, and influence of past behavior). A possible limitation of measuring all these items at once is multicollinearity—correlations among the factors may make it difficult to determine their separate effects and the ordering of the variables may affect the results.

58. The questionnaire used in Study I can be found in the methodological appendix of this Article. All other questionnaires are available upon request from the authors.

59. That is, the second and third studies employed a 2×2 design.

order to fully control for the effect of negotiations, both groups read a term which was presented as part of the contract. Whereas participants in the “Negotiation” subgroup were told that they had negotiated various obligations in the contract with the other party, participants in the “Standard Form” subgroup were told that the other party had presented them with a standard-form contract and demanded that they sign it on a take-it-or-leave-it basis.

2. The Dependent Variables

The dependent variables in these studies were self-reported and measured on a Likert scale (1 to 10).⁶⁰ The first two variables related to the social and moral desirability of compliance and noncompliance. “Perceived Morality” was measured by asking participants whether using the cheap paint in the legal situation described above would be morally unacceptable (with 1 being “Not unacceptable” and 10 being “Morally unacceptable”). “Perceived Social Desirability” was measured by asking participants whether using the cheap paint in the legal situation described above would be socially desirable (with 1 being “Desirable behavior” and 10 being “Undesirable behavior”).

The next two variables related to participants’ perceptions regarding the prevalence of compliance—that is, their expectations as to how others would behave in the same situation. “Percentage of Noncompliance” was measured by asking participants about the percentage of people in the country, under the same circumstances, who would choose to use the cheaper paint (with 1 being 10% and 10 being 100%).⁶¹ “Likelihood of Noncompliance” was measured by asking participants how strongly they agreed with the statement that “most people would use the cheaper paint in the legal scenario depicted” (with 1 being “Strongly agree” and 10 being “Strongly disagree”). Based upon the internal consistency (Cronbach’s $\alpha = 0.61$), we computed a measure of Perceived Prevalence of Noncompliance (Prevalence), by averaging the grading of the two aforementioned items, with higher values indicating lower perceived prevalence of using the cheaper paint.

The last three variables related to the participants’ intended future behavior. “Attempt To Comply” was measured by asking participants whether they agreed that “[t]o the extent possible [they would] attempt to refrain from using the cheaper paint in the legal scenario depicted” (with 1 being “I will use the cheaper paint” and 10 being “I will not use the cheaper paint”). “Willingness To Forgo Profits” (for compliance) was measured by asking participants whether they agreed that “[e]ven if [they saved] a lot of money, [they would] not use the

60. “Dependent variable” refers to the variables that are explained by the model. The Likert scale is one of the most common summative scales used in social sciences to rate evaluations or judgments on one dimension. There are a variety of possible response scales; we used scales from 1 to 10. The use of such scales enables participants to report the intensity of their attitudes (unlike dichotomous tools which offer participants a more limited ability to express the intensity of their views).

61. For this variable, a recode transformation was later conducted so that higher grading indicated lower percentage.

cheaper paint in the legal scenario depicted” (with 1 being “I will use the cheaper paint” and 10 being “I will not use the cheaper paint”). Finally, participants were asked a yes-or-no question to gauge their “Intention To Breach”: “In your estimation, would you ultimately use the cheaper paint in the legal scenario depicted above?” (with 0 being “Yes” and 1 being “No”).

C. STUDY I: CONTRACTUAL UNCERTAINTY VERSUS ENFORCEMENT UNCERTAINTY

We begin with a simple benchmark case in which we compare uncertainty created by ambiguity in the language of the contract with uncertainty created by probabilistic enforcement. To examine the effect of the type of legal situation on participants’ attitudes toward the misconduct, a one-way multivariate analysis of variance (MANOVA) was conducted, and the subgroups were compared with respect to the dependent variables of the study (that is, attitudes toward the misconduct and intention to breach).⁶² Following a significant effect,⁶³ a series of one-way univariate analyses of variance (ANOVA) were conducted in order to examine the source of the variance.⁶⁴ In Table 1, we report the mean scores and standard deviations for perceived attitudes and reactions toward the misconduct as a function of the legal situation.⁶⁵

Multivariate analysis of variance for the attitudes and reactions toward breach indicated that, overall, the subgroups differed significantly.⁶⁶ Participants were more likely to view the use of the cheaper paint positively under situations of legal uncertainty as opposed to enforcement uncertainty. Univariate analysis of variance indicated that a significant difference was detected for five of the six

62. MANOVA is a procedure that examines the explained variance in a series of dependent variables by a series of independent variables. This procedure accounts for the contribution of one out of many explanatory factors when more than one factor needs to be explained. The advantage of this procedure is that it identifies both interactions between the independent variables as well as other associations between the dependent variables. Given that the distribution of some of the outcomes was negatively skewed, a series of nonparametric Mann–Whitney *U* tests was also carried out to confirm the pattern of the results.

63. A significant effect in a statistical measurement refers to the odds that a certain result was created by chance. In the context of this paper, every time a difference or a result is presented as “significant” it means that there is less than a 5% likelihood that this difference was coincidental. The 5% level of significance is a common threshold used in statistical analysis. In some cases where the result was stronger, we added $p < .01$ to indicate that the likelihood of a chance-driven result was lower than 1%.

64. ANOVA is a common statistical technique that aims to identify the sources of variance among participants. In ANOVA, in contrast to MANOVA, there is only one dependent variable. In our design, the purpose of the statistical analysis is to examine whether the experimental groups are different from each other. The procedure allows us to tell how much of the difference between participants could be attributed to their assignment to the different subgroups. In plain words, the statistical analyses tell us how much of the differences in the participants’ responses can be explained by the type of contractual uncertainty. For the last item—Intention To Breach—which was dichotomous (0,1), an additional set of nonparametric tests was conducted. Given that the results were identical in terms of significance in all three studies, the results and associated tables are kept on separate file with the authors.

65. Standard Deviation is a common concept used to measure the distribution of a variable around the average.

66. Multivariate $F(7, 61) = 3.18, p < .01, \eta^2 = .27$.

Table 1. Mean Scores and Standard Deviations (in Parentheses) for Attitudes Toward the Breach as a Function of Uncertainty Type (n = 100)

Dependent Variable	Contractual Uncertainty		Enforcement Uncertainty		Difference Test
Perceived Morality	6.88	(2.60)	8.08	(1.97)	p < 0.05
Perceived Desirability	6.80	(2.46)	8.18	(2.04)	p < 0.01
Prevalence	3.80	(1.78)	4.59	(2.11)	p < 0.05
Attempt to Comply	6.90	(2.45)	8.40	(2.00)	p < 0.001
Willingness to Forge Profits	6.42	(2.60)	7.88	(2.25)	p < 0.01
Intention to Breach	0.76	(0.43)	0.88	(0.33)	NS

NOTE: The first five items were rated on a ten-point Likert scale. Higher values indicate more negative attitudes toward the use of cheaper paint, lower perceived prevalence of use of cheaper paint, and lower inclination to use cheaper paint. The sixth variable, Intention To Breach, was rated on a binary scale: 0 (yes) or 1 (no). *NS* = Not Significant.

dependent variables: Perceived Morality,⁶⁷ Perceived Desirability,⁶⁸ Prevalence,⁶⁹ Attempt To Comply,⁷⁰ and Willingness To Forgo Profits.⁷¹ The tests reveal that, for all of these measures, means were higher in the Enforcement Uncertainty subgroup than in the Contractual Uncertainty subgroup. Therefore, in accordance with the hypothesis, the inclination to breach the contract and use the cheaper paint was found to be higher for the group faced with contractual uncertainty than for the group faced with uncertainty in enforcement.

D. STUDY II: THE SOURCE OF THE CONTRACTUAL OBLIGATION

In the first experiment, we largely confirmed our basic hypothesis that contractual obligations carry a noninstrumental value and demonstrated the difference between uncertainty associated with enforcement and uncertainty associated with the language of the contract. This led us to examine the boundaries of this effect and the extent to which it would be repeated in other settings. Identifying the circumstances that influence the expressive power of contracts can serve two purposes. First, from a theoretical perspective, mapping these circumstances could help us understand the mechanism that underlies nonconsequential incentives for performance. Second, from a practical perspective, to the extent that such incentives differ between distinct situations, distin-

67. $F(1, 98) = 6.77, p < 0.05, \eta^2 = 0.06$.

68. $F(1, 98) = 9.34, p < 0.01, \eta^2 = 0.09$.

69. $F(1, 98) = 4.08, p < 0.05, \eta^2 = 0.04$.

70. $F(1, 98) = 11.24, p < 0.001, \eta^2 = 0.10$.

71. $F(1, 98) = 9.01, p < 0.01, \eta^2 = 0.08$.

guishing between these situations can assist policymakers in devising more tailored contract rules and contracting parties in designing superior contracts.

Contract scholarship has long since acknowledged that contracts are inherently incomplete.⁷² A variety of reasons such as transaction costs, asymmetric information, and bounded rationality routinely lead parties to draft contracts that do not specify the allocation of risks in different contingencies.⁷³ In fact, despite our concept of contracts as a tool that reflects mutual assent, contracts “usually mention relatively few contingencies explicitly out of the multitude of events of possible relevance.”⁷⁴ Contract law employs a set of default rules, which helps deal with contractual incompleteness. These rules govern the relationship between the parties in situations in which the contract between them is silent. Issues such as time and place of performance,⁷⁵ quality of goods,⁷⁶ and even price⁷⁷ can all be determined by the content of a default rule rather than by the explicit or implicit agreement of the parties.

In light of the centrality of default rules to the practice of contracting, in our second experiment, we turned to measure the expressive power of such rules and to compare it with the power of obligations created by the contracting parties themselves. Exploring this question is a challenging task because one can present two competing hypotheses regarding the power carried by default rules.

On one hand, when contractual risks are allocated by default rules, the ability to view the parties as actually agreeing to such rules is limited. Thus, people may not view them as a promise that they made to the opposing party and that they are morally obligated to keep.⁷⁸ As Charles Fried noted, cases involving unallocated risks “cannot be resolved . . . on the basis of the agreement—that is, of contract as promise.”⁷⁹ Furthermore, in many cases, policy considerations suggest that the legal system adopt default rules that serve one group of contracting parties and therefore systematically run against the interests of other groups of contracting parties.⁸⁰ This, in turn, may limit the commitment the

72. See, e.g., Scott Baker & Kimberly D. Krawiec, *Incomplete Contracts in a Complete Contract World*, 33 FLA. ST. U. L. REV. 725, 725 (2006) (noting that “[c]ontracts are never fully complete, because some contractual incompleteness is inevitable, given the costs of thinking about, bargaining over, and drafting for future contingencies”).

