Taking Outcomes Seriously

Daphna Lewinsohn-Zamir
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Daphna Lewinsohn-Zamir*

INTRODUCTION

The basic goal of economic efficiency is to maximize people’s welfare,¹ and the criterion for measuring welfare is “preference satisfaction.”² Economic efficiency is the most influential consequentialist theory in the legal literature due to the dominance of the economic analysis of law movement. As a consequentialist theory, economic efficiency holds that outcomes are the only factor that ultimately counts.³ Alternatives—whether acts, legal rules, policies, or institutions—should be assessed, compared, and chosen solely on the basis of the outcomes they generate.⁴ Efficiency analysis aims to promote best outcomes by maximizing the extent to which people’s preferences are fulfilled.⁵

Given the crucial role of outcomes in efficiency analysis, surprisingly little attention has been devoted to the question of what an outcome actually is. Law-and-economics scholars typically ignore this issue. Efficiency analysis of legal issues implicitly and uncritically adopts the narrowest possible definition of

¹ LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 18, 24–27 (2002).
³ SHELLY KAGAN, NORMATIVE ETHICS 60, 70 (1998).
⁴ Note that nonconsequentialist (or deontological) theories do not deny the importance of outcomes. Deontological theories maintain that outcomes should be taken into account and are sometimes even a decisive consideration. They reject, however, the contention that outcomes are all that matter, arguing instead that there are additional factors with intrinsic moral importance. These factors (such as principles against harm doing) may constrain the attainment of best outcomes. Samuel Freeman, Utilitarianism, Deontology, and the Priority of Right, 23 Phil. & Pub. Aff. 313, 323, 348–49 (1994).
outcome—namely, end results in terms of wealth. Thus, for example, standard economic analysis of breach of contract does not view the cause or intentionality of the breach as affecting its outcome. It does not distinguish between breach due to the availability of a more lucrative contract and breach to avoid out-of-pocket losses; instead, it assumes the promisee’s loss is identical in the two cases.  

Similarly, economic analysis treats the loss from a governmental taking of property no differently than a loss from an act of God. Oddly, scholars have not attempted to discover what conception of outcome people actually hold.

This Article seeks to fill the gap in the literature and argues that the narrow definition of outcomes may lead to inefficiency. A broad definition of outcomes may be better suited to people’s actual perceptions and therefore more successful at promoting their welfare. This argument is based on a new experimental study of individuals’ evaluation of outcomes. The study found the evaluations of laypersons and experienced businesspeople to be remarkably similar. The findings reveal that people commonly reject a narrow, simplistic conception of outcomes in favor of a broad one. They judge the outcome in terms of various factors that are not limited to end results. Events with similar end results are perceived as generating different outcomes, varying in their value. In particular, the experiments demonstrate that giving something to an entitled party “nicely,” with goodwill and mutual cooperation, affects the recipient’s valuation of what she has received. Conversely, unwilling giving decreases the value of the outcome in the eyes of the recipient. Thus, when an asset is not transferred voluntarily by the promisor but obtained following the use of a simple self-help device, a threat to file suit, or a court order, the outcome has less value for the promisee. This is true even when all pecuniary costs (such as litigation costs) are covered, and even if the promisee is only minimally inconvenienced. In a similar vein, an injurious outcome is considered to be worse if it is generated intentionally (though without malice or intent to harm) rather than unintentionally (even if negligently). Another factor affecting the value of outcomes is the identity of the parties involved—that is, whether the actor is a stranger or a friend. These perceptions are not limited to cases of unique assets but extend to fungibles (including money) and are common to both laypersons and businesspeople.

The experimental findings are highly relevant for economic analysis in general and economic analysis of law in particular. To maximize people’s welfare, measured by the extent to which their preferences are fulfilled, outcomes should be broadly defined. Leaving factors such as intentionality, the identity of the actor, and motivation outside of the economic calculus will result in inefficiency. Since nothing in economic analysis or in its underlying theory of human welfare

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8 See infra Part II.
9 See infra notes 55–62, 81, 84–85 and accompanying text.
10 See infra notes 53–55 and accompanying text.
11 See infra notes 65–67, 86 and accompanying text.
mandates a narrow conception of outcomes, this deficiency of the standard analysis is easily rectifiable.

The study presented in this Article differs from comparable studies in three major respects. First, previous experiments focused on moral judgments. They found, for example, that people view breach of contract motivated by the prospect of making more money as more objectionable than breach aimed at cutting losses, and therefore feel that the injured party should receive compensation surpassing her losses in the former case. These results were interpreted as evidence that moral intuitions conflict with efficiency. In contrast, this study’s finding that individuals perceive outcomes broadly implies that factors such as the intentionality of an act or the identity of the actor should be an integral part of the efficiency calculus, rather than a departure from efficient reasoning. Efficiency is not reduced—but rather enhanced—if we take factors beyond “bottom-line wealth” into account.

Second, earlier studies were conducted with laypersons. Critics have asserted—albeit with no empirical or experimental data—that businesspeople likely behave differently than laypersons and maximize monetary end results. Since my study examined the evaluations of experienced businesspeople as well, it is not subject to this criticism. The generality of these findings renders them far more powerful. Third, whereas previous experiments focused on one specific factor, the present experiments tested multiple factors, including ones that have not been examined before. A prime example is the effect of uncooperative or unwilling giving on the recipient, which is particularly important for the law because legal remedies typically entail coerced giving.

The experimental results bear on a wide range of legal issues such as punitive and liquidated damages in contract law, the efficient breach doctrine, compensation for takings of property, the zoning versus homeowner association debate, and the public/private distinction. To take one example, the detrimental effects of unwilling giving on the outcome suggest that current damages awards in breach of contract and eminent domain cases may be systematically undercompensatory for reasons not formerly articulated. These findings provide a

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13 Id. at 422.
15 See Daniel Markovits & Alan Schwartz, The Myth of Efficient Breach: New Defenses of the Expectation Interest, 97 VA. L. REV. 1939, 1954 n.32 (2011). Markovits and Schwartz claim that previous experiments are irrelevant for their project because “the subjects are individual persons, not firms. A firm is more likely to exhibit behavior consistent with the maximization of monetary returns than an individual responding to a questionnaire.” Id.
16 See infra Part III.A–B.
prima facie justification for adding a “compelled giving” or “legal intervention” premium to current damages measures.

Part I of this Article lays the groundwork by showing that standard efficiency analysis has adopted a very narrow definition of outcomes and that alternative definitions are available. Part II examines experimentally how laypersons and businesspeople actually perceive outcomes. Part III discusses various normative implications of the prevalent broad conception of outcomes, as confirmed by the experiments. To maximize welfare, punitive and emotional disturbance damages should arguably be awarded more liberally, liquidated damages clauses should be enforced to a greater extent, proposals to expand liability rules (as opposed to property rules) should be considered with caution, and certain forms of decentralization should be regarded as problematic. Part IV discusses possible critiques of these arguments. It asks whether people’s perception of outcomes should be debiased, addresses the contention that broad-outcome effects are transitory, and justifies the focus on outcomes rather than on deontological constraints.

I. EFFICIENCY ANALYSIS’S NARROW DEFINITION OF OUTCOME

According to the simplest, narrowest definition, an outcome is the end result that follows an act.\(^{17}\) Law-and-economics analyses generally equate outcomes with bottom-line wealth. A good example is the debate on whether redistribution should be attained solely through taxes and transfer payments, such as negative taxation and unemployment compensation, or also via private law, such as substantive rules of property and contract law.\(^{18}\) The alleged superiority of the tax-and-transfer system rests, inter alia, on the claim that it results in more wealth being transferred to the recipients at a lower cost.\(^{19}\) This argument ignores the effect of additional factors—such as how the wealth is obtained—on the recipients’ estimation of the goodness of the outcome. Plausibly, a charity-like mode of redistribution is less beneficial to the recipients than a mode that implies entitlement.\(^{20}\)

\(^{17}\) See Derek Parfit, Reasons and Persons 26 (1984).


\(^{20}\) Daphna Lewinsohn-Zamir, In Defense of Redistribution Through Private Law, 91 Minn. L. Rev. 326, 331–32, 357–60 (2006) (arguing that the value of the same quantity of redistributive goods depends on the mode of its production; some methods of redistribution are humiliating, whereas others are respectful and empowering).
A second example is contractual remedies. Standard economic analysis of remedies for breach of contract treats voluntary and involuntary breaches similarly, and does not distinguish between breaches due to difficulties in performance and those due to the availability of more lucrative opportunities. In all cases, the loss to the promisee is assumed to be the expected profits from the bargain, and expectation damages are thus the remedy. Once again, this analysis focuses on the bottom-line losses to the injured party, disregarding the possibility that other factors such as the cause of the breach or whether it is intentional affect the outcome from the standpoint of the promisee. In a similar vein, it is often presumed that the source of an end result is unimportant: government-created risks, such as takings of property, are treated similarly to acts of God and market-created risks, such as detrimental actions of competitors.

The claim that economic analysis of law usually embraces a narrow definition of outcomes is descriptive rather than normative. Indeed, there is nothing in efficiency analysis to dictate the adoption of such a narrow conception of outcomes. Since efficiency is determined by the satisfaction of preferences, whatever their content might be, these preferences can encompass factors and objectives beyond ultimate wealth. While this point is sometimes acknowledged in principle, it is not, however, reflected in actual economic analyses of specific issues, which tend to employ the narrow definition of outcomes. The noninevitability of the narrow conception of outcomes is significant here. If people do not actually perceive outcomes as limited to the bottom line, then efficiency maximization requires us to broaden the concept of outcomes.

Philosophers have long recognized the multiplicity of the notion of outcome. Events with similar end results may engender different emotions, which are viewed

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21 Posner, supra note 6, at 119–20 (stating that from an economic standpoint, involuntary breach due to the impossibility of performance is the same as voluntary efficient breach); Aaron S. Edlin, Breach Remedies, in 1 The New Palgrave Dictionary of Economics and the Law 174, 174 (Peter Newman ed., 1998) (“Fulfilling contractual obligations is not always efficient. . . . [A] seller may find out that it is more costly to produce a good than she expected; her production cost could rise with the price of some input, or her opportunity cost might rise if another buyer wants the good or demands her time.”); see also Cooter & Ulen, supra note 19, at 349–52 (equating cases where performance becomes prohibitively costly to cases where nonperformance is more profitable than performance, and advocating breach in both).

22 Posner, supra note 6, at 120; Edlin, supra note 21, at 174–75.

23 Kaplow, supra note 7, at 533–35.


26 See also Christine Jolls, Behavioral Law and Economics, in Behavioral Economics and Its Applications 115, 115 (Peter Diamond & Hannu Vartiainen eds., 2007) (stating that a distinguishing feature of the law-and-economics literature “is that it often (controversially) employs the normative criterion of ‘wealth maximization’”).
as part of the outcome and thus affect the welfarist calculus. This expanded
definition still regards outcomes as following the act, but it considers factors other
than pecuniary outcomes. Accordingly, a broken promise affects the resulting state
of affairs to the extent that promisees are disappointed or frustrated.27

Considering the emotional effects of actions as part of their results is an
indirect way of taking actions into account. In contrast, an extended concept of
outcomes may take actions into account directly. Philosophers have maintained
that outcomes need not be limited to what happens after the act, but rather the
intrinsic goodness or badness of the acts themselves may be regarded as part of the
outcome.28 For instance, it has been claimed that the act of murder makes the
resulting state of affairs worse, above and beyond the number of deaths.29

Similarly, the goodness of an ensuing outcome is increased when a loyal act is
performed30 or a promise fulfilled.31 By the same token, the consequences of an act
may depend on who performs it. As Amartya Sen persuasively argues,
"‘Desdemona expired’—rather than ‘Othello Killed Desdemona’—would give a
fearfully poor account of the state of affairs."32 Finally, some scholars have
suggested a pluralist conception of good outcomes, which includes such factors as
equality and the fair distribution of resources.33

Recognizing the multiplicity of definitions does not necessarily entail the
endorsement of a broad definition of outcomes.34 Moreover, even scholars who
explicitly advocate a broad notion of outcomes have not discussed the
compatibility of this notion with people's own perceptions and preferences.35 For

27 Walter Sinnott-Armstrong, Consequentialism, STANFORD ENCYCLOPEDIA OF
PHILOSOPHY § 1, http://plato.stanford.edu/entries/consequentialism (last updated Sept. 27,
2011); see also Steven Shavell, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 609
(2004) (acknowledging that if promise-keeping causes people to feel virtuous, then this
experienced utility should be a component in the social welfare calculus).

(1991); Amartya Sen, Well-Being, Agency and Freedom: The Dewey Lectures 1984, 82 J.

29 Kagan, supra note 3, at 216–17; David McNaughton & Piers Rawling, Agent-


31 James Griffin, The Human Good and the Ambitions of Consequentialism, in The

32 Amartya Sen, Evaluator Relativity and Consequential Evaluation, 12 PHIL. & PUB.
AFF. 113, 128 (1983). Similarly, the outcome when a son is saved from drowning by his
father is different from that when he is saved by a stranger. Michael Slote, Common-

33 E.g., Parfit, supra note 17, at 26.

34 See Kagan, supra note 3, at 216–17; McNaughton & Rawling, supra note 29, at
168–69.

35 Broome, supra note 2, at 3–4; Griffin, supra note 31, at 119; Sen, supra note 28, at
181–82. In his most recent work on the subject, Sen distinguishes between “culmination”
and “comprehensive” outcomes, favoring the latter. A comprehensive outcome
the purposes of this Article, the interplay and exact typology of the definitions are largely immaterial. It is sufficient that more than one conception of outcome is plausible. Within the framework of a preference-based theory of welfare, the pertinent question is what notion of outcomes individuals actually embrace. Surprisingly, no attempt has previously been made to examine this matter. The experiments presented in Part II aim to fill this void.

The importance of this examination goes far beyond consequentialist and welfarist normative theories such as welfare economics. Nonconsequentialist, deontological theories do not deny the intrinsic value of outcomes; they simply insist that outcomes are not the only factor that ultimately counts.\(^{36}\) An adequate notion of outcomes is thus important for deontologists as well.\(^{37}\) In the same vein, even consequentialists (and deontologists) who do not embrace a preference-satisfaction theory of human welfare—but instead objective theories of well-being—do not deny the value of preference fulfillment as one component of human welfare. Indeed, objective theories attribute ample (though not decisive) weight to the preferences people actually have\(^{38}\) and hence to their perception of outcomes.

II. HOW DO PEOPLE PERCEIVE OUTCOMES?

A. Previous Studies

Previous psychological studies have examined reactions to or opinions about various events, but have not focused on perceptions of outcomes. As a result, the literature typically concludes that moral sentiments distort or diverge from economic efficiency. For example, a recent study of attitudes toward breach of contract elicited subjects’ beliefs about the morality of a promisor’s breach in different scenarios such as a breach motivated by the prospect of making more money versus a breach to avoid out-of-pocket losses.\(^{39}\) People viewed the former behavior as more immoral and therefore thought that the injured party should receive compensation exceeding her loss from the breach.\(^{40}\) The study did not

\(^{36}\) See supra text accompanying note 4.

\(^{37}\) See also infra Part IV.C for further explanation of the focus on outcomes.

\(^{38}\) Objective theories of well-being hold that certain things—such as autonomy, knowledge, accomplishment, and meaningful social relationships—are good for people and make for a better life. Although objective theories posit that individuals’ welfare can be judged by an external standard, distinct from their desires and tastes, they acknowledge that fulfillment of people’s preferences is an important factor that affects their well-being. Daphna Lewinsohn-Zamir, The Objectivity of Well-Being and the Objectives of Property Law, 78 N.Y.U. L. Rev. 1669, 1701–07, 1710–13 (2003).

\(^{39}\) Wilkinson-Ryan & Baron, supra note 12, at 413–14.

\(^{40}\) Id. at 414, 420–21. Furthermore, the experimenters found that “subjects thought that a person who caused harm via breaking a contractual promise was more immoral and
inquire whether certain factors—such as the cause or intentionality of the breach—are regarded as part of the outcome itself, therefore affecting the magnitude of the loss. This study thus concluded that nonconsequential factors like “moral intuition” hinder the promotion of efficient outcomes.41

Similarly, in a study of contract misrepresentation, responders were asked to rate the moral goodness of the actor, depending on such variables as the identity of the deceiver and the nature of the deception (commission versus omission).42 The study found that misrepresentation by a friend was judged as more immoral and that the commission/omission distinction loomed larger in the case of a deception by a stranger.43 Because the participants were not asked to evaluate the outcomes of the various scenarios, the results were attributed to moral judgments about the special responsibilities of friendship.44

If, however, people view the identity of the actor or the way in which the outcome was brought about as part of the outcome, then these perceptions do not counter the efficiency analysis or depart from economic reasoning, but instead should be considered as part of the cost-benefit analysis. According to this line of reasoning, efficiency is not sacrificed to attain other goals—it is enhanced. The new experiments described below were designed to discover whether this is in fact the case.

Also germane are previous experimental studies that pertain to procedural fairness or justice. These experiments show that people care not only about substantive outcomes, but also about the process leading up to them. The perceived fairness or unfairness of the process may affect how the outcome is accepted and how legitimate it is perceived to be.45 These findings indirectly support this Article’s argument against focusing on end results. The new experiments described below, however, differ from the previous studies in two main respects. First, much like the judgment-of-morality studies mentioned above, the procedural-justice studies assume that the process is external to the outcome.46 They define outcomes

should feel more guilt than a person who caused harm via negligence,” and therefore imposed higher damages on the wrongdoer in the former case. Id. at 419–20.

41 Id. at 422–23 (stating that “[p]eople’s moral intuitions about contract law may make breach less frequent than is economically efficient,” and concluding that their experiment identified “tensions between intuition and reason”).


43 Id. at 206–07, 209–10, 217.

44 Id. at 212–13.

45 See John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis 72–77, 89–94, 118–22 (1975) (showing that verdicts reached through the adversarial legal process are viewed as fairer and are more readily accepted by both parties than verdicts reached through the inquisitorial legal process); Tom R. Tyler, Justice in the Political Arena, in The Sense of Injustice: Social Psychological Perspectives 189, 207–21 (Robert Folger ed., 1984).

46 See Tom R. Tyler, Why People Obey the Law 75 (2006); Tyler, supra note 45, at 215, 217.
narrowly and emphasize the possible conflict between enhancing the value of the outcome and the independent value of procedural fairness; in contrast, this study’s experiments examined the concept of “outcome” itself. Second, the procedural-fairness literature discusses factors such as the impartiality of the decision-maker and the opportunity to be heard, while this study’s experiments test other factors like the willingness or unwillingness of a giving, the identity of the parties, and the intentionality of their acts.

The experimental component of this study is composed of three experiments. The first two examined laypersons’ perceptions of outcomes in within-subject and between-subject designs and the third elicited the perceptions of experienced businesspeople.

B. Experiment 1: Laypersons, Within-Subject

The first experiment examined how people evaluate the outcome of various events. Individuals were asked to numerically assess the goodness or badness of the outcome of events that had a similar end result but which differed in another respect. Thus, for example, events could vary in how the end result was achieved (voluntarily or coercively) or in the identity of a relevant party (stranger or friend). My hypothesis was that most individuals would perceive the outcome of an event to be broader and more complex than its bottom-line end product. The experiment sought to examine whether people perceive outcomes broadly or narrowly, not to identify the specific psychological mechanisms that explain these perceptions; the latter question is beyond the scope of the present study.

Participants. Ninety-four students at the Hebrew University of Jerusalem (44 men, 46 women, 4 did not indicate gender), the vast majority of whom were undergraduates, participated in the study in exchange for NIS 10. They ranged in age from twenty to thirty, with a mean of twenty-three.

Experimental Design. Participants randomly received one of six versions of the questionnaire. The questionnaires contained seven clusters (marked A to G) with three events each (marked x, y, z). The order of the events in each cluster was manipulated within subject, and the order of the clusters and the order of the events within the clusters were counterbalanced between respondents, using six

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48 Here 95% of the subjects were undergraduates and 5% were graduate students. Their fields of study were economics, statistics, accountancy, and business administration (24%); other social sciences (34%); humanities (17%); law (7%); education and social work (2%); and unknown (16%).

49 One New Israeli Shekel (NIS) is worth approximately $0.25.
presentation orders. The participants were asked to evaluate the outcome of each event on a scale from -7 (an especially bad outcome) to +7 (an especially good outcome). In every cluster, event x represented what people with a broad conception of outcomes were expected to regard as the best outcome of the three; event z represented what they were expected to regard as the worst; and event y presented an intermediate outcome, in some cases closer in nature to that of event x and in others closer to that of event z. Cluster A, for example, read as follows:

\[ A/x \]
A factory contracted for the purchase of iron from an importer. The iron was not delivered on the agreed-upon date, due to a strike in the harbor. The factory purchased iron from another supplier, and received it two weeks after the delivery date set in the first contract. The factory sued the importer and the court awarded it NIS 100,000 in damages.

How would you assess the outcome of the event from the factory’s perspective?
Bad outcome  -7   -6   -5   -4   -3   -2   -1   0   1   2   3   4   5   6   +7  Good outcome

\[ A/y \]
A factory contracted for the purchase of iron from an importer. The iron was not delivered on the agreed-upon date, due to problems with the importer’s inventory management. The factory purchased iron from another supplier, and received it two weeks after the delivery date set in the first contract. The factory sued the importer and the court awarded it NIS 100,000 in damages.

How would you assess the outcome of the event from the factory’s perspective?
Bad outcome  -7   -6   -5   -4   -3   -2   -1   0   1   2   3   4   5   6   +7  Good outcome

\[ A/z \]
A factory contracted for the purchase of iron from an importer. The iron was not delivered on the agreed-upon date because after the signing of the contract, another company offered the importer a higher price for the iron and the iron was sold to that company. The factory purchased iron from another supplier, and received it two weeks after the delivery date set in the first contract. The factory sued the importer and the court awarded it NIS 100,000 in damages.

How would you assess the outcome of the event from the factory’s perspective?
Bad outcome  -7   -6   -5   -4   -3   -2   -1   0   1   2   3   4   5   6   +7  Good outcome

The end result of the three events in Cluster A is similar: The factory was awarded the same amount of damages for the breach and received the iron from another supplier after the same amount of time. The difference between x, y, and z
lies solely in the cause of the breach. The six other clusters also presented three cases that differed in a certain feature of the events but had the same end result.\textsuperscript{50}

Results. The hypothesis was confirmed by the results (see Table 1, below).\textsuperscript{51} The subjects embraced a broad conception of outcomes and regarded the events in each cluster as generating different outcomes. Moreover, and again as predicted, across clusters respondents ranked the outcome of x as better than the outcome of both y and z, and the outcome of y as better than the outcome of z. These rankings were found to be highly statistically significant.\textsuperscript{52} The results of each individual cluster are more nuanced and will be discussed in detail below. Nonetheless, the ranking of outcome x above outcome z was found to be highly statistically significant for five of the seven clusters.\textsuperscript{53}

\textsuperscript{50} In all clusters, participants were asked to assess the outcome from the standpoint of one of the parties to the event. The fact that the outcomes were evaluated from the perspective of a particular party does not limit the significance of the results, as any factor that affects the assessment of an outcome from the standpoint of one party will affect the aggregate value of that outcome as well.

\textsuperscript{51} A repeated measure ANOVA (Analysis of Variance) with cluster and event as within-subject factors and order of events and order of clusters as between-subject factors, yielded no significant effect of the order of the events and clusters on the participants’ evaluation of outcomes. Therefore, the analysis collapsed the data across orders. Likewise, one-way ANOVA analyses revealed that the participants’ gender, age, mother tongue, field of study, type of degree, and year of study did not have a significant effect on their valuation.

\textsuperscript{52} x > y: F(1, 92) = 67.470, p < 0.001; y > z: F(1, 92) = 9.898, p < 0.005; it follows that x > z: F(1, 92) = 71.408, p < 0.001.