73. For a recent review of the literature, see Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 665–68 (2004).

74. Shavell, *supra* note 14, at 446.

75. U.C.C. § 2-308 (2010) (providing for delivery to be conducted at seller’s place of business); *id.* § 2-309 (providing for performance within reasonable time).

76. *Id.* § 2-314(2)(b) (providing fair average quality of goods).

77. *Id.* § 2-305 (providing for reasonable price).

78. To be sure, we do not claim that there is no moral argument in favor of fulfilling contractual commitments created by default rules. All that we argue is that people may view this as a weaker commitment.

79. FRIED, *supra* note 17, at 60.

80. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (introducing the concept of penalty default rules that

latter group of people feels towards respecting the allocation of risks set by the default rule.

On the other hand, default rules are set by agents of the states, namely courts and legislatures. State actions are often perceived as being fair, reflecting commonly held values of justice, and promoting aggregate efficiency.⁸¹ Similarly, default rules are likely to be perceived as more balanced with regard to the respective interests of the contracting parties.⁸² This perception can bolster parties' respect towards default rules and cause them to adhere to the allocation of risks determined by them. In other words, the expressive power of law, usually alluded to in the context of prohibitions, may also be present in the context of dispositive contract rules.

To examine the effects of the source of the contractual obligation and the type of legal uncertainty on the dependant variables, a two-way MANOVA between the source of obligation (Contract Term or Default Rule) and uncertainty type (Contractual Uncertainty or Enforcement Uncertainty) was conducted. A separate one-way ANOVA for each source of obligation comparing the means of the uncertainty-type subgroups was also conducted.⁸³

In Table 2, we report the mean scores for perceived attitudes and reactions toward the misconduct as a function of the source of the obligation and the type of uncertainty. In addition, the table presents the results of the ANOVA conducted separately for the two sources of obligations.

A two-way MANOVA indicated that, overall, there was a significant main effect for the uncertainty type,⁸⁴ indicating that participants were more likely to use the cheaper paint under situations of contractual uncertainty than under enforcement uncertainty. In addition, the MANOVA indicated that there was a significant main effect for the source of the obligation,⁸⁵ revealing a higher tendency to use the cheaper paint in situations involving a default rule than in

incentivize parties to reveal private information by offering the parties default rules that penalize them); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983) (arguing that default rules should fit the preferences of the majority of contracting parties, thus countering the interests of the minority); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 474 (1980) (arguing that contract rules should be used to redistribute wealth, thus systematically functioning against the interests of the wealthy).

81. See Yuval Feldman, *Five Models of Regulatory Compliance Motivation*, in HANDBOOK ON THE POLITICS OF REGULATION (David Levi-Faur ed., forthcoming 2011) (manuscript at 6–7) (on file with authors) (reviewing the literature on regulatory compliance and suggesting state laws enjoy some assumed legitimacy so that they operate within societal expectation); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 358–72 (2000) (arguing that state law has the power to signal what are the shared beliefs of members of society regarding a certain act).

82. See Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1585 (2005) (comparing standard-form contracts and default rules).

83. In this study, the size of the Contractual Uncertainty subgroup was substantially larger than that of the Enforcement Uncertainty subgroup (seventy-two to twenty-five). This gap proved irrelevant for both the differences between the two uncertainty conditions as well as for the two sources of the norm (given the direction to the effect).

84. Multivariate $F(6, 188) = 6.32$, $p < 0.001$, $\eta^2 = 0.17$.

85. Multivariate $F(6, 188) = 2.62$, $p < 0.05$, $\eta^2 = 0.08$.

Table 2. Mean Scores and Standard Deviations (in Parentheses) for Attitudes Toward the Breach as a Function of Source of the Obligation and Uncertainty Type (n = 197)

Dependent Variable	Source of the Obligation					
	Contract Term			Default Rule		
	Contractual Uncertainty	Enforcement Uncertainty	Difference Test	Contractual Uncertainty	Enforcement Uncertainty	Difference Test
Perceived Morality	7.35 (2.24)	9.20 (1.19)	p < 0.001	6.37 (2.77)	8.00 (2.05)	p < 0.001
Perceived Desirability	7.49 (2.01)	9.12 (1.17)	p < 0.001	6.37 (2.32)	8.18 (1.80)	p < 0.001
Prevalence	3.97 (1.87)	4.10 (1.99)	NS	3.46 (1.83)	4.09 (1.71)	p < 0.05
Attempt To Comply	7.72 (1.89)	9.08 (1.19)	p < 0.01	6.72 (2.32)	7.75 (2.50)	p < 0.05
Willingness To Forgo Profits	7.11 (2.15)	8.88 (1.61)	p < 0.001	6.02 (2.39)	7.65 (2.53)	p < 0.001
Intention To Breach	0.81 (0.40)	1.00 (0.00)	p < 0.05	0.67 (0.48)	0.84 (0.37)	p < 0.05

NOTE: The first five items were rated on a ten-point Likert scale. Higher values indicate more negative attitudes toward the use of cheaper paint, lower perceived prevalence of use of cheaper paint, and lower inclination to use cheaper paint. The sixth variable, Intention To Breach, was rated on a binary scale: 0 (yes) or 1 (no). NS = Not Significant.

situations involving a contract term. Finally, the MANOVA showed that there was no significant interaction effect between the source of the obligation and the uncertainty type.

The univariate tests show a significant difference between the uncertainty subgroups in five of the six dependent variables: Perceived Morality,⁸⁶ Perceived Desirability,⁸⁷ Attempt To Comply,⁸⁸ Willingness To Forgo Profits,⁸⁹ and Intention To Breach.⁹⁰ For each of these variables, the means were higher (indicating a lesser inclination to use the cheaper paint) in the Enforcement Uncertainty subgroup than in the Contractual Uncertainty subgroup.

In addition, a significant difference was found between the source-of-the-obligation subgroups with respect to the same five dependent variables: Perceived Morality,⁹¹ Perceived Desirability,⁹² Attempt To Comply,⁹³ Willingness To Forgo Profits,⁹⁴ and Intention To Breach.⁹⁵ For each of these variables, the means were higher (that is, less likely to use the cheaper paint) in situations in which a contract term was the source of the obligation rather than a default rule.

E. STUDY III: NEGOTIATED CONTRACTS VERSUS STANDARD-FORM CONTRACTS

Study II demonstrated the difference between explicit agreements and default rules. These two sources of obligations, however, differ with respect to two main dimensions. First, agreements involve negotiations whereas default rules normally are characterized by a lack of negotiation. Second, agreements are private creations, whereas default rules are creations of the state. To further our understanding of the role played by the presence of negotiations, we designed a third experiment in which we compared contractual uncertainty with respect to negotiated and standard-form contracts.

A voluminous body of legal literature has dealt with the distinctions between standard-form contracts and negotiated contracts.⁹⁶ Whereas it is a settled matter that contract law differentiates between the two types of contracts,⁹⁷ it is unclear whether contracting parties do so as well.⁹⁸ We hypothesize that contract-

86. $F(1, 193) = 25.50, p < 0.001, \eta^2 = 0.12$.

87. $F(1, 193) = 32.70, p < 0.001, \eta^2 = 0.14$.

88. $F(1, 193) = 13.66, p < 0.001, \eta^2 = 0.07$.

89. $F(1, 193) = 24.23, p < 0.001, \eta^2 = 0.11$.

90. $F(1, 193) = 9.32, p < 0.01, \eta^2 = 0.05$.

91. $F(1, 193) = 9.96, p < 0.001, \eta^2 = 0.05$.

92. $F(1, 193) = 11.58, p < 0.001, \eta^2 = 0.06$.

93. $F(1, 193) = 12.92, p < 0.001, \eta^2 = 0.06$.

94. $F(1, 193) = 11.25, p < 0.001, \eta^2 = 0.05$.

95. $F(1, 193) = 6.40, p < 0.05, \eta^2 = 0.03$.

96. For a review of the literature, see Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1274–82 (1993).

97. See *id.* at 1264.

98. In a recent working paper, Zev Eigen used an online experiment to study the unique aspects of performance in standard-form settings. Eigen measured whether the willingness of participants to continue with a tedious questionnaire was affected by the type of obligation they took on themselves initially. One of the main findings of the study was that when participants selected the contract term

ing parties treat standard-form contracts and negotiated contracts distinctly. More specifically, we presume that they assign less weight to the noninstrumental motivations for performance in the context of standard-form contracts. This hypothesis stems from several characteristics of standard-form contracts to which we now turn to review.

First, standard-form contracts routinely involve asymmetric information regarding their content.⁹⁹ In a typical setting, a consumer is offered a lengthy contract written in impenetrable language that alludes in great detail to highly unlikely contingencies.¹⁰⁰ Furthermore, the consumer usually knows that even if she reads the contract, she will be unable to alter its content. As a result, the consumer rationally chooses to sign the contract without reading it.¹⁰¹ The fact that consumers are not aware of the content of the contract may lead them to discount their obligation with respect to the contract. They may, for example, convince themselves that breaching the contract does not violate the prohibition against breaking promises, as they never truly agreed to the relevant provisions of the contract.¹⁰²

Second, the procedure of signing a standard-form contract may be seen by some as unfair. Standard-form contracts are usually offered on a take-it-or-leave-it basis. This unilateral process does not allow parties to incorporate their preferences into the contract. Negotiated contracts, by contrast, involve a joint effort to reach an agreement. As a result, they can be adjusted in order to address the needs of both parties. The literature on procedural justice shows that compliance is driven by the nature of the process through which authorities attempt to achieve it.¹⁰³ As people view the process as more fair and just, their willingness to accept its outcome increases.¹⁰⁴ Two factors that may increase

themselves, they were significantly more likely to complete the online survey. See Zev J. Eigen, When and Why Individuals Obey Form-Adhesive Contracts: Experimental Evidence of Consent, Compliance, Promise and Performance 26–27 (July 14, 2010) (unpublished manuscript) (on file with authors).

99. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435–37 (2002).

100. See *id.* at 435.

101. *Id.* at 436. For an empirical demonstration of this point, see Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 36–37 (N.Y. Univ. Sch. of Law Ctr. for Law, Econ. & Org., Working Paper No. 09-40, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256 (showing that household consumers hardly ever read standard-form contracts when they engage in online transactions).

102. See Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 628–30 (2002) (reviewing the tension between promise-based theories of contract and standard-form contracts). To be sure, we make no claim as to the normative validity of this point of view. All that we conjecture is that some subjects may rationalize their actions in this fashion. For a discussion on the normative implications of asymmetric information in standard-form contracts, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *HARV. L. REV.* 1173, 1250–55 (1983) (arguing that courts should distinguish between visible and invisible terms); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 *U. PA. L. REV.* 630, 638 (1979) (arguing that an informed minority of marginal consumers can overcome information gaps).

103. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 5–7 (1990).

104. *Id.*

the sense of procedural justice are having one's voice heard and having perceived control over the process.¹⁰⁵ 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.¹⁰⁶ 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.

Third, the importance of personal involvement in the contracting process can be accounted for in the social-cognition literature. According to this literature, the ability to form a mental representation of one's goals has a positive influence on the ability to cope with difficulties while working toward those objectives. As Shelley Taylor and Lien Pham noted, "[T]he simple act of forming an intention to implement an action facilitates the detection of action-related opportunities, intensifies commitment to the action sequence, and leads to a high likelihood of action."¹⁰⁷

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.¹⁰⁸ 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

105. For research on the relevancy of control and voice to a process associated with increasing the sense of procedural fairness associated with it, see, for example, P. Christopher Earley & E. Allan Lind, *Procedural Justice and Participation in Task Selection: The Role of Control in Mediating Justice Judgments*, 52 J. PERSONALITY & SOC. PSYCHOL. 1148 (1987); Jerald Greenberg & Robert Folger, *Procedural Justice, Participation, and the Fair Process Effect in Groups and Organizations*, in BASIC GROUP PROCESSES 235 (Paul B. Paulus ed., 1983); Kwok Leung & Wai-Kwan Li, *Psychological Mechanisms of Process-Control Effects*, 75 J. APPLIED PSYCHOL. 613 (1990).

106. 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.

107. Shelley E. Taylor & Lien B. Pham, *Mental Simulation, Motivation, and Action*, in THE PSYCHOLOGY OF ACTION: LINKING COGNITION AND MOTIVATION TO BEHAVIOR 219, 229 (Peter M. Gollwitzer & John A. Bargh eds., 1996); see also Suzanne C. Thompson, *Will It Hurt Less if I Can Control It? A Complex Answer to a Simple Question*, 90 PSYCHOL. BULL. 89, 97–98 (1981) (discussing relationship between control and future outcomes).

108. The originator of this theory is Leon Festinger in his seminal book *A Theory of Cognitive Dissonance*. For a broader account, see ALBERT 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?*, 74 J. PERSONALITY 1557, 1562–68 (2006).

committed to that activity.¹⁰⁹ 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.¹¹⁰

Finally, standard-form contracts are often perceived as reflecting an unbalanced division of power that has even been described as "authoritarian."¹¹¹ In this regard, the suppliers of the contract are viewed as powerful and sophisticated, whereas the consumers are viewed as weak and vulnerable.¹¹² Recent studies in the area of social psychology have identified a so-called Robin Hood effect, according to which, individuals are inclined to transfer wealth from the rich to the poor.¹¹³ This behavior is driven by both envy towards the affluent and empathy towards the disadvantaged.¹¹⁴ These findings suggest that parties may be more willing to behave selfishly in the context of standard-form contracts because they might view this behavior as a means to transfer wealth from the powerful to the powerless.¹¹⁵

109. 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 N. Goetzmann & Nadav Peles, *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).

110. 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).

111. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) (noting that contracts of adhesion allow firms "to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms"); see also Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 787–98 (1982) (presenting a taxonomy of the nature of the bargaining that takes place based on the types of parties and commodities).

112. See, e.g., Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 247 (1970) (noting that "[d]isparity in bargaining power between parties to standard-form contracts is a universally recognized problem"). For a criticism of the simplistic usage of the concept of unequal bargaining power and a suggested analytical model for intervention in the freedom of contract based on distributive, paternalistic, and efficiency arguments, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 570–75 (1982).

113. See, e.g., Francesca Gino & Lamar Pierce, *Robin Hood Under the Hood: Wealth-Based Discrimination in Illicit Customer Help* 30 (Jan. 5, 2009) (unpublished manuscript) (on file with authors), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1157083.

114. See *id.* at 31.

115. Nonetheless, it should be acknowledged that in our own study we were careful not to give parties any information on the wealth of the other party. As described below, in future studies of

Table 3. Mean Scores and Standard Deviations (in Parentheses) for Attitudes Toward the Breach as a Function of Negotiation and Uncertainty Type (n = 187)

Dependent Variable	Negotiation			Standard Form		
	Contractual Uncertainty	Enforcement Uncertainty	Difference Test	Contractual Uncertainty	Enforcement Uncertainty	Difference Test
Perceived Morality	7.09 (2.46)	8.37 (2.06)	p < 0.01	5.47 (2.83)	8.65 (1.58)	p < 0.001
Perceived Desirability	7.10 (2.41)	8.15 (2.00)	p < 0.05	5.32 (2.91)	8.63 (1.52)	p < 0.001
Prevalence	3.70 (1.64)	4.53 (1.98)	p < 0.05	3.60 (2.12)	4.14 (1.72)	NS
Attempt To Comply	7.60 (2.57)	8.24 (2.06)	NS	6.45 (2.90)	7.91 (1.96)	p < 0.01
Willingness To Forgo Profits	7.07 (2.52)	7.96 (2.30)	NS	5.21 (3.19)	7.80 (1.90)	p < 0.001
Intention To Breach	0.75 (0.43)	0.93 (0.25)	p < 0.05	0.63 (0.49)	0.89 (0.31)	p < 0.01

NOTE: The first five items were rated on a ten-point Likert scale. Higher values indicate more negative attitudes toward the use of cheaper paint, lower perceived prevalence of use of cheaper paint, and lower inclination to use cheaper paint. The sixth variable, Intention To Breach, was rated on a binary scale: 0 (yes) or 1 (no). NS = Not Significant.

To examine the effects of the negotiation and contractual uncertainty on the dependent variables, we conducted a two-way MANOVA between the contract type (Negotiation or Standard Form) and the uncertainty type (Contractual Uncertainty or Enforcement Uncertainty). We also conducted a separate one-way ANOVA for each of the negotiation subgroups, comparing the means of the uncertainty-type subgroups.

In Table 3, we report the mean scores for perceived attitudes and reactions toward the misconduct as a function of the existence of negotiations and of the type of uncertainty. In addition, the table presents the results of the ANOVA conducted separately for the negotiation subgroups.

The findings of this study show a significant main effect with respect to the type of uncertainty,¹¹⁶ indicating that participants were more likely to use the cheaper paint in situations of contractual uncertainty than in situations of enforcement uncertainty. The negotiation variable, on the other hand, did not have a statistically significant main effect on the dependent variables. Finally, the MANOVA showed a significant interaction effect between negotiation and uncertainty,¹¹⁷ indicating that the difference in behavior under both legal and enforcement uncertainty is more prominent in the standard-form context than in the negotiation context.

Looking at the variables individually presents a more nuanced picture. The univariate tests show a significant difference between the uncertainty subgroups across all of the dependent variables: Perceived Morality,¹¹⁸ Perceived Desirability,¹¹⁹ Prevalence,¹²⁰ Attempt To Comply,¹²¹ Willingness To Forgo Profits,¹²² and Intention To Breach.¹²³ For each of these variables, the means were higher (indicating a lesser inclination to use the cheaper paint) in the Enforcement Uncertainty subgroup than in the Contractual Uncertainty subgroup.

In addition, a significant difference was found between the negotiation subgroups with respect to four of the six dependent variables: Perceived Morality,¹²⁴ Perceived Desirability,¹²⁵ Attempt To Comply,¹²⁶ and Willingness To Forgo Profits.¹²⁷ For each of these variables, the means were higher (indicating a lesser inclination to use the cheaper paint) in the Negotiation subgroup than in the Standard Form subgroup.

compliance to form contracts we hope to discern between the identity of the contracting parties and the nature of the contract. *See infra* Part III.C.

116. Multivariate $F(6, 178) = 10.73, p < 0.001, \eta^2 = 0.27$.

117. Multivariate $F(6, 178) = 2.81, p < 0.05, \eta^2 = 0.09$.

118. $F(1, 183) = 44.48, p < 0.001, \eta^2 = 0.20$.

119. $F(1, 183) = 43.13, p < 0.001, \eta^2 = 0.19$.

120. $F(1, 183) = 6.24, p < 0.05, \eta^2 = 0.03$.

121. $F(1, 183) = 9.71, p < 0.01, \eta^2 = 0.05$.

122. $F(1, 183) = 22.39, p < 0.001, \eta^2 = 0.11$.

123. $F(1, 183) = 15.22, p < 0.001, \eta^2 = 0.08$.

124. $F(1, 183) = 3.96, p < 0.05, \eta^2 = 0.02$.

125. $F(1, 183) = 3.90, p < 0.05, \eta^2 = 0.02$.

126. $F(1, 183) = 4.75, p < 0.05, \eta^2 = 0.02$.

127. $F(1, 183) = 7.48, p < 0.01, \eta^2 = 0.04$.

Estimated Marginal Means of Morality

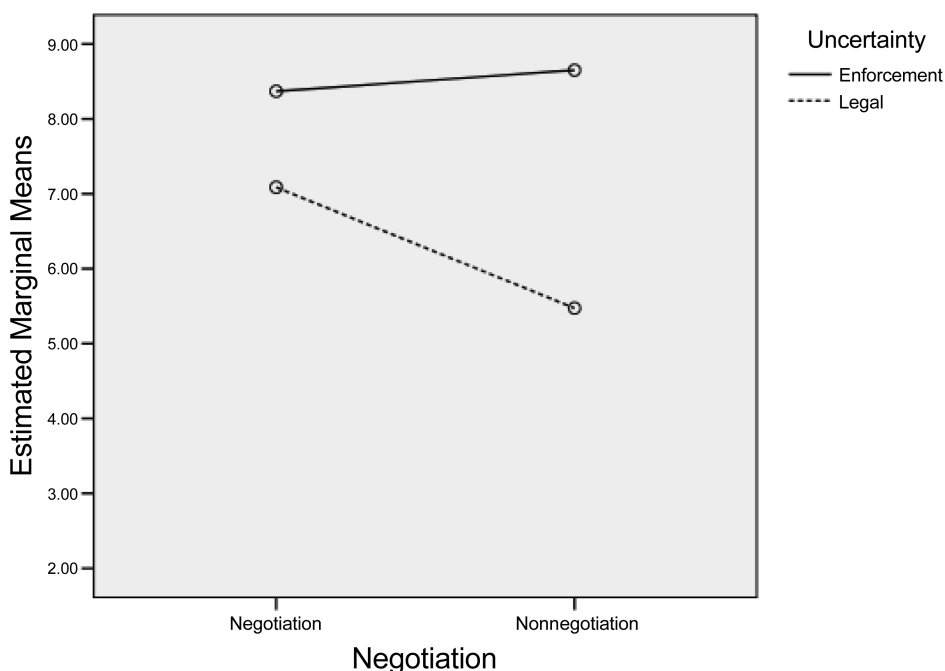


Figure 1. The Means of the Measures as a Function of Uncertainty and Negotiation

Importantly, the univariate tests also indicated a significant interaction effect for three of the six variables: Perceived Morality,¹²⁸ Perceived Desirability,¹²⁹ and Willingness To Forgo Profits.¹³⁰ That is, the differences found between the uncertainty subgroups were moderated by whether negotiations took place. The direction of the interaction was in accordance with our initial hypothesis: the more pronounced differences were found in the nonnegotiation context. Figure 1 illustrates this effect with respect to Perceived Morality. As is evident from the graph, there is almost no difference between standard-form contracts and negotiated contracts when their contents are unambiguous, but there exists a large gap between the two types of contracts once contractual uncertainty is present.