\textsuperscript{53} Although the exact statistical significance of x > z varied between clusters A, C, D, E, and G, all five yielded a result of p ≤ 0.005.
Cluster A, based on the story of a factory that contracted to purchase iron from an importer, demonstrates that the *cause* of a certain end result substantially affects the valuation of an outcome. In all three scenarios of Cluster A, the importer failed to deliver the iron on the agreed-upon date, the factory purchased (and received) iron from a different supplier, and the court awarded damages in the amount of NIS 100,000. The cases differed only in the cause of the contract’s breach. The breach was due to a strike in the harbor in scenario x, problems with the importer’s inventory management in scenario y, and the sale of the iron to

**TABLE 1**

<table>
<thead>
<tr>
<th>Cluster</th>
<th>Mean x</th>
<th>Mean y</th>
<th>Mean z</th>
<th>* = Statistically Significant</th>
</tr>
</thead>
<tbody>
<tr>
<td>A – Sale of Iron</td>
<td>2.58 Unintentional and No-Fault Breach</td>
<td>2.43 Unintentional (Possible Fault) Breach</td>
<td>1.52 Intentional Efficient Breach</td>
<td>Overall *&lt;br&gt;( x &gt; z )&lt;br&gt;( x &gt; y )&lt;br&gt;( y &gt; z )</td>
</tr>
<tr>
<td>B – Sale of Drills</td>
<td>2.87 Negotiated (Ex Post) Damages</td>
<td>3.14 Liquidated (Ex Ante) Damages</td>
<td>2.58 Damages Following Threat to Sue</td>
<td>Overall&lt;br&gt;( x &gt; z )&lt;br&gt;( y &gt; x )&lt;br&gt;( y &gt; z )</td>
</tr>
<tr>
<td>C – Sale of Parcel</td>
<td>4.66 Voluntary Performance</td>
<td>3.09 Specific Performance</td>
<td>3.29 Damages</td>
<td>Overall *&lt;br&gt;( x &gt; z )&lt;br&gt;( x &gt; y )&lt;br&gt;( z &gt; y )</td>
</tr>
<tr>
<td>D – Purchase of Tables</td>
<td>4.41 Voluntary Payment</td>
<td>1.53 Payment by Set-off</td>
<td>1.17 Payment by Court Order</td>
<td>Overall *&lt;br&gt;( x &gt; z )&lt;br&gt;( x &gt; y )&lt;br&gt;( y &gt; z )</td>
</tr>
<tr>
<td>E – Sale/Land Expropriation</td>
<td>2.53 Voluntary Sale</td>
<td>0.70 Expropriation for Government</td>
<td>0.60 Expropriation for Entrepreneur</td>
<td>Overall *&lt;br&gt;( x &gt; z )&lt;br&gt;( x &gt; y )&lt;br&gt;( y &gt; z )</td>
</tr>
<tr>
<td>F – Kidney Donation</td>
<td>5.60 Donation by Stranger</td>
<td>5.49 Donation by Friend</td>
<td>5.39 Donation by Family Member</td>
<td>Overall&lt;br&gt;( x &gt; z )&lt;br&gt;( x &gt; y )&lt;br&gt;( y &gt; z )</td>
</tr>
<tr>
<td>G – Used Car Sale</td>
<td>-3.34 Misrepresentation by Stranger</td>
<td>-3.65 Misrepresentation by Unknown Neighbor</td>
<td>-4.38 Misrepresentation by Friend</td>
<td>Overall *&lt;br&gt;( x &gt; z )&lt;br&gt;( x &gt; y )&lt;br&gt;( y &gt; z )</td>
</tr>
<tr>
<td>Overall, Across All Clusters</td>
<td>2.75</td>
<td>1.80</td>
<td>1.48</td>
<td>Overall *&lt;br&gt;( x &gt; z )&lt;br&gt;( x &gt; y )&lt;br&gt;( y &gt; z )</td>
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another company that had offered the importer a higher price (so-called efficient breach) in scenario z.

Regardless of the fact that both parties were firms, the object sold fungible, and the bottom-line result identical, participants perceived the events as producing different outcomes. Even though all three events were cases of breach that required judicial proceedings, they were not assessed as being equal. Specifically, the outcome in the efficient-breach scenario (z) was regarded as the worst from the standpoint of the injured party. Pairwise comparisons showed that the inferiority of outcome z to both x and y is statistically significant.\(^54\) The plausible explanation is that the very existence of intentional injury (scenario z) increases the badness of an outcome. Interestingly, this is true even when the intentionality does not involve malice or intent to harm the injured party. It is also striking that this intentionality detrimentally affected the evaluation of the outcome even in the case of pecuniary losses in commercial settings, which differ markedly from the case of bodily harm to individuals, where the intentionality of the harm is expected to matter.

The response to the intermediate event, y, is also noteworthy. Although the breach in scenario y was unintentional (problems with the importer’s inventory management), it may have been the fault of the breaching party or due to negligence. In contrast, the breach in scenario x (a strike in the harbor) was not only unintentional but also without fault. Nevertheless, the difference in the assessment of these two cases was not statistically significant,\(^55\) which would indicate that the intentional/nonintentional feature of the events in Cluster A was more salient than the fault/no-fault feature.

Cluster D examined another important factor: whether something was given willingly or unwillingly to the party entitled to it. This cluster depicted a commercial transaction in which a company operating a banquet hall purchased a stock of tables from a furniture factory. The contract stipulated that the tables were to be paid for in six monthly installments. In all three events, the tables were delivered to the buyer, and the seller received the agreed-upon price. The cases differed only in how this monetary value was realized. In event x, the buyer willingly paid the money according to the terms of the contract. In event y, the buyer paid only one installment, and the seller received the rest of the money due by unilaterally exercising an extrajudicial right: setting off the buyer’s debt against its own. In event z, when the buyer did not make the payments, a court order ensured that the seller would receive payment in full (and covered the seller’s litigation costs as well). Notwithstanding these differences, the end-result is the same. In scenarios y and z, the seller ends up in the same financial position as in scenario x, where the price was paid in accordance with the contract. In all three cases, the seller realized the benefit of the bargain.

The subjects, however, overwhelmingly rejected the idea that the outcomes were equivalent. Although money is the quintessential fungible asset, the parties involved were two firms (rather than private individuals), and the seller’s goal was

\(^{54}\) x > z: F(1, 90) = 8.296, \(p = 0.005\); y > z: F(1, 90) = 8.121, \(p = 0.005\).

\(^{55}\) x > y: F(1, 90) = 0.441, \(p > 0.05\).
to gain a certain profit from the transaction, the respondents were nevertheless of
the opinion that from the standpoint of the seller, outcome \(x\) was better than both \(y\)
and \(z\). These highly statistically significant results\(^{56}\) indicate that a crucial factor is
whether an asset was given to the entitled party willingly, through mutual
cooperation, or unwillingly. Voluntary giving increases the goodness of the
ensuing outcome from the perspective of the recipient, whereas compelled giving
reduces it.

The intermediate scenario, \(y\), highlighted the significance of “giving nicely.”
Although set-off is a form of nonvoluntary giving, it is an inexpensive and easily
exercised self-help device for collecting debts—significantly more convenient than
going to court, as it only requires notification to the other party and a simple
arithmetic deduction of one debt from the other.\(^{57}\) One would therefore presume
that the outcome of payment through set-off would be judged as very close (if not
identical) to that of voluntary payment. Yet, participants viewed the outcome of the
set-off scenario (\(y\)) as significantly worse than that of the willing-payment scenario
(\(x\)). Moreover, the difference between participants’ assessment of the set-off
scenario (\(y\)) and the scenario involving payment pursuant to a court order (\(z\)) was
not statistically significant.\(^{58}\) This striking result indicates that the superiority of
voluntary payment over payment by court order does not primarily stem from the
inconvenience of resorting to the court system or the delay this step usually entails.

Cluster C also demonstrated the effect of giving voluntarily on the value of
the outcome for the recipient. This cluster dealt with a real estate company that
contracted to purchase a parcel of land for investment purposes. In event \(x\), the
vendor conveyed title in the parcel on the agreed date; in events \(y\) and \(z\), the
vendor did not convey title on time, and the company filed suit. In event \(y\), the
court awarded a specific performance order that was carried out; in event \(z\), the
court awarded damages that enabled the company to purchase a similar parcel in
the same area. In both \(y\) and \(z\), the vendor compensated the company for the
damage caused by nonconveyance of title on time and covered its litigation costs.

According to a narrow perception of outcome, the scenarios result in a similar
state of affairs. The real estate company did not purchase the parcel for self-use,

\(^{56}\) \(x > z: F(1, 91) = 68.799, p < 0.001\); \(x > y: F(1, 91) = 52.635, p < 0.001\). Only 2%
of the participants gave the assessment that \(x = y = z\).

\(^{57}\) The phrasing of the questionnaire related to a substantive right of set-off that
discharges the cross-obligations by an informal, unilateral, and extrajudicial notification of
one contractual party to another. This type of set-off exists in Israel (where the experiment
took place) and in several civil law systems. REINHARD ZIMMERMANN, COMPARATIVE
discussing set-offs in various civil law systems). Note that American law primarily
recognizes a procedural right of set-off, whose exercise requires judicial proceedings.
actual legal rule, the questionnaire informed the respondents that the seller lawfully set off
the breaching buyer’s debt by unilaterally deducting it from the sum the seller owed the
buyer.

\(^{58}\) \(y > z: F(1, 91) = 0.875, p > 0.05\).
but only as an investment. It eventually gained title to either the contracted-for parcel itself (y) or a similar parcel (z), and it received compensation for the damages and costs caused by the vendor’s breach. Arguably, the end results of scenarios y and z place the company in the same position as in scenario x, where the contract was performed in a timely manner. The participants, however, did not see the outcomes as equivalent. The outcome of event x was considered better for the real estate company than that of y and z. These results were highly statistically significant.\(^5\) Evidently, the fact that the vendor had to be compelled to fulfill its obligation dilutes the value of the outcome for the recipient.

Once again, the results of the intermediate scenario, y, bolster this Article’s argument. Without the intermediate scenario, a possible counterclaim is that notwithstanding the fact that the land was bought by a firm (rather than an individual) for investment purposes (rather than for self-use), the end results of scenarios x and z are actually dissimilar. This argument would hold that since no piece of land is entirely identical to any other, receiving a different parcel in the same area (z) is not tantamount to getting the original, bargained-for parcel (x). Scenario y undermines this claim: The vendor was awarded specific performance and received the contracted-for parcel (as well as compensation for the costs of the breach), and yet, this outcome was still considered worse than receiving the parcel through voluntary fulfillment of the contract (x). Moreover, the difference between the participants’ valuation of the specific-performance outcome (y) and the award-of-damages outcome (z) was not statistically significant.\(^6\) Although specific performance results in receiving the bargained-for asset in kind, it was not regarded as a better outcome than coerced payment of full monetary damages.\(^7\) This finding supports the argument that factors like voluntariness of giving, goodwill, and mutual cooperation affect the evaluation of the outcome. In their absence, the recipient considers the outcome less valuable, and this can overshadow the positive aspects (the fact that the contracted-for asset was eventually delivered).\(^8\)

\(^5\) x > z: F(1, 91) = 13.027, p = 0.001; x > y: F(1, 91) = 17.324, p < 0.001. Only 10% of the participants responded that x = y = z.

\(^6\) z > y: F(1, 91) = 0.461, p > 0.05.

\(^7\) A word of caution: This result was found with respect to a firm that purchased an asset for investment purposes. It remains to be seen if similar results will be found in relation to private individuals who purchase assets for self-use.

\(^8\) The importance of giving willingly is also supported by the results of Cluster B. This cluster involved the breach of a commercial contract between a manufacturer and a contractor for the supply of drills. In all three cases, the manufacturer failed to deliver the drills on time and paid the contractor an identical sum in damages for the delay. In scenario x, the sum paid was negotiated by the parties after the breach; in scenario y, the amount was specified in a liquidated-damages clause in the contract; and in scenario z, the sum was demanded and paid after the contractor’s lawyer sent a letter threatening to file suit. The difference in the participants’ valuation of outcomes between negotiated (ex post) damages and liquidated (ex ante) damages was not statistically significant (y > x: F(1, 89) = 0.782, p > 0.05). The only statistically significant result in this cluster was that the outcome of
The voluntariness factor is important not only from the standpoint of the recipient, but also when evaluating the outcome from the perspective of the giver, as demonstrated by the results of Cluster E. The events in this cluster relate to a real estate company that purchased an undeveloped parcel of land. The participants were expressly told that the value of the parcel to the company is equal to its market value. Event x involved a subsequent sale of the parcel to a buyer who paid the company its current market price. Events y and z depicted, in lieu of a sale, an expropriation of the parcel—either for the use of the government or for a private entrepreneur—and a similar payment of its current market price. In all three scenarios, the reason for the sale/expropriation was to build a park on the parcel (together with additional plots in the area). Even though the company valued the parcel at its market price and, in fact, received this very amount in all three cases, participants still believed that, from the perspective of the company, the scenarios produced different outcomes. Specifically, the outcome of the voluntary sale (x) was considered to be significantly better than that of both nonvoluntary purchases.\(^6\) The difference between the two expropriation cases (y and z) was not statistically significant.\(^6\) Evidently, the very existence of coercion reduces the goodness of an outcome from the standpoint of the coerced party. The nonvoluntariness of the transfer is an injury in itself— independent of the owner’s valuation of the asset—and is regarded as part of the resultant state of affairs.

Finally, the experiment also revealed that the identity of the parties may substantially affect the assessment of the outcome. Cluster G demonstrates the importance of this factor with cases of misrepresentation in the sale of a used car. In all three scenarios, after purchasing a car, the buyer discovered that the seller had not disclosed that the car had been in an accident, something that decreased its value by a small amount. The scenarios differed only in the identity of the untruthful seller. In event x, the seller was a stranger; in event y, a neighbor that the buyer did not know; and in event z, a close friend of the buyer. Despite the identical end result, the outcome of z was regarded as significantly worse from the standpoint of the buyer than the outcome of x and y.\(^6\) Apparently, the identity of event y was viewed as better from the standpoint of the injured party than the outcome of event z (\(y > z\): \(F(1, 89) = 6.654, p = 0.012\)). The adverse effect of not giving “nicely” explains this result. In case y, the breaching party voluntarily paid the agreed-upon liquidated-damages sum. In contrast, the manufacturer in case z paid unwillingly, after being threatened with a lawsuit. This increased the badness of the breaching outcome, even though the injured party did not have to resort to judicial proceedings in order to receive damages. My argument is indirectly supported by an experiment finding that contracting parties are more willing to exploit efficient breach opportunities when the contract includes a liquidated damages clause. Wilkinson-Ryan, supra note 14, at 655–64. It appears that a liquidated damages clause may be regarded as an agreed-upon price for breach and consequently affords some legitimacy for breach.

\(^{63}\) \(x > z\): \(F(1, 90) = 40.685, p < 0.001\); \(x > y\): \(F(1, 90) = 34.533, p < 0.001\).

\(^{64}\) \(y > z\): \(F(1, 90) = 0.136, p > 0.05\).

\(^{65}\) Both results were statistically significant: \(x > z\): \(F(1, 92) = 11.243, p = 0.001\); \(y > z\): \(F(1, 92) = 5.003, p < 0.05\).
the deceptive seller in case $z$—a friend—adds the element of betrayal to the injury of misrepresentation (common to all three cases).\footnote{The above explanation is strengthened by the difference between the outcomes of events $x$ and $y$, which was not statistically significant: $x > y$: $F(1, 92) = 2.181$, $p > 0.05$. This result makes sense because scenarios $x$ and $y$ concern misrepresentation by persons unacquainted with the buyer. Hence, in neither case is there a betrayal of friendship.} Participants viewed a betrayal of friendship as part of the ensuing outcome.\footnote{Note that no similar effect was found in Cluster F, a depiction of three cases in which a kidney donation saved someone’s life. The cases differed only in the identity of the donor: a stranger who volunteered after reading a public appeal in the newspaper (scenario $x$), a friend of the recipient (scenario $y$), and a relative (scenario $z$). Although the mean valuation of donation by stranger was higher than the mean valuation of the other two scenarios, these results were not statistically significant ($x > y$: $F(1, 92) = 0.371$, $p > 0.05$; $x > z$: $F(1, 92) = 2.043$, $p > 0.05$). My hypothesis was that the outcome in scenario $x$ would be considered the best because it is the most altruistic. Possibly, the lack of statistically significant difference was due to the incontrovertible goodness of sacrificing a kidney to save another person’s life, regardless of who the donor is. Another explanation is that participants were asked to evaluate the events from the standpoint of the recipient. From the beneficiary’s perspective—in contrast to the more general perspective of society—it is not clear that donation by a stranger generates a better outcome than donation by a friend or relative, since this degree of altruism is liable to cause the recipient unease. Some people may not want to be so indebted to a stranger.}

In sum, Experiment 1 found that people tend to embrace a broad conception of outcomes that includes factors beyond end results. Certain factors—such as how an outcome was brought about, the relationships between the parties, the voluntariness of their behavior, and the intentionality of their acts—significantly affected the valuation of the outcome. These findings were not limited to unique assets or to cases involving private individuals, but extended to fungibles (including money) and to firms. Experiments 2 and 3 reinforce these findings by testing two possible counterarguments, one pertaining to the within-subject experimental design and the other to the fact that the respondents were laypersons. As demonstrated below, the results of Experiment 1 were replicated with a between-subject design and even when respondents were experienced businesspeople.

**C. Experiment 2: Laypersons, Between-Subject**

One could argue that the fact that the subjects in Experiment 1 were presented with clusters of three events may have led them to think that they were expected to assess each event differently. A closer look at the results of Experiment 1 indicates that this concern is unfounded. Although no subject believed that the outcomes of the three events were similar in all seven clusters, some respondents evaluated the outcomes within a cluster as equal. Table 2 presents the percentage of respondents who gave an identical assessment to the events in a cluster.
Based both on the existence of identical rankings for different scenarios in the same cluster and on the considerable between-cluster variance in the percentage of identical evaluations, it is evident that the participants (a) correctly understood that they could legitimately give the same ranking to the three events in a cluster, and (b) saw the events in some clusters as generating similar outcomes and the events in others as generating different ones. This said, equal valuations were a clear minority in six of the seven clusters. Only in Cluster F, the topic of which was kidney donation, did the majority of respondents regard the outcomes as equally good.68 While most of the participants perceived outcomes broadly and assigned different values to events with similar end results, when participants genuinely believed that the three events yielded the same outcome, they responded accordingly.

To address any doubts that the experimental design may have affected the results, in Experiment 2, each subject was asked to evaluate the outcome of a single event from one of the clusters from Experiment 1. Each subject was presented with either event x, event y, or event z of a certain cluster. Experiment 2 aimed to discover whether the findings of Experiment 1 are replicated when the participants cannot compare between events or clusters.

Participants. Two hundred fifty-four individuals volunteered to answer a questionnaire distributed at the Hebrew University of Jerusalem (88 men, 164 women, 2 did not indicate gender). The majority were undergraduates69 from various departments in the university.70 They ranged in age from eighteen to sixty-seven with a mean of twenty-five.

Experimental Design. Participants randomly received one of nine questionnaires. Each questionnaire contained a single event from one of the

<table>
<thead>
<tr>
<th>Cluster</th>
<th>% of Equal Assessment of Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>A – Sale of Iron</td>
<td>27.5</td>
</tr>
<tr>
<td>B – Sale of Drills</td>
<td>25</td>
</tr>
<tr>
<td>C – Sale of Parcel</td>
<td>10</td>
</tr>
<tr>
<td>D – Purchase of Tables</td>
<td>2</td>
</tr>
<tr>
<td>E – Sale/Land Expropriation</td>
<td>25</td>
</tr>
<tr>
<td>F – Kidney Donation</td>
<td>58</td>
</tr>
<tr>
<td>G – Used Car Sale</td>
<td>19</td>
</tr>
<tr>
<td>All Clusters</td>
<td>0</td>
</tr>
</tbody>
</table>

68 Cluster F was the only one that did not yield statistically significant differences between the three events. See supra note 67.
69 Here 81% of the participants were undergraduates and 18% were graduate students. One percent of the participants were not students.
70 Their fields of study were as follows: social sciences (62%), humanities (21%), education and social work (8%), law (6%), and other (3%).
clusters in Experiment 1: A (Sale of Iron), D (Purchase of Tables), or G (Used Car Sale). As in Experiment 1, respondents were asked to evaluate the outcome on a scale from -7 (an especially bad outcome) to +7 (an especially good outcome).

Results. In the absence of a significant effect for gender, age, mother tongue, field of study, type of degree, and year of study on the evaluation of the outcome, the analysis collapsed the data across these variables. The results across clusters are summarized in Table 3.71

<table>
<thead>
<tr>
<th>Type of event</th>
<th>Mean Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>x</td>
<td>1.42</td>
</tr>
<tr>
<td>y</td>
<td>-0.35</td>
</tr>
<tr>
<td>z</td>
<td>-0.14</td>
</tr>
</tbody>
</table>

As in Experiment 1, participants embraced a broad conception of outcome and regarded the three types of events (x, y, z) as producing different outcomes. Again in accordance with the findings of Experiment 1, the type x events were viewed as generating the best outcome, superior to that of both the y and z events. These results were statistically significant.72 Although the mean evaluation of the type z events was slightly higher than that of the type y events (whereas in Experiment 1, y usually received a higher mean assessment than z),73 the difference between the two was not statistically significant.74 The replication of the supremacy of type x events in Experiment 2 is quite remarkable since the assignment of numerical figures to outcomes does not correspond to any real measurable quantity but simply expresses a subjective evaluation. In sum, even absent an opportunity to compare between events or clusters, the outcome of type x events was ranked as significantly better than the outcome of the two other types.

D. Experiment 3: Businesspeople

Most of the scenarios depicted in Experiments 1 and 2 involved commercial transactions, fungible assets (including money), and firms, with responses elicited from laypersons. Experiment 3 examined the claim that studies using laypersons as subjects are irrelevant to debates about firms, as businesspeople hold different preferences than laypersons.75

71 ANOVA of the outcome assessment by event and cluster yielded a significant main effect of event ($F(2, 253) = 6.465, p < 0.005$) and no significant interaction of event and cluster ($p = 0.259$).
72 $x > y$: $F(1, 165) = 7.111, p < 0.01$; $x > z$: $F(1, 169) = 4.845, p < 0.05$.
73 See supra Table 1.
74 $z > y$: $F(1, 168) = 0.103, p > 0.05$.
75 See supra note 15 and accompanying text.
While those who claimed that the preferences and choices of businesspersons are fundamentally different from those of laypersons provide no experimental or empirical support for their claim, some empirical studies indicate that businesspeople and laypersons behave in a similar fashion. For example, in his seminal article on noncontractual relations in business, Professor Stewart Macaulay shows that businesspeople often resort to informal dealings rather than detailed contracts, and seldom turn to legal sanctions to settle disputes.\(^{76}\) Macaulay attributes these findings in part to the existence of a widely accepted norm that “commitments are to be honored in almost all situations” and to considerations of reputation.\(^{77}\) Furthermore, adjustment of the agreement, dispute resolution via litigation, and even the threat of litigation are viewed negatively and may terminate the relationship, and hence are used faute de mieux.\(^{78}\) In a similar fashion, Professor Lisa Bernstein found that merchants in the cotton industry rely heavily on each other’s word, promise, and reputation for actual performance of their commitments, and that personal relations play a key role in these commercial agreements.\(^{79}\) These studies lend support to the hypothesis that factors such as the voluntariness of a giving or the intentionality of an act would affect both a layperson’s and a businessperson’s valuation of outcomes.\(^{80}\) Experiment 3 set out to examine this hypothesis.

**Participants.** Three groups of businesspeople, totaling eighty-six participants, took part in Experiment 3 voluntarily. Group 1 consisted of thirty high-ranking executives from international high-tech firms, most employed at one very large company. These executives held various managerial positions: company chairman; CEO; vice presidents of software, operations, strategic business, and marketing; development, telecom, and information technology managers; and so forth. Groups 2 and 3 were composed of businesspeople enrolled in two Executive MBA (EMBA) programs at the Hebrew University of Jerusalem. The twenty-two members of Group 2 were in an EMBA program specializing in finance; the thirty-four members of Group 3 were in an integrated, general program. These businesspeople came from diverse fields, such as high-tech, real estate, banking, investment, commerce, and advertising. Their job descriptions included general

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\(^{77}\) Id. at 63.

\(^{78}\) Id. at 64–65.


directors and vice presidents of companies; marketing, sales, product development, and operations managers; bankers; accountants; and analysts.

Of the businesspeople who took part in Experiment 3, 81% were men and 19% were women. They ranged in age from twenty-two to sixty-seven with a mean of thirty-nine, and had one to forty-four years of professional experience with a mean of thirteen. Group 1 was composed of businesspeople from throughout the globe: Israel (57%), North America (37%), Europe (3%), and East Asia (3%). All the members of Groups 2 and 3 were Israeli.

**Experimental Design.** Participants in each of the three groups were presented with one cluster of three events, based on those used in Experiment 1. The questionnaires were randomly distributed to Group 1 by e-mail. Groups 2 and 3 answered the questionnaire during a meeting of their Executive MBA program. Groups 1 and 2 received slightly modified versions of Clusters D (Purchase of Tables) and G (Used Car Sale), respectively. Group 3 was presented with Cluster E (Sale/Land Expropriation). The order of the events in each cluster was counterbalanced between subjects, using two presentation orders. Participants were asked to evaluate the outcome of the events on the same scale used in the previous experiments.