To understand the source of the variance, we conducted a separate MANOVA for each negotiation subgroup. The analysis indicated that in the Standard Form subgroup there were significant differences between the uncertainty subgroups' conditions in five of the six variables: Perceived Morality, Perceived Desirability, Attempt To Comply, Willingness To Forgo Profits, and Intention To Breach.

128. $F(1, 183) = 8.04, p < 0.01, \eta^2 = 0.04$.

129. $F(1, 183) = 11.66, p < 0.001, \eta^2 = 0.06$.

130. $F(1, 183) = 5.39, p < 0.05, \eta^2 = 0.03$.

In the Negotiation subgroup, on the other hand, there were significant but moderated differences between the uncertainty conditions in four of the six variables: Perceived Morality, Perceived Desirability, Prevalence, and Intention To Breach.

III. DISCUSSION AND POLICY IMPLICATIONS

After presenting our findings regarding the different factors that affect the motivation of people to adhere to contractual obligations, we now turn to an analysis of these results. We begin by reviewing the contribution of our study to contract theory in general. Then we examine several concrete policy debates and demonstrate that our findings can shed new light on them. Finally, we address the limitations of the study and offer several avenues by which these limitations can be dealt with in future research.

A. GENERAL DISCUSSION

The most salient and consistent finding stemming from all three studies is that contracts do not function merely as a price-setting device for noncooperative behavior. Participants in each experiment demonstrated that they treat enforcement uncertainty and contractual uncertainty distinctively and were relatively more willing to use the cheap paint when the latter type of uncertainty was involved. This result suggests that, whereas enforcement uncertainty functions merely as a discount for the monetary cost of breach, contractual uncertainty carries moral weight and discounts both the monetary cost of breach and the noninstrumental implications of breach. Thus, one can view our findings as a documentation of the expressive power of contracts. The content of contracts, notwithstanding the legal price of breach, induces compliance.

The second and third experiments highlight the more intricate nuances associated with the expressive power of contracts and show that not all contractual obligations are created equal. The results of Study II suggest that people view contract terms and default rules as different types of obligations, carrying distinctive noninstrumental power. Furthermore, the results of Study III demonstrate that the existence of negotiations may affect the way in which people treat contractual obligations. Generally, the picture arising from the results is of a continuum of contractual obligations. At one end of this continuum lie settings that are close to the paradigmatic case of a promise. In such cases, people feel a strong commitment to fulfill their obligations and thus tend to behave cooperatively irrespective of the monetary consequences. As we shift away from this setting and dilute the level of consent, people tend to assign a lower value to their contractual obligations. In such contexts, the gap between promise and contract widens, and people are more willing to further their own goals and interpret their contractual obligations in a selfish manner.

Analyzing the data from the second and third studies along the dimensions of both of the independent variables reveals more insights regarding the interaction

between these variables. In Study III, participants did not view standard-form contracts and negotiated contracts differently when there was no contractual uncertainty. In these settings, it seems as though the complete certainty associated with breach dominated participants' choices. Once contractual uncertainty was introduced, however, the difference between standard-form contracts and negotiated contracts emerged. Participants viewed breaching the ambiguous standard-form contract as less immoral than breaching the equally ambiguous negotiated contract and were more willing to exploit this ambiguity to behave selfishly and use the cheaper paint.

Interestingly, participants in Study II did not behave in a symmetric fashion with respect to default rules. While the results revealed a clear difference between default rules and contract terms, there was no interaction between the two variables. This result can be accounted for by two alternative explanations. First, as we acknowledged while presenting our hypothesis, the expressive power of default rules is arguably stronger than that of standard-form contracts because of the fairness associated with the former and the unfairness associated with the latter.¹³¹ Thus, the gap between enforcement uncertainty and contractual uncertainty with respect to default rules was expected to be smaller and more difficult to measure. Second, participants may have been sensitive to the question of responsibility for uncertainty. In the standard-form setting, participants could view the drafting party as responsible for the contractual uncertainty. This responsibility, in turn, could justify interpreting the contract in a self-serving manner. In the context of default rules, however, participants could not assign responsibility to the uncertainty because it was created by an external party. As a result, the importance of uncertainty was diminished in this context.

Finally, it is worth noting that the differences in the dependent variable Prevalence were statistically insignificant in most experiments. In other words, while participants' attitudes toward breach reflected sensitivity to the noninstrumental dimensions of performance, they assumed that others would not show similar sensitivity. This finding is consistent with a number of theoretical paradigms, the most recent of which is the holier-than-thou effect, which suggests that people perceive themselves as being fairer, more altruistic, and more self-sacrificing than others.¹³²

131. See *supra* notes 78–82 and accompanying text.

132. See Nicholas Epley & David Dunning, *Feeling “Holier Than Thou”: Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOL. 861 (2000). To some extent, the fact that participants differed systematically with respect to variables that measured self-related attitudes and did not with respect to measures of others reassures us as to the internal validity of our questionnaires and the careful reading of our respondents. For a discussion of the possible effects of this perception gap in legal contexts, see Robert Cooter, Michal Feldman & Yuval Feldman, *The Misperception of Norms: The Psychology of Bias and the Economics of Equilibrium*, 4 REV. L. & ECON. 889 (2008).

B. POLICY IMPLICATIONS

Thus far, we have focused on the theoretical and abstract interpretations of our findings. We now turn to explore their implications for concrete policy issues. First, we analyze the way in which our results may affect judicial policies regarding contract interpretation. Second, we evaluate the literature dealing with default rules in light of our findings and argue that some of its current conclusions ought to be revisited. Lastly, we discuss the lessons contracting parties can draw from our studies.

1. Contract Interpretation

The most common contract disputes are those that involve issues of interpretation.¹³³ Both the limitations of the language and transaction costs often lead parties to define their obligations in a vague manner.¹³⁴ This, in turn, requires an adjudicator to interpret the contract in order to determine the parties' obligations. Contractual vagueness can result from terms that are inherently unclear, such as terms that require parties to engage in a "best effort" or terms that excuse performance in cases of a "material" change of circumstances. Nevertheless, even apparently clear terms may raise interpretative questions. A court may, for example, have to determine whether a chicken that is only suitable for stewing and not for broiling or frying constitutes a "chicken" under a sales contract.¹³⁵

The main object of contract interpretation is to identify the intent of the drafting parties.¹³⁶ As Lawrence Solan recently noted, the single concern of courts in interpretation cases "is to discover the intent of the parties, and reach a decision that will vindicate that intent."¹³⁷ This goal promotes efficiency because the parties' intent arguably reflects the optimal allocation of risks.¹³⁸ This goal also promotes autonomy, as it respects the parties' will and does not

133. See Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 928 n.3 (2010) (reviewing the evidence on the prevalence of contract disputes that stem from interpretation).

134. For a review of the different sources of contractual uncertainty, see 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.8 (3d ed. 2004).

135. We allude to the famous contract interpretation case of *Frigalimont Importing Co. v. B.N.S. International Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

136. See Schwartz & Scott, *supra* note 133, at 937 (noting that "it is uniformly held that a court resolving an interpretive dispute should recover the parties' intentions, whatever those intentions were"). *But see* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1778 (1997) (arguing that along with the goal of identifying intentions contract interpretation has other goals such as "promoting fairness and equivalence of considerations, fostering redistributive policies, and protecting individuals from their own shortsightedness and weakness").

137. Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 388 (2007). For a review of the case law, see *id.* at 388–94.

138. See Posner, *supra* note 82, at 1590–91 (analyzing the goals of interpretation and arguing that focusing on parties' intentions is desirable).

impose on them obligations that they did not intend to take.¹³⁹

Deciphering the true intentions of the parties, however, is a difficult task for courts engaging in *ex post* adjudication. When questions of interpretation arise, each party has an incentive to claim that the parties' intention was that which will maximize its profits. In light of this, contract interpretation is mostly an objective rather than subjective task.¹⁴⁰ The substantive rules of contract law routinely employ objective standards according to which they construct the parties' presumed intentions.¹⁴¹ These substantive doctrines are coupled with evidentiary rules, such as the rule barring parole evidence,¹⁴² that further detach contract interpretation from the subjective intentions of the parties.

The findings of all three of our studies support the objective trend in contract interpretation. The consistent gap between enforcement uncertainty and contractual uncertainty demonstrates the tendency of parties to interpret obligations in light of their private interests. Thus, relying on the parties' *ex post*, subjective perceptions of intent is expected to have little value if the goal of the court is to inquire as to the parties' *ex ante* intent.¹⁴³ Reliance on such testimonies will, at best, add little to the precision of judicial rulings and, at worst, jeopardize the parties' true intentions by generating costly litigation that may undermine the ability to enforce contracts.

This insight has manifested itself in the case of *AM International, Inc. v. Graphic Management Associates* in which Judge Posner introduced his theory of contract interpretation.¹⁴⁴ As Posner notes, subjective testimony presented by the parties as to what the contract means is "invariably self-serving."¹⁴⁵ Nevertheless, Posner recognizes the need for extrinsic evidence in order to ascertain the parties' intentions.¹⁴⁶ To cope with this need, Posner allows for objective evidence that can be supplied by disinterested third parties to be introduced

139. See, e.g., William C. Whitford, *Relational Contracts and the New Formalism*, 2004 WIS. L. REV. 631, 641–42 (noting that "fail[ing] to implement the expectations that the parties formed at the time of formation [is] a legitimate autonomy concern").

140. 1 FARNSWORTH, *supra* note 134, § 3.6, at 210 ("By the end of the nineteenth century, the objective theory had become ascendant and courts universally accept it today."). There are, of course, situations in which the parties' subjective state of mind does play a role in the interpretation of contracts. See RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.").

141. See, e.g., Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 431–32 (2000) (presenting a comprehensive overview of different objective theories). For a review of objective interpretation in several common law jurisdictions, see KIM LEWISON, *THE INTERPRETATION OF CONTRACTS* 24–29 (4th ed. 2007).

142. See U.C.C. § 2-202(1)(a) (2010) (noting that the terms of a contract "may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be supplemented by evidence of . . . course of performance, course of dealing, or usage of trade").

143. For a theoretical argument along these lines, see STEVEN J. BURTON, *ELEMENTS OF CONTRACT INTERPRETATION* 173 (2009).

144. 44 F.3d 572, 575–77 (7th Cir. 1995).

145. *Id.* at 575.

146. *Id.*

even in order to challenge the text of a seemingly clear contract.¹⁴⁷ This flexible approach seems to reflect a workable compromise. On one hand, it allows for a brief inquiry into the parties' true intentions. On the other hand, it prevents prolonged trials based on evidence of questionable value.

Aside from these general insights regarding contract interpretation, our findings shed new light on a specific interpretation doctrine as well. One of the long-standing rules regarding contract interpretation is the rule of *contra proferentem*. According to this rule, ambiguous contract terms are interpreted against the interest of the party that drafted them.¹⁴⁸ Although this rule governs all types of contracts, it is mostly applied in the context of standard-form contracts.¹⁴⁹

Legal scholars have presented competing rationales for this doctrine. One line of thought focuses on noninstrumental objectives. According to this argument, because the drafter caused the ambiguity, she should also bear its consequences.¹⁵⁰ As Eyal Zamir noted, if the nondrafting party "could have reasonably relied on an interpretation of the ambiguous contract favorable to her, it would be unfair to disregard this reliance."¹⁵¹ A second line of thought focuses on the incentives generated by the rule.¹⁵² According to these arguments, contractual ambiguity is undesirable as it creates a risk of misunderstandings regarding the parties' rights under the contract. Such misunderstandings, in turn, may bring about inefficient contracting because parties will enter into contracts they ought not to enter. Assuming that drafters are in a better position to reduce uncertainty, assigning liability for ambiguity will incentivize them to minimize the costs created by the ambiguity.¹⁵³

Although we do not aim to rebut the existing theories, one should acknowledge their relative weaknesses when dealing with the application of the rule to standard-form contracts. As noted earlier, both contract theory and recent empirical studies suggest that hardly anyone actually reads standard-form contracts.¹⁵⁴ Thus, focusing the analysis on the interaction between the parties at the time of contracting requires assumptions that are not aligned with reality.

147. *Id.*

148. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). For a review of the case law, see FARNSWORTH, *supra* note 134, § 7.11, at 300–04 nn.26–33.

149. See FARNSWORTH, *supra* note 134, § 7.11, at 302–03.

150. See RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (1981).

151. Zamir, *supra* note 136, at 1724.

152. For a recent critical review of incentive-based justifications of the doctrine, see David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 457–66 (2009). See also Zamir, *supra* note 136, at 1724–25 (analyzing efficiency-based rationales of the doctrine).

153. This is not to say that drafters will simply minimize ambiguity; rather, they will minimize the combined cost of ambiguity and drafting. See *Carolina Care Plan Inc. v. McKenzie*, 467 F.3d 383, 390 (4th Cir. 2006), *overruled on other grounds by* *Champion v. Black & Decker (U.S.) Inc.*, 550 F.3d 353 (4th Cir. 2008) (contending that assigning liability to the drafter will cause it to reach "the most efficient balance between clarity and ambiguity").

154. See *supra* notes 99–102 and accompanying text.

Nondrafters are unlikely to rely on the text of a standard-form contract, for the simple reason that they are clueless as to the contract's content.¹⁵⁵ Similarly, it is improbable that parties enter into inefficient contracts because of contractual uncertainty, as they are unaware of the ambiguous provision at the time of consent.¹⁵⁶

Our findings suggest a new explanation for the doctrine that rests on purely *ex post* grounds. Participants in the third experiment viewed contractual obligations that were dictated by the opposing party as obligations with a weaker noninstrumental value. They thought that their moral obligations to adhere to such contracts were relatively smaller and expressed greater willingness to utilize uncertainty within them to their benefit. These perceptions may be reflected in the doctrine of *contra proferentem* that grants the nondrafting party greater freedom in interpreting the text of the contract. Such a match between peoples' moral intuitions and legal doctrine may result from the mere fact that judges share these intuitions and therefore incorporate them into their decisions (leaving the question of the desirability of the doctrine unanswered). Alternatively, it may also result from an effort to align legal doctrine with moral intuitions in order to bolster the law's expressive power and thus enhance voluntary compliance (suggesting that the doctrine is at least potentially efficient).¹⁵⁷

2. Default Rules

Whereas contract interpretation deals with situations in which the parties addressed a certain contingency in the contract, default rules deal with situations in which the contract remains silent.¹⁵⁸ As noted earlier, given the inherent

155. To be sure, nondrafters may rely on the text of a standard-form contract if they become aware of its content during the duration of the contract. Although we do not rule out this option, it seems quite unlikely in most settings. In the context of insurance contracts, for example, it is more plausible that the insured will read the policy only after a potential claim has arisen.

156. Furthermore, the assumption that drafters will adjust the text of standard-form contracts as a result of liability for ambiguity is questionable as well. As Michelle Boardman suggests, once an ambiguous term has been adjudicated, it is no longer ambiguous, and therefore, using it may be less risky than attempting to draft a new term. Thus, drafting parties may choose to stick with the existing term and price the contract appropriately. See Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 176, 178–84 (Omri Ben-Shahar ed., 2007).

157. In a series of influential articles, Paul Robinson and John Darley have argued that criminal law ought to reflect commonly held moral intuitions as a means to promote adherence. See generally Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007) (discussing the impact of community intuition on attempts to reform criminal law); Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003) (discussing the limitations of the deterrence model of criminal law); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997) (advocating a criminal law that reflects “the community’s perception of just desert”).

158. Although from a doctrinal perspective, there is a crisp distinction between the interpretation of complete contracts and gap filling in incomplete contracts, the distinction between the two is quite

incompleteness of contracts, a significant chunk of contract law is dedicated to filling in these gaps.¹⁵⁹ Despite the voluminous body of literature dealing with the topic, a consensus has yet to be reached regarding the desirable structure of default rules and the underlying theory that should guide their selection.¹⁶⁰ As the analysis in this subsection demonstrates, the findings of our experiments can offer new insights with regard to this ongoing debate. We begin by highlighting the implications of our study regarding the appropriate theory for the selection of default rules. That done, we turn to the question of the desirable structure of specific default rules.

Over the years, an array of theories have attempted to draw a normative criterion for the selection of default rules. These theories focused on consequential goals such as efficiency and wealth redistribution¹⁶¹ and on nonconsequential goals such as the promotion of autonomy.¹⁶² Within this debate, the dominant approach regarding default rules has been the majoritarian one.¹⁶³ According to this theory, default rules should be tailored in accordance with the preferences of most contracting parties. From a consequential perspective, such rules can enhance aggregate welfare by minimizing the transaction costs associated with contracting around them.¹⁶⁴ From a nonconsequential perspective, such rules can promote autonomy as they are most likely to correspond with the unexpressed wishes of promisors.¹⁶⁵

Importantly, within the majoritarian framework, default rules are viewed as mere starting points from which the parties can gravitate towards the desirable allocation of risks. Whereas parties for which the default rule fits their needs will do nothing and adopt it, parties for which the rule is problematic will opt out of it and draft provisions that better fit their preferences. This is the key feature that differentiates default rules from mandatory rules.

Legal scholars have challenged the “mere starting point” concept and demonstrated the central role default rules may play in determining the final allocation of risks. Analyzing the issue from a rational-choice perspective, Ian Ayres and

murky, as both deal with situations in which the allocation of risks is unclear. See Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 579 (2006).

159. See *supra* notes 72–77 and accompanying text.

160. For examples of recent contributions to this debate, see Symposium, *Default Rules in Private and Public Law*, 33 FLA. ST. U. L. REV. 557 (2006).

161. See, e.g., Ayres & Gertner, *supra* note 80, at 97–100 (presenting an efficiency-centered theory of default rules); Zamir, *supra* note 136, at 1782–84 (presenting a distributional analysis of default rules).

162. See generally Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992) (presenting a consent-based justification for the use of default terms).

163. See Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1631–32 (2009) (noting that “[w]ith a few possible exceptions, contract default rules are best understood as attempts to impute into contracts terms that most similarly situated parties would have wanted to include had they considered them” (footnote omitted)).

164. See, e.g., Eric A. Posner, Essay, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 839 (2003) (arguing that “[c]hoosing a majoritarian default rule reduces the negative consequences of high transaction costs”).

165. See Kraus, *supra* note 163, at 1631–34.

Robert Gertner demonstrated that, given information asymmetries, parties may be reluctant to contract around a default rule if attempting to do so will reveal valuable private information.¹⁶⁶ Thus, the initial default rule may end up being the governing rule even if it does not maximize the contractual surplus.¹⁶⁷ Viewing the issue from a behavioral perspective, contract scholars have argued that cognitive biases, such as the endowment effect, may impede contracting around the initial default rule.¹⁶⁸ This theoretical argument was later corroborated in stylized experiments that documented the stickiness of default rules.¹⁶⁹

Within this long-standing debate, there is an overlooked implicit assumption that all parties share. Both those who view default rules as mere starting points and those who view them as central to the final allocation of risks believe that, *ex post*, parties will behave in the same manner whether their conduct is regulated by a default rule or by a contract term.¹⁷⁰ For example, parties who explicitly agreed that goods must be of “reasonable quality” in order to opt out of a default rule that requires some other quality are assumed to perform this obligation in the same way as parties who did not agree on the issue of quality and, thus, are subject to a default rule that requires reasonable quality. Our findings, however, suggest that the legal vessel carrying the obligation will affect parties’ performance decisions. More specifically, the results of our second study demonstrate that explicit agreements carry greater expressive value than default rules and therefore bring about greater compliance. Participants viewed not complying with a default rule as less immoral and reported a greater willingness to construe it in accordance with their self-interest. Thus, setting the default rule will not only affect the allocation of rights but will also affect the strength of those rights and the behavior of the parties.

The behavioral differences associated with default rules versus contract terms suggest a potential drawback to the extensive use of majoritarian default rules. From a narrow perspective, the majoritarian approach promotes the welfare and autonomy of contracting parties by supplying them with the terms they want. This approach, however, causes most parties to rely extensively on default rules and thus dilutes the power of a significant part of contractual obligations. Policymakers wishing to bolster the power of contractual obligations in order to strengthen the nonconsequential incentives to perform may choose to design a legal regime that will encourage the parties to reach explicit agreements. Such a

166. See Ayres & Gertner, *supra* note 80, at 103. For further analysis on the role of default rules with respect to the revelation of information, see Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 *YALE L.J.* 729, 738–42 (1992); Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 *YALE L.J.* 615, 626–39 (1990).