The changes made to the original versions of Clusters D and G were intended to further test the findings of Experiment 1 and to eliminate possible concerns. As in Experiment 1, Cluster D depicted a commercial transaction for the purchase of tables, with the tables delivered to the buyer and the seller receiving the agreed-upon price. The cases differed only in the circumstances of the payment. The events in Experiment 1 were voluntary payment (x), payment by the seller’s exercise of a right of set-off (y), and payment by court order (which also covered the seller’s litigation costs) (z). In Experiment 3, event z was replaced by the following information: the buyer informed the seller a month in advance that it was not going to make the payment on time. After the seller’s in-house counsel sent the buyer a letter threatening to sue, the buyer paid on time. This substitution was designed to eliminate any concern that the assessments in Experiment 1 had been affected by the indirect costs of litigation (or even the costs of hiring a lawyer).81

Cluster G involved the misrepresentation in the sale of a used car (nondisclosure of information somewhat reducing the car’s value). The deceptive seller was either a stranger (x), a neighbor that the buyer did not know (y), or a friend of the buyer (z). Participants in Experiment 3 were given an additional piece of information regarding event z: the friend had listed his car for sale because he was about to immigrate to Australia. This modification was meant to assuage the concern that in event z, in addition to the pecuniary loss and the betrayal by a

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81 In Experiment 1, contrary to the voluntary payment in event x, both y and z depicted an unwilling payment, but only the latter involved litigation costs. The fact that there was no statistically significant difference between the assessments of the outcome in events y and z—both of which elicited a significantly lower assessment than event x—plausibly implies that this concern was not serious in the first place.
friend, the outcome also involved the subsequent loss of a relationship. In the modified version, the relationship was about to come to an end anyway.

Results. Participants’ age, gender, years of experience, and country of residence did not significantly affect their evaluation of the outcomes. The by-group mean assessment of the outcomes in each cluster is presented in Table 4. Although order of presentation had a significant effect across clusters, it did not significantly interact with the effect of the events. The same hierarchical relationship between events x, y, and z was observed in both orders of the three clusters. Since the main concern in this experiment was the ordinal ranking of the outcomes in each cluster (with the absolute value assigned to the outcome in each type of event being immaterial), the data was collapsed across orders. Across the three clusters, a repeated measure ANOVA with the event as a within-subject factor found a significant difference between the outcome evaluation of events x, y, and z.

The data shows that the valuations of experienced businesspeople did not differ from those of laypersons. As in Experiment 1, businesspeople embraced a broad conception of outcomes and viewed the events in the cluster as generating different outcomes. Experiment 3 replicated the results of Experiment 1. Across clusters, respondents ranked the outcome of event x as better than the outcome of events y and z, and the outcome of y as better than the outcome of z. These rankings were highly statistically significant.

### Table 4

<table>
<thead>
<tr>
<th>Cluster</th>
<th>Mean x</th>
<th>Mean y</th>
<th>Mean z</th>
<th>* = Statistically Significant</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Group 1</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Purchase of Tables (Cluster D)</td>
<td>5.07 Voluntary Payment</td>
<td>1.17 Payment by Set-off</td>
<td>0.37 Payment after Threat to Sue</td>
<td>Overall * x &gt; z * x &gt; y * y &gt; z</td>
</tr>
<tr>
<td><strong>Group 2</strong></td>
<td>-4.00 Misrepresentation by a Stranger</td>
<td>-3.32 Misrepresentation by an Unknown Neighbor</td>
<td>-5.41 Misrepresentation by Friend</td>
<td>Overall * x &gt; z * y &gt; x * y &gt; z</td>
</tr>
<tr>
<td>Used Car Sale (Cluster G)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Group 3</strong></td>
<td>1.82 Voluntary Sale</td>
<td>-1.68 Expropriation for Government</td>
<td>-2.73 Expropriation for Entrepreneur</td>
<td>Overall * x &gt; z * x &gt; y * y &gt; z *</td>
</tr>
<tr>
<td>Sale/Land Expropriation (Cluster E)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Overall</strong></td>
<td>1.47</td>
<td>-1.10</td>
<td>-2.34</td>
<td>Overall * x &gt; z * x &gt; y * y &gt; z *</td>
</tr>
<tr>
<td>Across All Three Clusters</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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82 \( F(1, 67) = 6.496, p = 0.013 \) for the effect of order in a repeated measure ANOVA of outcome evaluation by events and order as a between-subject factor.

83 \( x > y: F(1, 84) = 29.139, p < 0.001; y > z: F(1, 84) = 10.064, p < 0.005 \); it follows that \( x > z: F(1, 84) = 70.346, p < 0.001 \).
Pairwise comparisons demonstrate that the results of Group 1 are identical to those of Cluster D in Experiment 1. Respondents viewed the outcome of the voluntary payment scenario (x) as better than both the set-off and the threatening letter scenarios (y and z). These results were highly statistically significant. In contrast, the difference between the outcomes of events y and z was not statistically significant. Even experienced businesspeople seem to believe that willing giving increases the value of the outcome from the perspective of the recipient, and conversely, unwilling or uncooperative giving decreases its value. Similarly, the results in Group 2 replicated the results of Cluster G in Experiment 1, indicating that the identity of the deceptive seller affects the assessment of the outcome for businesspeople as well as laypersons.

Finally, the results of Group 3 (using Cluster E, which tested the significance of voluntariness in parting with land purchased for investment and valued according to its market value) basically replicated those of Experiment 1. The voluntary sale outcome (x) was ranked as significantly better than the outcome of both nonvoluntary purchases (y and z). In the eyes of both laypersons and businesspeople, the very existence of coercion reduces the goodness of an outcome. The only difference between the results of Experiments 1 (Cluster E) and 3 related to the two coerced transfers. While in Experiment 1 the difference between the two expropriations was not statistically significant, responders in Experiment 3 viewed expropriation for the sake of a private entrepreneur as yielding a worse outcome than expropriation for the use of the government. Possibly, businesspeople are more sensitive to the fact that in event z, it is another businessperson who reaps the benefit of the public project.

In sum, Experiment 3 demonstrated that businesspeople do not differ from laypersons in their perception of outcomes: both tend to perceive outcomes.

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84 \( x > z: F(1, 28) = 31.740, p < 0.001; x > y: F(1, 28) = 31.199, p < 0.001 \). No subject responded that \( x = y = z \). In Experiment 1, 2% of the subjects gave an equal assessment in Cluster D.

85 \( y > z: F(1, 28) = 1.286, p > 0.05 \). In Experiment 1, as well, the difference between the two cases of uncooperative giving was not statistically significant.

86 The outcome of the deception-by-friend scenario (z) was regarded as worse than the outcome of the two other deception scenarios: \( x > z: F(1, 20) = 24.896, p < 0.001; y > z: F(1, 20) = 8.623, p < 0.01 \). In contrast, and again as in Experiment 1, the difference between the two scenarios not involving betrayal of friendship was not statistically significant: \( y > x: F(1, 20) = 0.762, p > 0.05 \). The assessment that \( x = y = z \) was given by 23% of the respondents. In Experiment 1, 19% of the subjects gave this assessment in Cluster G.

87 \( x > z: F(1, 32) = 35.303, p < 0.001; x > y: F(1, 32) = 21.206, p < 0.001 \). The assessment that \( x = y = z \) was given by 29% of the respondents. In Experiment 1, 25% of the subjects gave this assessment in Cluster E.

88 See supra note 64.

89 \( y > z: F(1, 32) = 5.112, p = 0.031 \).
broadly, and view the spirit in which something is given, the identity of the parties, and the voluntariness or nonvoluntariness of a transfer as affecting the value of the outcome.

III. NORMATIVE IMPLICATIONS OF THE BROAD CONCEPTION OF OUTCOMES

The experimental findings indicate that the focus on end results in evaluating outcomes can be misleading. Both laypersons and businesspeople regard various factors as part of the ensuing outcome, affecting its goodness or badness. What, then, are the implications of the experimental results for legal decision-making?

The fact that people perceive outcomes broadly does not ipso facto mean that policymakers should do the same. However, if one holds that enhancing human welfare is a central goal of legal policymaking, and if one espouses a theory of welfare that is concerned with preference fulfillment, these findings are clearly pertinent. This is particularly true for efficiency analysis, which aims to maximize people’s welfare, as measured by the extent to which preferences are satisfied. It also holds for deontological theories (since they do not deny the importance of consequences, including human welfare) and objective theories of well-being (since they accept that fulfilling people’s wishes is one element of human welfare). Evaluating outcomes narrowly—by focusing on the bottom line—may thus result in an erroneous calculation of costs and benefits and hence in inefficiency. This Part illustrates that general conclusion in specific legal contexts.

A. Addressing Systematic Undercompensation

The above-discussed experiments revealed the importance of giving “nicely.” A factor that substantially affects the value of an outcome is whether something was given to the entitled party voluntarily, with goodwill, and with mutual cooperation. Unwilling giving dilutes the value of an outcome for the recipient. Another crucial factor, which exacerbates an injurious outcome, is whether the injury was brought about intentionally (though without malice or intent to harm) rather than unintentionally. As detailed below, these findings imply that current measures of damages are plausibly undercompensatory for reasons not formerly articulated.

Damages for breach of contract. The standard criterion for compensation is expectation damages that aim to put the injured party in as good a position as she would have been in had the contract been performed. The injured party is awarded

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90 Interestingly, there was even a similarity between the size of the minority of laypersons and businesspeople who gave the assessment that \( x = y = z \) in each cluster. See supra notes 84, 86, and 87.
91 See supra notes 1–5 and accompanying text.
92 See supra notes 55–62, 81, 84–85 and accompanying text.
93 See supra notes 53–55 and accompanying text.
her expected profits from the contract. Scholars have acknowledged that expectation damages may not fully protect the nonbreaching party’s expectation interest because of factors such as the foreseeability requirement, the mitigation of damages rule, the nonrecovery of legal costs, and the unverifiability of certain losses. Yet, these factors are context dependent, and some are avoidable. In contrast, the losses from nonvoluntary performance are unavoidable and are likely to prevail even in the absence of the obstacles to full monetary redress. The experiments point to the existence of an additional prevalent loss to the injured party that stems from the very fact of unwilling performance by the breaching party and the concomitant need to resort to legal threats or legal intervention.

The questionnaires were designed to avoid the accepted obstacles to full compensation. The events they described did not involve problems of proof, foreseeability, or damage mitigation. The reference to fungible assets (including money) bypassed the difficulty of evaluating a party’s subjective valuation of unique assets. The questionnaires also emphasized, whenever relevant, that the injured party’s litigation costs were covered. Yet, these measures did not eliminate the perceived loss caused by receiving something given without goodwill and cooperation. The outcome of receiving expectation damages was still regarded as significantly worse than the outcome of voluntary performance of the contract. The detrimental effect of nonvoluntary giving was especially striking when all that was needed to gain the counter-performance was to exercise a self-help device of set-off or send a threatening letter—two measures that entail very low costs. Contrary to a common assumption in the legal field, people do not view a contractual obligation as an option to either perform or pay damages, and compensation is not regarded as a way of fulfilling the obligation.

The problem of undercompensation is exacerbated in the case of efficient breach. In a nutshell, the doctrine of efficient breach holds that a promisor may breach a contract whenever breach is more efficient than performance—that is, the promisor’s profits from the breach exceed the losses to the promisee. Thus, if after

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94 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 190 (3d ed. 2004).
96 For instance, not all contract infringement cases involve unforeseeable or unproven losses.
97 Thus, the law can be altered to allow the winning party to be reimbursed by the losing party for attorney’s fees and other litigation expenses.
98 See supra notes 59–61 and accompanying text.
99 See supra notes 57–58, 62, 81, 84–85 and accompanying text.
100 This understanding of contractual obligations goes back to Holmes, who famously stated that “[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.” Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 462 (1897); see also Daniel Markovits, Contract and Collaboration, 113 YALE L.J. 1417, 1504 (2004) (“A promisor who pays expectation damages continues to collaborate with her promisee, in spite of her breach.”).
contracting with A for the sale of an asset, the seller finds a second buyer, B, willing to pay a higher price, the seller may breach the contract with A, transfer the asset to B, and compensate A for her losses. The breach is considered efficient because the asset is transferred to the person who values it most, while minimizing transaction costs. The seller does not have to bargain with A for a release from the seller’s obligation, but may directly contract with B.\footnote{\textit{See Cooter \\& Ulen, supra} note 19, at 344–45, 349–52.}

Since efficient breach requires the payment of expectation damages to the injured party,\footnote{Steven Shavell, \textit{Damage Measures for Breach of Contract}, 11 \textit{Bell J. Econ.} 466, 485 (1980); Thomas S. Ulen, \textit{The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies}, 83 \textit{Mich. L. Rev.} 341, 362–63 (1984).} it involves the perceived injury from unwilling giving.\footnote{In reality, breachers of contracts rarely voluntarily offer to pay damages; typically, damages are awarded by court order. \textit{Eyal Zamir \\& Barak Medina, Law, Economics, and Morality} 266 (2010). Furthermore, even if some promisors offer expectation damages on their own initiative, my focus here is on the remedy that should be granted by the courts. This question arises only in cases where adequate monetary compensation was not given voluntarily. Interestingly, Bernstein reports that merchants in the cotton industry view even voluntary payment of damages as nonequivalent to actual performance. Bernstein, \textit{supra} note 79, at 1755.} Moreover, efficient breach entails an additional cost demonstrated by this study: the injury from \textit{intentional} breach. Consequently, expectation damages may be undercompensatory.\footnote{For additional critiques of the efficient breach doctrine, see Daniel Friedmann, \textit{The Efficient Breach Fallacy}, 18 \textit{J. Legal Stud.} 1, 6–7, 24 (1989).} The experimental results, in themselves, do not necessarily support a rejection of the efficient breach doctrine, but rather they illustrate that for the breach to be truly efficient, the injured party must be paid more than expectation damages as commonly calculated.\footnote{Cf. Richard Craswell, \textit{Against Fuller and Perdue}, 67 \textit{U. Chi. L. Rev.} 99, 157 (2000) (distinguishing between expectation damages as currently measured by the court and “true” expectation damages, which indeed leave the injured party indifferent between receiving performance or damages).}

How can contract law address this undercompensation problem? One possibility would be to increase compensation awards by allowing for a “compelled giving” or “legal intervention” premium, above expectation damages.\footnote{Working out the details of such a premium exceeds the scope of this Article. Suffice it to note that considerations of implementation costs would dictate either a fixed premium above the ordinary damages measure or a rising-percentage scale of additional compensation, according to the degree of unwillingness of the giving or the intentionality of the breach. Ad-hoc quantification of the premium in each adjudicated case would probably be too expensive. \textit{Cf. Shavell, supra} note 27, at 242 (supporting the compensation of nonpecuniary losses, even when they are likely to be small, and dealing with the administrative costs of measuring such losses by using “simple tables or formulas”); \textit{see infra} note 120 (illustrating employment of such techniques in the context of compensation for governmental takings of land).} There are also possible anchors within existing rules and doctrines.
Three possibilities that come to mind are punitive damages, damages for emotional disturbance, and liquidated damages. As explained below, these forms of compensation would have to be expanded to accommodate the harm from unwilling giving and intentional breach.

Courts award punitive damages for breach of contract only in extraordinary circumstances, such as those that involve fraudulent, oppressive, or malicious conduct. The prevailing justifications for awarding punitive damages are retribution and deterrence. According to the first rationale, punitive damages are meant to reflect the moral condemnation of conduct deemed outrageous or reprehensible. The second, in contrast, views punitive damages as a solution to underdeterrence. Theorists argue that granting overcompensatory damages in the cases that come before the court corrects for cases in which potential suits were not filed.

The case of compensation for emotional disturbance is quite similar. According to the Restatement (Second) of Contracts, recovery for mental distress depends on whether “the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.” A prominent example is mental suffering resulting from breaches relating to funeral services. Courts have also awarded emotional disturbance damages when the breach was reprehensible, tortious, or caused bodily harm.

My findings point to the existence of a loss from the very existence of unwilling giving or intentional (though not malicious) breach. This harm is potentially present whenever legal intervention is necessary. Courts should consider granting punitive and emotional disturbance damages more liberally. These damages should not necessarily be restricted to tortious conduct, cases of special blameworthiness, or circumstances in which disincentives to sue exist; rather, they should be granted in less exceptional cases of inconsiderate and

110 RESTATEMENT (SECOND) OF CONTRACTS § 353.
uncooperative behavior as well.\textsuperscript{113} To be sure, there may be convincing counterarguments against broadening the entitlement to damages for breach of contract; the point is that there is an additional factor—heretofore overlooked—that should be taken into consideration.

Liquidated damages clauses are another implement in the contract-law toolbox. These clauses prestipulate the sum to be paid as damages. According to current doctrine, a liquidated damages clause will be upheld only if the stipulated amount is reasonable in light of the anticipated or actual loss caused by the breach.\textsuperscript{114} The findings of this study suggest that a sum that may initially seem excessive may actually fairly compensate the party for her real losses. Thus, the experimental results provide at least a prima facie argument for greater judicial tolerance toward liquidated damages clauses.

The implications of the experiments with regard to specific performance orders are less straightforward. The participants regarded specific performance as a form of unwilling giving. Consequently, the outcome of receiving an asset through specific performance was perceived as worse than the outcome of voluntary performance of the contract. In fact, the participants did not consider compelled specific performance as better than the coerced payment of full monetary damages.\textsuperscript{115} But there is arguably an advantage to specific performance over expectation damages in this context. To the extent that subsequent opportunities for more lucrative contracts motivate breaches, actual performance of the initial contracts would not enable promisors to realize these gains. As a result, a rule of specific performance gives promisors, ex ante, an incentive to either voluntarily perform the initial contract or to negotiate a release of their obligation from the promisees.\textsuperscript{116} In both cases, the parties arrive at a voluntary, cooperative agreement that avoids the injury from unwilling giving and thus enhances the goodness of the ensuing outcome. Once again, various considerations may weigh against this conclusion, yet the present consideration must not be disregarded.

\textit{Compensation for takings of property.} A different example of systematic undercompensation under current legal rules relates to the taking of land for public use. Compensation awards for takings are generally based on the objective, fair

\textsuperscript{113} The additional damages can be justified by both compensatory and deterrence considerations. Therefore, it is not decisive that damages for nonpecuniary losses do not serve an insurance function. See Shavell, supra note 27, at 242 (“If damages do not fully reflect nonpecuniary losses, parties’ incentives to reduce risks may be inadequate.”).

\textsuperscript{114} U.C.C. § 2-718(1) (2011); Restatement (Second) of Contracts § 356(1).

\textsuperscript{115} See supra note 60 and accompanying text.

\textsuperscript{116} Arguably, postcontractual bargaining may sometimes fail if parties are strategic bargainers and have asymmetric information. Shavell, supra note 27, at 87–91, 315. Elsewhere I have relied on behavioral studies to argue that people would not consider themselves entitled to all the gains of the trade, and therefore frequently succeed in dividing the potential gains of efficient transactions fairly. Daphna Lewinsohn-Zamir, The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies, 80 Tex. L. Rev. 219, 226–39 (2001).
market value of the property. Market value is defined as the price that would have been agreed upon between a willing seller and a willing buyer in a competitive market and is often determined by observing actual sale prices of comparable properties. Scholars and legislatures have focused on the problem of obvious undercompensation that arises when owners of property with high subjective valuation receive only market value. In recognition of this undercompensation, some states have adopted legislation that adds a fixed percentage above market prices for condemnation of a person’s residence.

According to this study’s findings, undercompensation may not be solely due to the discrepancy between market value and subjective value. The very fact that the asset is transferred unwillingly inflicts a loss distinct from the owner’s valuation of the asset. This can be true even when the parcel is expropriated from a real estate company that had held it as part of its commercial stock and valued it at the current market price. Awarding compensation based on market price is thus inherently undercompensatory, and in the long run it may lead to inefficiency and the demoralization of property owners. The findings here thus provide a cogent argument in favor of adding a “coercion premium” in all takings cases.

118 Id. at 169–71.
120 Condemnors in the State of Indiana, for example, are required to pay 150% of fair market value for occupied residences, and Michigan’s constitution states that compensation for takings of a principal residence must not be less than 125% of market value. See IND. CODE ANN. § 32-24-4.5-8(2)(A) (LexisNexis Supp. 2012); MICH. CONST. art. X, § 2 (2006).
121 See supra notes 63–64, 86–87 and accompanying text. A recent psychological study of eminent domain has focused, in contrast, on the expropriation of private homes. Janice Nadler & Shari Seidman Diamond, Eminent Domain and the Psychology of Property Rights: Proposed Use, Subjective Attachment, and Taker Identity, 5 J. EMPIRICAL LEGAL STUD. 713 (2008). The authors note that an important question not addressed in their experiment is “whether the fact that the property of interest was a home stimulated a sense of entitlement that would not be recognized for other types of properties.” Id. at 747. My results imply that the injury from coerced transfer may be inherent in any taking of property and the risk of undercompensation is probably greater than scholars have realized.
122 Scholars have noted additional uncompensated costs that render the market-value-compensation measure incomplete, such as lost goodwill and moving expenses. James E. Krier & Christopher Serkin, Public Ruses, 2004 MICH. ST. L. REV. 859, 866. However, loss of good will is relevant only to operating businesses, and relocation costs are borne only when the condemned land had been formerly occupied. In contrast, the loss highlighted by the experiments—the injury from coerced transfer itself—is potentially relevant to all takings cases, including those involving undeveloped and unoccupied parcels.
124 Interestingly, such a premium once existed in English law, which generally awarded landowners a 10% bonus above market value in cases of expropriation, to
As a supplemental measure, courts could require the condemning authority to prove that it had attempted to negotiate a voluntary sale of the land but failed.125

The choice between property rules and liability rules. An entitlement is protected by a property rule if no one can appropriate the entitlement without securing the owner’s consent. The entitlement must be transferred through a voluntary transaction, and the owner-seller must agree to its price. Liability-rule protection, in contrast, enables a forced transfer of the entitlement. The coercing party need not seek the owner’s permission, but need only pay the owner the objectively determined value of the entitlement.126 Professor Guido Calabresi and Douglas Melamed offer a simple, elegant criterion for choosing between property rules and liability rules: transaction costs.127 Property rules should be used when transaction costs are low and the parties can bargain with one another. In such cases, property-rule protection will induce parties to negotiate a voluntary transfer of the entitlement. Liability rules are best applied when transaction costs are high and bargaining is impossible or impracticable, such as when there are numerous parties involved.128

Critics of the Calabresi-Melamed criterion have claimed that liability rules may be superior to property rules even when transaction costs are low.129 This argument is based, inter alia, on the risk that bargaining under property rules might fail.130 An advantage of liability rules in this regard is that they eliminate the entitlement owners’ holdout power and thereby ensure the execution of efficient transfers.131 Without attempting to resolve this debate, this Article’s findings shed light on one important consideration.

The experimental results reported here show that the advantage of liability rules—facilitating the transfer of an entitlement without having to secure the

compensate for the compulsory nature of the purchase. This practice was abolished in 1919. FREDERICK CORFIELD & RICHARD R.J.A. CARNWATH, COMPULSORY ACQUISITION AND COMPENSATION 3–4, 177 (1978).


127 Id. at 1096–1100.


131 Kaplow & Shavell, supra note 129, at 724–37.
consent of its initial holder—is at the same time a disadvantage. Liability rules entail coerced transfers and hence a distinct coercion injury. Even if courts correctly assess the value of the entitlement, until they address this further loss they will still systematically undercompensate entitlement owners. The experiments lend additional support to the property-rule camp and the original Calabresi-Melamed criterion.

B. Decentralization and the Public/Private Distinction

Another finding from this study is that the relationships between the parties involved in an event may affect the value of its outcome. Specifically, a loss caused by a person who is known to the injured party increases the badness of the outcome. This experimental result is relevant for privatization and decentralization debates. In evaluating the attractiveness of such proposals, we must not confine our examination to the comparative advantages and disadvantages of achieving a particular end result by private or public means. We should also take into account that the relative advantage of decentralization may be at least partially offset by the fact that the party inflicting the loss is a local acquaintance—perhaps a friend or neighbor of the injured party. Two examples illustrate this point.

*Land assembly for economic development projects.* Professor Michael Heller and Professor Rick Hills advocate a privatized solution to the problem of land assembly for economic-development projects. In lieu of government

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133 Cf. Kaplow & Shavell, *supra* note 129, at 720, 730–32 (conceding that their argument for liability rules holds true only if courts do not systematically undercompensate compensation awards to entitlement owners).

134 See *supra* notes 65–67, 86 and accompanying text. Responses to betrayal have been examined in the psychological literature. See Jonathan J. Koehler & Andrew D. Gershoff, *Betrayal Aversion: When Agents of Protection Become Agents of Harm*, 90 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 244 (2003). The authors investigated attitudes toward serious crimes like rape, child molestation, treason, and robbery. They found that subjects assigned harsher prison terms to crimes that involved betrayal (such as child molestation by the day-care worker or rape by the campus police officer) than to identical crimes that did not involve violations of a duty or promise to protect (such as child molestation by a grocery clerk or rape by a construction worker). *Id.* at 245–47. Koheler and Gershoff note that further research is needed to determine whether this betrayal effect also exists in smaller-stakes betrayals and when the betayers did not cause the very harm they were entrusted to guard against. *Id.* at 258. My findings suggest that betrayal may be an influential factor even when the harm is smaller (economic loss from misrepresentation in a car sale) and the injurer does not have a duty to protect against this type of harm (a friend and not a mechanic).

expropriation of the required parcels, the property owners themselves would collectively decide whether their land would be assembled into a larger parcel. Heller and Hills propose the creation of special Land Assembly Districts (LADs). Owners whose land is placed in the LAD would have the power to decide, by majority vote, whether to sell their neighborhood to a developer or to a municipality that wishes to consolidate the land into a single parcel. Like eminent domain, LADs can overcome holdout problems, but unlike eminent domain, the owners can bargain for a share in the profits. Heller and Hills emphasize that the minority landowners opposing the sale would have the right to opt out of the bargain and receive conventional market value for the condemnation of their parcels. Therefore, the authors present LADs as a Pareto improvement. The minority landowners are not worse off than under current eminent domain law, and the majority landowners are better off. Heller and Hills thus conclude that LADs are superior to all other methods of economic-development land assembly.