167. See Ayres & Gertner, *supra* note 80, at 103.

168. See, e.g., Zamir, *supra* note 136, at 1760–62.

169. See Korobkin, *supra* note 10, at 633–47; Sunstein, *supra* note 10, at 113–14.

170. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 *YALE L.J.* 541, 596 (2003) (assuming that “[i]n a world of free contracting, unpopular defaults thus will raise contracting costs but not otherwise affect parties’ behavior”).

regime can be based on the concept of “penalty default rules”—default rules that run *against* the preferences of the contracting parties.¹⁷¹ By setting such default terms, or even by simply refusing to fill certain gaps in contracts,¹⁷² policymakers can encourage parties to reach explicit agreements, thereby assisting them in the design of their contracts.¹⁷³

Our findings also raise doubts regarding the desirability of a large set of specific default rules used by courts and legislatures. A primary source for an array of specific default rules in American jurisdictions is the U.C.C. A central characteristic of the default rules set forth in the U.C.C. is their vagueness. Given that the rules that are tailored *ex ante* have to apply to an endless set of potential cases, they routinely employ ambiguous terms such as “reasonable,” “good faith,” and the like.¹⁷⁴ This legislative policy was grounded in the strong belief of Karl Llewellyn as to the ability of judges to incorporate efficient business practices into these terms *ex post*.¹⁷⁵ The prevalence of vague terms in the U.C.C. has brought some contract scholars to argue that the Code does not really set default *rules* but rather sets default *standards*.¹⁷⁶

The vagueness of many of the provisions in the U.C.C. has generated a lively debate regarding the desirability of this drafting policy.¹⁷⁷ On one side of this debate lie those who view the Code’s policy as an effective way to promote

171. The term “penalty default rule” was coined by Ayres & Gertner, *supra* note 80. For a review of such rules, see *id.* at 95–107. To be sure, the normative claims of Ayres and Gertner are distinct from those we present in the text. According to the Ayres–Gertner framework, penalty default rules should be adopted to encourage the efficient transfer of information and not to encourage negotiations. See *id.* at 128. For a critical analysis of the thesis presented by Ayres and Gertner, see Posner, *supra* note 158.

172. See U.C.C. § 2-201(1) (2010) (stating that a “contract is not enforceable under this [provision] beyond the quantity of goods shown”); see also Ayres & Gertner, *supra* note 80, at 95–96 (comparing the U.C.C.’s treatment of contracts with no price term to that of contracts with no quantity term).

173. To be sure, we are not in favor of a complete abandonment of the default-rule project. In many (perhaps even most) settings, the potential benefits of strengthening the commitment of the parties to the contract is outweighed by the transaction costs created by forcing the parties to negotiate. Furthermore, leaving economic costs aside, forcing parties to negotiate is problematic from a psychological perspective as well. For one, studies in the area of cognitive psychology demonstrate that people systematically err when making choices during negotiations. Thus, there may be a paternalistic case for using default rules. Cf. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 1–5 (2008) (introducing the theory of “libertarian paternalism” in the context of using the design of a cafeteria to influence students’ food choices). In addition, forcing people to deal with many contingencies may be emotionally stressful. Thus, eliminating options may actually increase the welfare of contracting parties. See Chris Guthrie, *Panacea or Pandora’s Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601, 634–38 (2003).

174. See U.C.C. §§ 1-205, 2-305, 2-309 (2010).

175. See Posner, *supra* note 158, at 582.

176. See Schwartz & Scott, *supra* note 170, at 598–601.

177. The discussion over the use of standards in the U.C.C. follows to a great degree the more general debate regarding the use of standards as a means to regulate behavior. For a comprehensive analysis of the issue, see, for example, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

efficient contracting.¹⁷⁸ Using flexible standards allows the courts to tailor specific rules that fit the needs of contracting parties.¹⁷⁹ The use of rigid rules, conversely, would either impose inefficient terms on many contracting parties or raise the transaction costs for those parties by forcing them to negotiate an alternative provision. Furthermore, flexible standards can be adjusted over time by the courts.¹⁸⁰ Given changing economic circumstances, flexible standards thus allow for relatively swift and easy adjustments to the way in which contractual risks are allocated.

On the other side of this debate lie those who view clear, bright-line rules as the desirable way of assisting contracting parties to achieve their goals.¹⁸¹ According to this line of thought, rules offer a precise allocation of rights and thus enhance predictability.¹⁸² This clear allocation of rights, so the argument goes, assists markets to function and thus facilitates productive behavior.¹⁸³ Furthermore, whereas relying on standards may reduce transaction costs for the parties, it also imposes a cost on courts, which are constantly required to tailor new rules for highly specific circumstances.¹⁸⁴

Our aim is not to end this ongoing debate in the legal literature.¹⁸⁵ We do, however, wish to highlight the way in which our findings may add to it. The results of our experiments suggest an overlooked drawback created by vague default rules. Participants in all three studies demonstrated a tendency to exploit contractual ambiguity in order to further their own self-interest. Thus, when a contracting party needs to decide whether a certain type of behavior is “reasonable,” she is unlikely to do this in a balanced fashion. Rather, she is expected to engage in a self-serving deliberative process that will draw the line of reasonableness according to her private interests. Thus, vague standards are expected to bring about more contractual conflicts and may undermine the relationship between the parties, whereas clear rules could help foster cooperation.

Arguably, legal advice may alleviate the risk described above. To the extent lawyers can offer parties objective advice regarding the meaning of vague standards, this may remove the parties’ bias and help them to sustain their relationship. Such a solution, however, seems unattainable on both economic and behavioral grounds.

178. See, e.g., Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 553–58 (2000) (reviewing the reasons for the use of standards throughout the U.C.C.).

179. *Id.* at 553–55.

180. *Id.* at 556.

181. See, e.g., Schwartz & Scott, *supra* note 170, at 601–05.

182. See *id.*

183. See *id.* at 595.

184. See Ian Ayres & Robert Gertner, Response, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1597 n.21 (1999) (alluding to the possibility that contracting parties might free ride on courts’ ex post efforts).

185. For examples of some of the main contributions to this debate, see Kaplow, *supra* note 177, at 568–86 (analyzing when the legal system should use rules and when it should use standards); Kennedy, *supra* note 112, at 576–83 (discussing the ideal scope of ex post court intervention).

From an economic perspective, parties are expected to seek legal advice only if the expected benefit of such advice exceeds its costs.¹⁸⁶ The expected benefit of legal advice is calculated by multiplying the (subjective) probability that the advice will lead a party to alter her behavior by the benefit gained from the altered behavior.¹⁸⁷ Contracting parties who are driven to believe that their behavior is worthy expect that the legal advice they acquire will vindicate this belief. As a result, such parties will assign a low value to legal advice because they do not think it will alter their behavior. If, for instance, a contractor has convinced himself that using cheap paint must be “reasonable,” he will not waste money just to hear the same advice from a lawyer. Thus, given contracting parties’ subjective valuations of legality, their rational response is to avoid paying for legal advice.¹⁸⁸

From a behavioral perspective, recent studies suggest that parties may strategically avoid legal advice so that they can continue to engage in motivated reasoning. Jason Dana, Roberto Weber, and Jason Kuang demonstrated this point by altering the design of the traditional dictator game.¹⁸⁹ In their experiment, the dictator had to choose between a personal payoff of 6 and a personal payoff of 5.¹⁹⁰ Each of these payoffs was matched with an uncertain payoff, which was determined exogenously by a lottery and was unknown to the dictator, of 1 or 5 to the opposing player.¹⁹¹ Thus, the dictator could choose the selfish payoff (6) while convincing herself that the opposing party would receive the high payoff (5 rather than 1) as well. Nevertheless, before choosing between the payoffs, dictators were offered a chance to reveal (at no cost) the results of the lottery so that they could be privy to the implications for the opposing player.¹⁹² Interestingly, about half of the dictators chose to remain uninformed.¹⁹³ This, in turn, allowed them to choose the option that maximized their personal welfare yet was undesirable from a joint perspective.¹⁹⁴ This type of behavior suggests that parties are expected to be reluctant to purchase legal advice that would remove the moral uncertainty surrounding their choices. Instead, they are expected to prefer to sustain a type of blissful ignorance that allows them to further their personal welfare.

The problems associated with vague standards raise an obvious question: if

186. Steven Shavell, *Legal Advice About Contemplated Acts: The Decision To Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123, 127 (1988).

187. *Id.*

188. In the analysis in the text, we focus on the issue of the incentives to purchase legal advice as this point arises from our results. This does not imply that if the parties manage to pay for legal advice in order to eliminate ex post uncertainty, then vague standards are efficient. Ex post expenditures on legal advice should be viewed as a type of transaction cost that is imposed on the parties ex post by the legal rule. To the extent that these costs are high, they could render the rule inefficient.

189. For a description of such games, see *supra* notes 28–34 and accompanying text.

190. Dana et al., *supra* note 28, at 71–72 (describing the design of the experiment).

191. *Id.*

192. *Id.*

193. *Id.* at 74–76 (describing the results of the experiment).

194. *See id.*

such provisions are so problematic, what can contracting parties do in order to deal with them? Unlike commanding vague standards (for example, the negligence standard in torts or the fair use standard in copyright), contracting parties can always opt out of vague standards if they find them to be undesirable. In the next subsection, we turn to deal with this question in greater detail.

3. Drafting Contracts

The results of our experiments carry practical lessons not only for policymakers engaged in the regulation of contracts but for drafting parties as well. The results of all three experiments demonstrate that contractual ambiguity is expected to bring about an increased amount of selfish behavior. This type of behavior may, in turn, reduce the surplus the parties can expect to gain from their relationship. In order to avoid this welfare loss, parties are expected to prefer clear rather than ambiguous provisions. While clear provisions may backfire at times and lead to undesirable outcomes in specific cases, they could also foster cooperative behavior in the vast majority of cases, as they clarify the obligations of the parties and prevent opportunistic interpretations.

Scholars researching actual contract provisions have in fact documented this type of behavior. Lisa Bernstein, for instance, has observed that contracts in the cotton industry include extremely specific provisions and do not include terms such as “reasonable.”¹⁹⁵ Recently, Alan Schwartz and Robert Scott have reviewed the systematic tendency of parties to business contracts to opt out of the ambiguous standards set by the U.C.C. and to adopt alternative provisions that are more specific.¹⁹⁶ This type of contract design can be viewed as an attempt by parties to deal with the behavioral patterns documented in this Article.¹⁹⁷

Aside from explaining why parties might opt out of default rules, our findings also explain why parties choose to explicitly opt *into* the allocation of risks created by default rules. Frequently, parties incorporate into their contracts terms that are identical to the governing default rule.¹⁹⁸ For instance, it has been reported that sales contracts routinely state the rule set forth in section 2-312 of the U.C.C. regarding the obligation of the seller to deliver to the buyer a clean title.¹⁹⁹ On its face, this pattern of behavior is puzzling as there is no need to incorporate into the contract a term that will apply even if not incorporated.