This conclusion is problematic. The argument that minority landowners are not made worse off by LADs rests on a comparison limited to end results. Under LADs—like under traditional eminent domain—the minority’s lands are taken and market value is paid. As the experiments in this Article demonstrated, however, minority owners may perceive the two events as generating different outcomes. Conventional eminent domain is carried out by an unfamiliar, distant public authority who would not recognize the injured parties on the street and vice versa. Coercion engendered by LADs, in contrast, will often be up close and personal. LADs involve the additional injury of “my neighbors did this to me,” which makes the outcome worse from the standpoint of the affected individuals. Arguably, the loss suffered by Suzette Kelo from the expropriation of her land in New London, for instance, would have been greater had her own longtime neighbors been instrumental in turning her out of her home.

Two caveats are in order. First, the distinct loss from the identity of the injuring party would not necessarily render the outcome inefficient. Although no longer a Pareto-improvement, its benefits may still exceed its costs. However, these additional costs should not be ignored. Systematic undercompensation might, in the long run, cause demoralization and inefficiency. The resultant damage to
values like friendship, trust, and community may also have detrimental long-term effects.Acknowledging this possible harm of privatization may decrease the appeal of LADs and raise the attractiveness of other options. For example, if we desire to give landowners a share in the profits of the future development, it may be better to leave coercion power in the hands of public authorities and grant compensation premiums above market value. Second, this Article’s argument is not aimed at decentralization per se. Rather, it points to the potential cost of a particular type of privatization, which involves the infliction of harm by familiar.

There are proposals for privatizing eminent domain that are not subject to the above critique, since the coercing party is a stranger.146

The zoning versus homeowners associations debate. Another privatization debate that can benefit from considering the injurer’s identity is the choice between zoning and homeowners associations. Scholars have deliberated whether regulation of land use is best attained through zoning ordinances of public municipalities or by covenants of private homeowners associations.147 Much of the debate addresses the efficacy of the competing alternatives in achieving a desired end result. Thus, while some claim that local governments are less successful in fulfilling the residents’ preferences than are homeowners associations,148 others believe that private associations are too small and limited in impact to supplant zoning.149 Both sides to the debate downplay the disadvantages of their favored

145 See supra note 120 and accompanying text.

146 A good example is Lehavi and Licht’s proposal. Amnon Lehavi & Amir N. Licht, Eminent Domain, Inc., 107 COLUM. L. REV. 1704 (2007). Like Heller and Hills, Lehavi and Licht discuss the case of profitable development projects that require the assembly of numerous parcels. Lehavi and Licht suggest that after the parcels are purchased through ordinary eminent domain procedures, the landowners would have the option of receiving shares in a special-purpose development corporation that had acquired unified ownership in the assembled lands. Id. at 1707, 1734. The (former) property owners would be able to share in the gains of the economic development project by selling their stock. Id. at 1734–38. Because the decision of whether to expropriate the parcels remains a public one and the development corporation is a stranger to the landowners, the special loss from injury by one’s neighbors does not materialize.

147 See Robert C. Ellickson, Cities and Homeowners Associations, 130 U. PA. L. REV. 1519 (1982) (advocating homeowners associations as the private alternative to cities); Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057, 1120–49 (1980) (arguing for the superiority of cities over private corporations as a form of decentralized power). Typically, a developer of a residential community drafts and records a deed that includes the covenants that will limit the uses of the residents’ property. These servitudes bind not only the original homeowners who purchase units in the development, but their successors as well. Paula A. Franzese, Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community, 47 VILL. L. REV. 553, 555–57 (2002).


alternative by blurring the differences between their alternative and its rival. Proponents of zoning, for instance, claim that membership in homeowners associations is not always voluntary and membership in cities is not necessarily involuntary.\(^{150}\) From the perspective of freedom, so the argument goes, there is no real difference between private associations and cities, since the former can be as coercive or noncoercive towards individuals as cities are.\(^{151}\) Similarly, advocates of private ordering challenge the claim that the residents’ (or the minority’s) rights are afforded greater protection under public law by pointing out that various protections—such as protections against takings of property without compensation—can be easily incorporated into the private arrangements.\(^{152}\)

Rather than trying to settle this issue, it is apparent that both sides overlook the “identity” factor. Even assuming that the two alternatives are a similar mix of coerciveness and noncoerciveness and that both can realize certain end-results in terms of land uses, the ensuing outcome may still be different. From the standpoint of the unsatisfied minority residents, a loss inflicted by the people they interact with daily—through majority voting—may be perceived as a worse outcome than a similar bottom-line loss caused by the decision of a faceless zoning board.

The public/private distinction. On a more general level, the experimental results are relevant to the public/private distinction, which has been deservedly criticized in the literature.\(^{155}\) Often, opponents of the distinction argue that the differences between the public and the private are illusory or exaggerated, and therefore the two spheres should receive similar legal treatment.\(^{156}\)

The Realists have justified legal intervention in the private sphere by claiming that private institutions—like property—are not private but rather are public.\(^{157}\) Private property, so the argument goes, is defined, initially allocated, and regulated by the law, which is a public creation. Moreover, property should not be seen as a


\(^{151}\) Frug, supra note 147, at 1132–36; see also Franzese, supra note 147, at 581–82 (explaining that developers draft and record covenants before residents purchase their property, and that many buyers are ignorant of the content of the covenants).

\(^{152}\) Ellickson, supra note 147, at 1535–39; Lee Anne Fennell, Contracting Communities, 2004 Ill. L. Rev. 829, 891.

\(^{153}\) David L. Callies et al., Ramapo Looking Forward: Gated Communities, Covenants, and Concerns, 35 Urb. Law. 177, 199 (2003) (noting that the board of directors of homeowners associations is often composed of the neighbors themselves, and that this means that they will be running each other’s lives without professional competence or experience).

\(^{154}\) Advocates of private ordering concede that many amendments to the association’s constitution could be made by some form of majority rule and would not require unanimous consent. Ellickson, supra note 147, at 1530–39.


\(^{156}\) Frug, supra note 150, at 1591; Ruth Gavison, Feminism and the Public/Private Distinction, 45 Stan. L. Rev. 1, 10 (1992).

realm of voluntary transactions between equals, because the law delegates coercion powers to property owners and places the legal-enforcement mechanism of the state (police, courts, etc.) at the service of the property owner against nonowners. In a similar fashion, feminists have fought the oppression of women by arguing that we should not view the private, family arena as an oasis of love, affection, and cooperation, and the public, outside world as governed by self-interest, callousness, and power relationships. In reality both realms are a mix of harmony and conflict, freedom and coercion, and therefore there may be need for legal intervention in the family as well.

The power and importance of these arguments is undeniable. However, the private/public distinction can sometimes be helpful because it draws attention to differences that affect the value of outcomes. An exaggerated tendency to equalize, that is, to focus on the similarities between public and private scenarios, can blind us to these important differences. For instance, the fact that an injury was inflicted by a familiar person might increase the badness of the outcome. This does not mean that the “private injury” outcome would always be worse than the “public injury” outcome. Indeed, sometimes the public aspects of the injury may exacerbate the badness of the outcome. A possible example is the difference between a lie by a private individual and a lie by a state official. The outcome of the latter event may be worse because on top of the injury caused by the lie itself is the additional loss of faith in the democratic system.

C. Concluding Remarks

This Part demonstrated that a broad conception of outcomes carries important normative implications for legal analysis in general and for efficiency analysis in particular. Among other things, damages awards in breach of contract and eminent domain cases may be systematically undercompensatory, liability rules may be less attractive than heretofore realized, and certain forms of decentralization may involve more difficulties than commonly assumed. The experimental results are thus potentially relevant to any normative analysis that takes outcomes into consideration. In closing, a caveat is in order. This Article does not claim that all individuals perceive outcomes broadly. In every cluster of events, some

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158 Id. at 11–14; see Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349, 1352–53 (1982) (arguing that most entities are somewhere on the continuum between public and private).


161 Cf. Eric Blumenson, Killing in Good Conscience: What’s Wrong with Sunstein and Vermeule’s Lesser Evil Argument for Capital Punishment and Other Human Rights Violations?, 10 New Crim. L. Rev. 210, 226–34 (2007) (arguing that state violations of human rights are more harmful than private violations because in addition to the injury to the individual they also adversely affect the basic tenets of a liberal democracy).
respondents perceived outcomes narrowly, as limited to end results, and therefore assigned equal value to all three events. The experiments revealed, however, that people exhibit a general and systematic tendency to view outcomes broadly, in a host of contexts.

How should decision-makers respond to this lack of uniformity? As a rule, it is impractical to tailor the rule to the perceptions of the individuals involved in each case. It is therefore conceivable that if most individuals regard certain factors as affecting the value of the outcome (e.g., the voluntariness of a giving or the identity of an injuring party), legal rules should be crafted with these factors in mind. Under the reasonable assumption that no rule can be devised to suit everyone, generalizations should take into account the majority’s conception of outcomes.

As a supplementary measure one can opt, whenever feasible, for solutions that are less prone to the nonuniformity problem. Recall the discussion of damages for breach of contract, which highlighted the fact that expectation damages may not compensate for the injured party’s loss from unwilling giving or intentional breach by the promisor.162 This problem can be addressed not only by increasing damages awards—which would overcompensate the minority holding a narrow conception of outcomes—but also by granting the alternative remedy of specific performance. As explained above, under the latter remedy there would be fewer instances of nonvoluntary giving.163

Likewise, the study suggests that certain forms of decentralization may be undesirable, because they involve the infliction of losses by familiars, which in turn might aggravate the badness of the outcome.164 If we opt for types of privatization where coercion is carried out by strangers, we can prevent an injury to people who have a broad conception of outcomes without altering the effect of decentralization on those individuals with a narrow perception (since they disregard the identity of the party in evaluating the ensuing state of affairs).

IV. RESPONSES TO POSSIBLE CRITIQUES

This Article’s experiments demonstrated that when people evaluate outcomes, they generally embrace a broad view. Most respondents did not perceive the outcome of an event as limited to its end result, but rather considered additional factors as part of the outcome and as affecting the outcome’s value. These included the willingness or unwillingness of a giving, the voluntariness or nonvoluntariness of a transfer, the intentionality or nonintentionality of an act, and the identity of the parties involved. This Article argued that legal analysis—and especially efficiency analysis—should take this broad conception of outcomes into account. It also argued that this finding has relevance for a wide range of issues. This Part discusses possible critiques of these claims. It asks whether people’s perceptions of

162 See supra notes 95–104 and accompanying text.
163 See supra notes 115–116 and accompanying text.
164 See supra notes 142–143, 152–154 and accompanying text.
outcomes should be debiased, addresses the possibility that broad-outcome effects are transitory, and explains the decision to focus on outcomes rather than on deontological constraints.

A. The “Debiasing” Option

One may accept that people are inclined to perceive outcomes broadly, yet contend that this tendency should be counteracted—that is, we should debias individuals and lead them to equate outcomes with bottom-line results. To succeed, this argument must overcome three cumulative hurdles. It has to convince us that (a) there is indeed cause for legal intervention, (b) debiasing in this context can be accomplished, and (c) debiasing has no significant negative side effects. The debiasing argument fails to clear any of the three, as explained below.

Is there anything to debias? Assuming that individuals perceive outcomes in a complex and broad manner, is this problematic from an efficiency perspective? I believe not. From the standpoint of standard economic analysis, welfare is maximized by the satisfaction of actual preferences, whatever their content. If promisees, for instance, are not indifferent to whether the promised asset was willingly or unwillingly given to them by the promisor, and they prefer the former state of affairs over the latter, then the law should consider taking this preference into account. However, even under ideal-preferences theories, which disregard at least some objectionable or irrational preferences, there seems to be no reason to ignore or try to change the current preferences, as there is nothing objectionable or irrational about them. There is no reason to obligate people to maximize their wealth rather than their welfare or to prefer narrow end results to broadly conceived outcomes. There is nothing objectionable or unreasonable, for example, in holding that a scenario in which a person was deceived by her friend generates a worse outcome than a scenario in which she was deceived by a stranger.

Note also that the subjects in this study were calm, disinterested evaluators of the events. As a result, their assessments of outcomes were not made in an emotional state of anger, hurt, or sorrow.