Existing explanations for this phenomenon have focused on the informational role of incorporation. According to this line of thought, “restating the content of legal rules . . . may provide the parties with information about their rights and

195. Bernstein, *Cotton Industry*, *supra* note 9, at 1731–34.

196. Schwartz & Scott, *supra* note 170, at 603.

197. We make no claim that this is the exclusive explanation for this behavior. Other considerations, such as the problems associated with litigating contract disputes, could also affect the contractual design chosen by the parties.

198. See Zamir, *supra* note 136, at 1774 (noting that often “parties include in their agreement provisions comparable or even identical to default rules”).

199. *Id.*

obligations, thus saving them the trouble of finding out what the law [is].”²⁰⁰ Although the informational argument holds ground, one should acknowledge its limitation in the context of ongoing contractual relationships between sophisticated parties. Arguably, the informational gap in such settings is relatively small, and therefore, there is no reason to “waste ink” to copy and paste the default rule.

Our findings suggest a complementing explanation that focuses on the ex post performance incentives of the parties. As the findings of the second study show, people tend to pay greater respect to terms included in the contract. Given this pattern of behavior, incorporation seems like a plausible strategy in order to enhance contractual compliance. Once a term is part of the contract, the motivation to adhere to it is elevated, and both parties are expected to exhibit more cooperation with respect to it.

Along with these general lessons, our findings offer specific insights with respect to the drafting of standard-form contracts. As the results of our third experiment demonstrate, parties face a greater challenge when they attempt to design standard-form contracts that will foster cooperation, as the tendency to interpret contracts in a self-serving manner is elevated in this setting. Drafters of standard-form contracts can deal with this by employing three somewhat contradictory strategies.

The first strategy takes parties’ tendency to downplay their obligations under a standard-form contract as a given and attempts to preempt it. When drafters choose to use standard-form contracts, they also anticipate that the opposing party will utilize any vagueness in the contract to further its own goals. Drafters can counter this behavior by designing clear, one-sided provisions that strengthen their rights. The combined effect of the one-sided provisions designed by drafters ex ante with the one-sided interpretation of the contract employed by opposing parties ex post could help foster efficient performance.²⁰¹

Take, for example, the case of a hotel that needs to design a contract that will

200. *Id.*

201. Legal economists have struggled to explain the efficiency of such one-sided provisions in standard-form contracts. According to economic theory, the mere fact that one of the parties controls the language of the contract is not expected to cause her to draft a one-sided, suboptimal contract, because, given the pricing mechanism, such a contract will reduce the welfare of *both* parties. Recently, Lucian Bebchuk and Judge Posner presented a theory of one-sided contracts that focuses on the ex post position of the parties at the time of breach. See Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 831–33 (2006). According to Bebchuk and Posner, there is an asymmetry between the parties because drafters are routinely subject to reputational penalties whereas nondrafters (usually consumers) are not. See *id.* at 831. In light of this situation, consumers agree to seemingly inefficient provisions, knowing that the provisions will not be enforced due to reputational concerns unless they behave in an egregious fashion. See *id.* at 833. Although the Bebchuk–Posner framework certainly captures a unique aspect of standard-form contracts, one should acknowledge its inability to explain large sections of one-sided contracts. On one hand, in many cases, nondrafting parties are subject to significant reputational sanctions. For example, the effect of breach on a party’s credit rating may create significant performance incentives. On the other hand, drafters are often not subject to reputational sanctions. For instance, “fly-by-night” firms are not likely to suffer from such sanctions. Thus, the Bebchuk–Posner theory cannot explain the observed

govern the issue of check-out time.²⁰² Assume that the surplus-maximizing provision is that all patrons check out by noon. Nevertheless, the hotel knows that if it states that the check-out time is noon, some patrons will interpret “noon” to mean “approximately noon” and will check out later. Anticipating this behavior, the hotel specifies a one-sided, inefficiently early check-out time, say 11:00 a.m., knowing that it can expect all rooms to be vacated by noon.

The second strategy attempts to alter parties’ behavior by framing the situation as a negotiation rather than as a standard-form setting. Tailoring the provisions of the contract jointly may cause the parties to increase their commitment to the contract. In cases in which the benefits of using standard-form contracts are marginal, this could imply forgoing this type of contracting and opting for negotiated contracts. Alternatively, if standardization is critical, the parties could still attempt to strengthen their commitment to the contract by creating contractual “menus” that will grant parties control over some parts of the contract.

Take again the case of the hotel-check-out contract. The hotel may choose to offer patrons their choice of preferred check-out times (for example, 10:00 a.m., 11:00 a.m., or 12:00 p.m.) while charging a nominal fee for later check-outs. Our findings suggest that such a scheme may change the way patrons view their commitment to leaving the hotel on time. Because the check-out time was bargained for, rather than offered on a take-it-or-leave-it basis, it comes closer to a promise. Thus, holding the cost of breach constant, more compliance is expected under this regime.

To be sure, we do not suggest that a general shift away from standard-form contracts is desirable. In many cases, the transaction and agency costs associated with using nonstandardized contracts may be prohibitive. It is quite possible that even moderate changes such as the introduction of menus could add additional costs to contracting that both parties would rather avoid. Additionally, there is no true need to foster cooperation between the parties in various settings because the obligation of the nondrafting party is rather straightforward and simple—to pay the specified price on time. The user of a cellphone, for instance, does not have many opportunities to interpret the contract with her service provider strategically, and therefore, there is little need to reinforce her commitment to the contract. The importance of cooperation rises as the contract reflects mutual performance obligations. In the context of employment contracts, for example, employers do not merely want their employees to show up to work on time. Rather, employers want employees to be “innovative, hard-

behavior in a comprehensive fashion. Our findings offer a more general explanation for the phenomenon, as they relate to all types of standard-form contracts.

202. This example stems from the check-out example presented by Bebchuk and Posner. *See id.* at 834.

working, and loyal to their projects and their coworkers.”²⁰³ It is in such settings, in which parties not only expect mutual compliance but also hope to foster cooperative behavior that goes “beyond compliance,”²⁰⁴ that special attention should be drawn to the way in which the transaction is designed.

The final strategy drafters can utilize falls back to the basic framework of economic analysis. To the extent that contractual ambiguity in the standard-form setting elicits incompliance, this tendency can be countered by elevating the “penalty” for breach. By setting damages at an appropriately high level, drafters can dissuade their contracting partners from behaving opportunistically. Adopting such a regime will be beneficial for both parties because *ex ante* they share the common interest of fostering cooperation.

This insight sheds new light on the ongoing debate regarding the regulation of liquidated damages. Legal doctrine has traditionally limited the freedom of parties to stipulate the amount of damages in the contract. The *Restatement of Contracts* caps the level of liquidated damages “at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.”²⁰⁵ This rule has been both rationalized and criticized by scholars writing from an economic perspective.²⁰⁶ Our findings, however, suggest that there is an additional behavioral dimension to liquidated damages. To the extent that drafters add such terms to contracts in order to discourage their partners from behaving selfishly, these findings would imply that courts should demonstrate greater caution before striking them down.

C. METHODOLOGICAL LIMITATIONS

In this final section, we acknowledge potential criticisms to this project. We outline the limitations of our results as they relate to the methodology we employed, the variables we studied, and the sample of subjects we utilized. Additionally, we suggest potential avenues of future research that could help address these limitations and further our understanding of the expressive power

203. Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1209 (2001) (citation omitted).

204. The term “beyond compliance” is often used to describe the tendency of actors to behave in a more constrained way than that required by the law. For some examples of this line of literature, see, for example, Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307 (2004) (documenting the phenomenon in the area of environmental regulation); Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005) (analyzing workplace safety regulations and arguing that policies should encourage employers to go beyond compliance).

205. RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981).

206. Compare Philippe Aghion & Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance Efficiency*, 6 J.L. ECON. & ORG. 381, 399 (1990) (defending limits on contract damages as efficient), with Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 383–87 (1990) (criticizing the legal regulation of liquidated damages).

of contracts.

First, one should recognize the general limitations of the methodology we used in this study. Measured items were self-reported attitude scales. Given the extensive literature on the complexity of the attitude–behavior relationship,²⁰⁷ one ought to be careful not to overstate these findings, especially in the context of the expressive aspects of participants’ behavior. Thus, because participants in our study did not face real monetary incentives, their answers may be biased towards overstating the noninstrumental incentive to respect contracts. Future research should attempt to overcome this problem by incorporating monetary incentives into the experimental design.²⁰⁸

That said, it should also be recognized that numerous studies have documented the validity of using attitudes as a proxy for behavior.²⁰⁹ These studies show that there exists a correlation between how parties intend to behave and how they actually behave. As William Crano and Radmila Prislin recently noted in a review of the literature, “Because attitudes predict behavior, they are considered the crown jewel of social psychology.”²¹⁰

Second, even if one accepts the methodological framework of attitude studies, one may still question the practical importance of the numeric results we obtained. After all, what is the meaning of a finding that the perceived immorality of breaching an uncertain contract is 6.88? This criticism, however, misses the mark as it does not acknowledge the characteristics of the experimental design we employed. Although it is true that the numeric results carry little value in absolute terms, their *relative* size is of importance as it allows us to compare between different subgroups that were randomly assigned to the distinct legal settings. Although we cannot ascertain the size of the noninstrumental incentive to perform, we can nonetheless identify it and the variables that affect it. Future research using both field- and lab-based approaches could and should be used to further our understanding of the phenomena described in this Article.

Third, our study did not capture the complete range of relevant variables

207. See, e.g., Yuval Feldman, *Attitudes and Behavior*, in *ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 102 (David S. Clark ed., 2007).

208. Nonetheless, it should be noted that with respect to variables such as Perceived Morality, Perceived Desirability, and Prevalence, which showed similar results to the self-reported Intention To Breach, incentive-compatible methodology is rarely seen as a valid methodological alternative.

209. See, e.g., Icek Ajzen & Nicole Gilbert Cote, *Attitudes and the Prediction of Behavior*, in *ATTITUDES AND ATTITUDE CHANGE* 289, 303–04 (William D. Crano & Radmila Prislin eds., 2008) (reviewing various empirical studies showing that specific behaviors can be predicted based on corresponding intentions); Ajzen, *supra* note 57, at 15–18 (discussing empirical research on the “theory of reasoned action” that demonstrates ability to predict behavior based on intention); Icek Ajzen & Martin Fishbein, *The Influence of Attitudes on Behavior*, in *THE HANDBOOK OF ATTITUDES* 173, 187–96 (Dolores Albarracín et al. eds., 2005) (providing a detailed overview of research substantiating predictive validity of behavioral intentions, including theory of reasoned action and theory of planned behavior).