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165 As explained above, a broad definition of outcomes is perfectly acceptable from a philosophical point of view. See supra notes 26–33 and accompanying text.
166 See Griffin, supra note 24, at 10.
167 According to an ideal-preferences theory, a person’s well-being is judged not by the preferences she actually has, but rather according to the preferences she would have had if she thoroughly, clearly, and calmly considered all possible alternatives and their consequences with full information and no errors in reasoning. Kagan, supra note 3, at 38.
168 Cf. Mark D. Spranca, What Goals Are to Count?, 17 Behav. & Brain Sci. 29, 29 (1994) (asserting that if consequentialism “allows [people] only certain goals, it would seem to change the focus of the theory from rationality to morality”).
169 For this reason, I need not take a stand on whether decisions made in such emotional states are necessarily irrational or distorted. See Michael Stocker with Elizabeth Hegeman, Valuing Emotions 91–121 (1996) (discussing and criticizing the view that emotions are distinct from reason); Dan M. Kahan & Martha C. Nussbaum,
Can we debias? Even assuming, arguendo, that outcomes ought to be evaluated only according to their end results, it is distinctly possible that people are unable to embrace such a narrow conception. An attempt to correct the tendency to view outcomes broadly may be futile, due to the relative rareness of the factors that detrimentally affect outcomes. Take, for example, ownership of land. Most parcels are voluntarily sold in the market and the great majority of landowners never have their land condemned. Coercion through eminent domain is the exception, not the rule. Similarly, in our daily lives, we enter into numerous contracts, most of which are voluntarily performed by the promisors.\textsuperscript{170} Furthermore, there are few opportunities for efficient breach. We usually get the pizza we ordered, receive the car we rented, and enjoy the travel package we booked. Compelled enforcement of a contract is also the exception rather than the rule. Since nonvoluntary giving is a rather unique, not widely distributed phenomenon in society, it may well be seen as a striking deviation from the norm. Consequently, it is not surprising that extraordinary features of an event, like the coerciveness of a transfer or the betrayal of friendship, affect the valuation of the outcome. Moreover, since these occurrences are relatively uncommon, it is unlikely that we can educate people to focus only on their end results and to view their outcomes as resembling those of ordinary events.

Indeed, arguably the law has been trying to debias us for years, but—as the experiments demonstrate—to no avail. Consider compensation for takings of land. From the onset of eminent domain, compensation was ordinarily based on fair market value, which was the agreed-upon market price between willing sellers and buyers.\textsuperscript{171} One may view this legal stance as a lesson that nonvoluntary purchases are not substantively different from voluntary ones. In both cases, owners should be satisfied with receiving the value of the land and should not expect any extra recompense for being forced to part with it. The experimental results show that individuals commonly reject this idea. Even when an undeveloped parcel is owned by a real estate company that values it at its market price, the outcome of a coerced transfer is regarded as worse than that of a voluntary sale.\textsuperscript{172} Our apparent inability to view outcomes narrowly should affect the law’s adopted definition of outcomes.

Should we debias? Notwithstanding the above discussion, for the sake of argument we will assume that a broad perception of outcomes is mistaken and that debiasing would prove successful. Consequently, individuals would evaluate outcomes on bottom-line results alone. Is this advisable? I think not, because of the deleterious long-term effects of this debiasing. Imagine a world in which there is


\textsuperscript{170} See Melvin Aron Eisenberg, \textit{The Principle of Hadley v. Baxendale}, 80 \textit{CALIF. L. REV.} 563, 593 (1992) (stating that observation shows that there is generally a very low rate of breach).

\textsuperscript{171} \textit{DANA & MERRILL}, supra note 117, at 169–71.

\textsuperscript{172} See \textit{supra} notes 63, 87 and accompanying text.
no perceived difference between a person who fulfills an obligation with a smile
and goodwill and a person who fulfills it against her will and with obvious distaste.
Similarly, the rendering of monetary value is viewed as a perfect substitute for the
provision of any promised asset, and—once compensation is paid—a coerced
transfer is equivalent to a voluntary one. In this alternative universe, deception by a
friend is viewed as no worse than deception by a stranger, as one does not expect
the former to be any more trustworthy than the latter. Most people would likely
find this world alien and nightmarish, since it radically alters our common
understanding of values like cooperation, respect, autonomy, and friendship. Thus,
the negative side effects of altering people’s conceptions of outcomes are simply
too high.

B. The Uncertain Magnitude of Broad-Outcome Effects

One may accept the conclusion that external debiasing is impossible or ill-
advised, yet maintain that legal rules need not consider the broad conception of
outcomes. This is because the detrimental effects of factors like unwilling giving
or coerced transfer may be largely transitory. Psychological studies into the well-
being of individuals who underwent negative or traumatic events have shown that
to varying extents, people adapt to their situation and inaccurately predict the
intensity and duration of future emotional experiences.173 Thus, it was found that
victims of severe accidents rated their current happiness level as higher than
expected (although lower than that of the control group).174 Likewise, some studies
show that most people who were forced to relocate from their homes (e.g., due to
urban-renewal projects) eventually acclimated to their new surroundings with no
serious long-term mental harm.175 Should we conclude, therefore, that we can
disregard the factors involved in the broad conception of outcomes?

I think not. The experiments demonstrate that people do not perceive
outcomes narrowly as the end results of events, but rather view additional factors
as part of the outcome and as affecting its value. The adaptation and affective
forecasting studies, in contrast, focus on the magnitude of certain positive and
negative effects. They do not question the existence of real psychological harms,
but only warn against their overvaluation. Thus, for example, no one seriously
suggests that tort victims should not be compensated for intangible injuries,
whether present or future.176 Scholars caution, however, that in evaluating the
extent of the harm, judges and juries should pay heed to the possibility of

173 Philip Brickman et al., Lottery Winners and Accident Victims: Is Happiness
174 Id. at 920–21, 925. Additional studies have found significant (albeit not complete)
adaptation with respect to serious physical injuries and the death of loved ones. Jeremy A.
Blumenthal, Law and the Emotions: The Problems of Affective Forecasting, 80 IND. L.J.
175 Stephanie Stern, Residential Protectionism and the Legal Mythology of Home, 107
176 See, e.g., Blumenthal, supra note 174, at 187.
forecasting errors and adaptation.\textsuperscript{177} I have no objection to applying similar caution vis-à-vis my own results. The next stage of research can attempt to discern the intensity and duration of injuries from nonvoluntary giving, betrayal of trust, and so forth. Indeed, even advocates of adaptation studies acknowledge that further research is necessary before the conclusions can be applied in practice\textsuperscript{178} and that the extent of acclimatization varies between persons and groups.\textsuperscript{179} In any event, even if certain losses are not permanent, they still merit consideration. The fact that an injury eventually passes does not retroactively eliminate the fact of its existence. It may, therefore, be worthwhile to avoid the injury altogether or compensate for its occurrence. One should also note that the risk of inaccurate forecasting is not unique to the prediction of future mental states, but is an inherent problem of any theory of welfare that takes preferences into consideration. Our preferences are always directed toward some future state of affairs. We wish to fulfill our desires because we anticipate that doing so will improve our lives. However, it is always possible that these expectations will not be realized when our preferences are actually satisfied.\textsuperscript{180} Yet, even objective theories of welfare afford preferences an important role, and rightly so.\textsuperscript{181} Awareness of uncertainties and inaccuracies in evaluating the magnitude of broad-outcome effects cannot justify disregarding them.

C. Why Outcomes?

The factors that affect people’s evaluation of outcomes, such as the intentionality of the act producing the outcome, the voluntariness of the pertinent behavior, and the relationships between the actor and the people affected by her act, also play a central role in nonconsequentialist, deontological moral theories.\textsuperscript{182} Thus one can argue that the more intuitive and natural way to take these considerations into account is as side constraints on attaining the best outcomes.

\begin{itemize}
\item \textsuperscript{177} See id. at 183.
\item \textsuperscript{178} Id. at 188, 226.
\item \textsuperscript{179} Stern, supra note 175, at 1117–19 (acknowledging that residential relocation may engender greater long-term costs for elderly people and children); see also Jeremy A. Blumenthal, “To Be Human”: A Psychological Perspective on Property Law, 83 Tulane L. Rev. 609 (2009). Blumenthal describes a study that interviewed the displaced residents of the Poletown-neighborhood expropriation. Early interviews revealed that the residents suffered significant psychological harm. Although follow-up interviews a few years later found substantial levels of acclimatization to the new surroundings, individuals still “reported missing friends, neighbors, stores, and churches . . . as well as emotional distress.” Blumenthal, supra, at 620.
\item \textsuperscript{180} L.W. Sumner, Welfare, Happiness, and Ethics 129–30 (1996).
\item \textsuperscript{181} See supra notes 37–38 and accompanying text.
\item \textsuperscript{182} Thus, for instance, the deontological constraint against harming draws distinctions between actively harming a person and not aiding her, and between intending harm and only foreseeing harm. See Shelly Kagan, The Limits of Morality 83–101, 128–82 (1989).
\end{itemize}
While there is some overlap between the factors affecting the value of outcomes according to my experiments and elements of deontological constraints, it does not follow that we should adopt a narrow conception of outcomes. To the extent that one’s theory of welfare takes into account people’s perceptions, preferences, or mental states, ignoring these factors in evaluating outcomes simply overlooks part of the picture. As the experiments indicated, a broad conception of outcomes is not an artificial intellectual exercise, but rather a more accurate depiction of many people’s perceptions. Thus, regardless of whether one is a deontologist or a consequentialist, an overly narrow conception of outcomes leads the analysis astray.

This is particularly crucial in the case of consequentialists, including legal economists, who deny the intrinsic importance of anything but the goodness of outcomes. Therefore, by explaining that outcomes need not be defined narrowly, and by showing how various factors affect the goodness of outcomes, the case for considering these factors grows stronger. While economists can choose to ignore deontological constraints, they cannot disregard considerations that influence the value of the outcome and therefore preference satisfaction. True, the above-mentioned shortcoming of the narrow conception of outcomes is less crucial for deontological theories because they can consider relevant factors apart from the assessment of outcomes. Yet, since deontological theories acknowledge the promotion of good outcomes as a pertinent normative factor, albeit not the only one, they should also benefit from evaluating outcomes more accurately.

It is important to note that nonconsequentialists often reject the very use of consequentialist methodology and terminology. For instance, they argue that it would be wrong to analyze issues such as human rights by inquiring whether their recognition would generate a more beneficial outcome than their denial would. Such reasoning in itself, so the argument goes, fails to show appropriate concern and respect for the affected individuals. Accordingly, consequentialist consideration of various factors, such as the intentionality of an act or the voluntariness of the actor’s behavior, within a broad definition of outcomes, will always be distinct from a nonconsequentialist consideration of these factors. Nevertheless, even deontologists can accept that outcome is a broad concept, and that the state should promote good outcomes—broadly conceived—subject to certain side constraints, such as not harming the innocent.

183 See supra notes 3–5 and accompanying text.
184 JOHN RAWLS, A THEORY OF JUSTICE 26 (rev. ed. 1999) (“[D]eontological theories are defined as non-teleological ones, not as views that characterize the rightness of institutions and acts independently from their consequences. All ethical doctrines worth our attention take consequences into account in judging rightness.”).
185 See supra note 4.
CONCLUSION

This Article has challenged the narrow understanding of outcomes that commonly underlies efficiency analysis. Standard economic analysis of law disregards the fact that individuals—whose preference satisfaction it aims to promote—may in fact embrace a much broader conception of outcomes, extending beyond the end results of any event. The new experimental findings reveal that certain factors, such as how an outcome was brought about, the identity of the parties involved, the voluntariness or nonvoluntariness of their behavior, and the intentionality or nonintentionality of their acts, are frequently regarded by both laypersons and businesspeople as part of the outcome and significantly affect its valuation. These factors are not moral considerations that thwart the attainment of efficiency. Quite the contrary: best outcomes may be promoted and efficiency maximized if one pays heed to the factors that affect the perceived goodness or badness of outcomes. Since there is nothing in efficiency analysis that dictates a narrow definition of outcomes or precludes the adoption of a broader one, this deficiency in standard economic analysis can easily be corrected. Taking into account the way people actually perceive outcomes bears on several legal issues, such as remedies for breach of contract, takings compensation, and decentralization schemes.

The insight that drives this Article is an old one. Over two thousand years ago, a freed slave by the name of Publilius Syrus wrote "[i]nopí beneficium bis dat, qui dat céleriter" in his book of maxims: "He doubly benefits the needy who gives quickly." True, Publilius Syrus did not engage in efficiency analysis. Yet he understood that a giving cannot be judged by its end-result alone. Immediate giving signals care and goodwill, which enhance the goodness of the outcome. Tardy giving, in contrast, signifies reluctance or indifference, which dilute the value of the benefit conferred. We would do well to employ a broad conception of outcomes in our own modern day legal rules.