210. William D. Crano & Radmila Prislin, *Attitudes and Persuasion*, 57 *ANN. REV. PSYCHOL.* 345, 360 (2006).

needed to fully understand the nonconsequential aspects of contract performance. It is quite possible, for example, that distinct types of contracts will generate different results. The universe of contracts includes an endless set of potential variations. These variations include dimensions, such as the kind of commodity being exchanged (goods, services, labor, etc.), the type of contracting parties (business to business, business to consumer, private parties, etc.), the existence of an agency relationship on one or both sides of the contract, and the medium of contracting (oral, written, web based, etc.). The selection of the fact pattern for this study was constrained by our need to design a story that our participants would be able to relate to and that could reasonably be construed to fit the settings we examined (explicit contract, standard-form contract, default rule). Future studies could explore different fact patterns such as contracts for the sales of goods rather than services and contracts in which private parties interact with corporations.

Fourth, the subjects used in our experiments may reflect a sampling problem. Participants in all studies consisted exclusively of law students, whose reactions to contractual performance may not represent those of the general population. For example, law students may be more willing to view contracts in instrumental terms as they are taught about the distinctions between contracts and promises. From this perspective, we expect to see a greater willingness to use contractual uncertainty among law students. On the other hand, the law in general and contracts in particular may hold greater expressive power in the eyes of law students because they tend to care more about their own image as law-abiding people. From this perspective, we expect to see a higher willingness to act in accordance with an uncertain contractual norm among law students.

Although we recognize this concern, it should not be overstated. The existing experimental literature on both contractual behavior and other legal topics has routinely relied on law students as subjects.²¹¹ Notwithstanding this long-standing practice, we certainly acknowledge that it would be both interesting and useful to rerun our experiments on subjects without a legal education to examine whether they perceive contractual obligations differently from our sample.

D. FUTURE RESEARCH

Future research should explore other degrees of contractual ambiguity. In this study, participants in the contractual uncertainty groups were informed of a relatively high likelihood (90%) that the selfish behavior would not be viewed as a breach. Such a high probability could arguably suggest that the governing

211. For examples in the experimental contract literature, see Korobkin, *supra* note 10, at 634; Sunstein, *supra* note 10, at 113. For examples in other experimental legal areas, see Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 188 (2000); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 140 (1996).

norm allows promisors to opt for the cheaper performance. In addition, participants in this group were informed that enforcement was certain (100%). Complete enforcement might be a unique situation because it might signal a complete lack of trust, which could have affected some of our respondents.²¹² Replicating this study using a wider range of probabilities could provide us with a deeper understanding of people's evaluations of legal ambiguity in general and in the context of contracts in particular.

Additionally, extensions of this study could examine other factors that may interact with people's behavior when facing contractual ambiguity. For example, promisors' behavior may differ depending on the type of harm they cause the opposing party. Whereas people may be inclined to behave selfishly when monetary interests are at stake, they may exhibit different patterns of behavior with respect to issues such as pain and suffering. Similarly, promisors may be sensitive to whether monetary incentives are framed as a gain or a loss. In our experiments, the decision to breach was related to an unexpected gain created by the new cheap paint. If, however, the decision to breach was related to an unexpected negative contingency that caused the contract to become a potentially losing prospect, participants may have behaved in a different fashion.²¹³ Additionally, there is probably some type of trade-off between consequential and nonconsequential incentives to perform. It might be the case, for instance, that as the monetary stakes grow the role of the expressive function of contracts diminishes because people engage in more careful cost-benefit analysis. In order to simplify our questionnaires we intentionally omitted from them any reference to the cost of breach (that is, the amount of damages to be paid). Future studies can control for this point by introducing information regarding the cost of breach and varying it.

CONCLUSION

In this Article, we explored the motivations associated with contract performance. At the end of the day, combining the wealth of behavioral research

212. For a discussion of the enforcement dilemma that policymakers face with special focus on the problematic message firms receive from high enforcement rates, see John T. Scholz, *Voluntary Compliance and Regulatory Enforcement*, 6 *LAW & POL'Y* 385, 388-89 (1984). For a more focused study on the effect of various enforcement probabilities in contracts, see Iris Bohnet, Bruno S. Frey & Steffen Huck, *More Order with Less Law: On Contract Enforcement, Trust, and Crowding*, 95 *AM. POL. SCI. REV.* 131 (2001) (demonstrating in a series of lab experiments that low probabilities of enforcement increase trustworthiness both in the short run and in the long run). For a broader discussion of perceptual studies of how people treat the certainty of punishment and enforcement, see Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 *J. CRIM. L. & CRIMINOLOGY* 325, 326-27 (1980).

213. This hypothesis stems from the basic findings of prospect theory according to which people tend to be risk averse with respect to gains and risk seeking with respect to losses. For an early exposition of the theory, see Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979). For a later description of the theory and the findings upon which it is grounded, see Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 *NW. U. L. REV.* 1115, 1117-19 (2003).

reviewed in this Article with our own findings allows us to reject the contracts-as-mere-options hypothesis associated with traditional economic reasoning and introduce the concept of the expressive power of contracts. As our results show, contract performance decisions are not driven solely by monetary incentives set by the legal system. Rather, they reflect a far more complex decision-making process. Forces such as moral obligations, motivated reasoning, and social norms affect people's perception of their contractual obligations and the way in which they are expected to behave. Deciphering this complicated web of forces could help build a more accurate (alas, less elegant) model of contractual behavior and thus help design superior policies and more efficient contracts.

APPENDIX: METHODOLOGY

I. CONTRACTUAL UNCERTAINTY QUESTIONNAIRE

Assume that, during the summer months, you decided to paint a house as a one-time job in order to earn money (i.e., you are not a professional painter and do not intend to offer further painting services in the foreseeable future). Prior to commencing work you signed an orderly agreement with the person living in the house you are to paint, defining your obligations, on the one hand, and the payment you would receive, on the other hand. The contract provided, among other things, as follows:

The promisee [in other words, you] undertakes to use paint bearing an Israel Standards Mark and which is of *reasonable quality*.

Recently, one of the Do-It-Yourself (DIY) store chains has begun marketing paint under its store brand. This paint bears an Israel Standards Mark, but you read in the newspaper that the quality of such brand is significantly inferior (the paint fades much faster) to that of paint manufactured by the well-known paint companies. Purchasing the generic-brand paint would save you NIS 2000 off the cost of materials. (In other words, this amount will go into your pocket.)

You know that the person who commissioned the work will be aware of the type of paint you use. Nevertheless, based on legal advice you received from an attorney friend, there is only a 10% chance of it being determined that use of the cheaper paint **does not** meet the *reasonable quality* requirement and, therefore, would constitute a breach of the contract.

■ Use of the cheaper paint in the legal scenario depicted above is morally unacceptable.

1 Not unacceptable	2	3	4	5	6	7	8	9	10 Morally unacceptable
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■ Use of the cheaper paint in the legal scenario depicted above is undesirable.

1 Desirable behavior	2	3	4	5	6	7	8	9	10 Undesirable behavior
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■ What percentage of the population in Israel would use the cheaper paint in the legal scenario depicted above?

10%	20%	30%	40%	50%	60%	70%	80%	90%	100%
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■ Do you agree with the statement, “Most people would use the cheaper paint in the legal scenario depicted above”?

1 Strongly agree	2	3	4	5	6	7	8	9	10 Strongly disagree
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■ To the extent possible, I will attempt to refrain from using the cheaper paint in the legal scenario depicted above.

1 I will use the cheaper paint.	2	3	4	5	6	7	8	9	10 I will not use the cheaper paint.
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■ Even if I save a lot of money, I will not use the cheaper paint in the legal scenario depicted above.

1 I will use the cheaper paint.	2	3	4	5	6	7	8	9	10 I will not use the cheaper paint.
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■ In your estimation, would you ultimately use the cheaper paint in the legal scenario depicted above?

Yes	No
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II. ENFORCEMENT UNCERTAINTY QUESTIONNAIRE

Assume that, during the summer months, you decided to paint a house as a one-time job in order to earn money (i.e., you are not a professional painter and do not intend to offer further painting services in the foreseeable future). Prior to commencing work, you signed an orderly agreement with the person living in the house you are to paint which defined your obligations, on the one hand, and the payment you would receive, on the other hand. The contract provided, among other things, as follows:

The promisee [in other words, you] undertakes to use paint bearing an Israel Standards Mark and which is of *reasonable quality*.

Recently, one of the Do-It-Yourself (DIY) store chains has begun marketing paint under its store brand. This paint bears an Israel Standards Mark, but you read in the newspaper that the quality of such brand is significantly inferior (the paint fades much faster) to that of paint manufactured by the well-known paint companies. Purchasing the generic-brand paint would save you NIS 2000 off the cost of materials. (In other words, this amount will go into your pocket.)

Based on legal advice you received from an attorney friend, there is no doubt that use of the cheap paint **does not** meet the *reasonable quality* requirement provided in the contract and, therefore, would constitute a breach of the contract. At the same time, you know that there is only a 10% chance that the person who commissioned the work will discover that you used the cheap paint.

■ Use of the cheaper paint in the legal scenario depicted above is morally unacceptable.

1 Not unacceptable	2	3	4	5	6	7	8	9	10 Morally unacceptable
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■ Use of the cheaper paint in the legal scenario depicted above is undesirable.

1 Desirable behavior	2	3	4	5	6	7	8	9	10 Undesirable behavior
----------------------------	---	---	---	---	---	---	---	---	-------------------------------

■ What percentage of the population in Israel would use the cheaper paint in the legal scenario depicted above?

10%	20%	30%	40%	50%	60%	70%	80%	90%	100%
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■ Do you agree with the statement, “Most people would use the cheaper paint in the legal scenario depicted above”?

1 Strongly agree	2	3	4	5	6	7	8	9	10 Strongly disagree
------------------------	---	---	---	---	---	---	---	---	----------------------------

■ To the extent possible, I will attempt to refrain from using the cheaper paint in the legal scenario depicted above.

1 I will use the cheaper paint.	2	3	4	5	6	7	8	9	10 I will not use the cheaper paint.
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■ Even if I save a lot of money, I will not use the cheaper paint in the legal scenario depicted above.

1 I will use the cheaper paint.	2	3	4	5	6	7	8	9	10 I will not use the cheaper paint.
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■ In your estimation, would you ultimately use the cheaper paint in the legal scenario depicted above?

Yes	No
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