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Law and Identifiability

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Law and Identifiability

DAPHNA LEWINSOHN-ZAMIR, ILANA RITOV & TEHILA KOGUT*

Psychological studies have shown that people react either more generously or more punitively toward identified individuals than toward unidentified ones. This phenomenon, named the identifiability effect, has received little attention in the legal literature, despite its importance for the law. As a prime example, while legislators typically craft rules that would apply to unidentified people, judges ordinarily deal with identified individuals. The identifiability effect suggests that the outcomes of these two forms of lawmaking may differ, even when they pertain to similar facts and situations.

This Article is a preliminary investigation into the relevance of the identifiability effect for law in general, and for lawmaking in particular. Based on theoretical discussion and the findings of two original experiments, the Article argues that this cognitive effect should be taken into account by policy makers and decision makers. While measures should be adopted to reduce the impact of the effect in certain circumstances, in others the effect may be harnessed to achieve favorable social goals. The analysis has normative implications for major legal debates, such as the choice between rules and standards and between different redistributive methods.

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INTRODUCTION

People respond differently to identified and unidentified individuals. They might, for example, think that a particular miner trapped in a collapsed mine should be rescued at any cost but object to taxation to finance more cost-effective measures that would prevent such mining accidents from occurring in the first place. The particular miner is identified, whereas those who would benefit from preventive safety measures are not.¹ Likewise, victims of natural disasters usually attract more generous contributions from the public when they are identifiable rather than anonymous.² This phenomenon, named the *identifiability effect* (IE), has received relatively little attention in the legal literature.

This may be due, in part, to the fact that the field of behavioral law and economics is comparatively young.³ The growing literature tends to concentrate on certain psychological phenomena while mostly neglecting others. A case in point is the *endowment effect*—that is, people’s tendency to value an entitlement that they already possess more than an identical entitlement that they have an opportunity to acquire.⁴ Scholars have thoroughly explored the implications for legal theory of this discrepancy between individuals’ selling price and their purchase price.⁵ Other behavioral phenomena that have garnered significant attention are *loss aversion*⁶ and the *hindsight bias*.⁷ In comparison, the IE has been largely overlooked, despite its high relevance for many legal debates. One possible reason is that even the psychological

1. I. Glenn Cohen, Norman Daniels & Nir Eyal, *Statistical Versus Identified Persons: An Introduction* (describing the real-life rescue of thirty-three Chilean miners trapped underground), in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE 1, 1 (I. Glenn Cohen, Norman Daniels & Nir Eyal eds., 2015).

2. Deborah A. Small, George Loewenstein & Paul Slovic, *Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Identifiable and Statistical Victims*, 102 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 143, 143 (2007).

3. For an early comprehensive review see generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

4. Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *The Endowment Effect: Evidence of Losses Valued More than Gains*, in 1 HANDBOOK OF EXPERIMENTAL ECONOMICS RESULTS 939, 939–47 (Charles R. Plott & Vernon L. Smith eds., 2008).

5. Thus, for example, scholars have argued that, contrary to the prediction of the Coase Theorem, the initial allocation of legal entitlements may very well affect the outcome of bargaining, even when transaction costs are low and wealth effects are insignificant. Russell Korobkin, *Wrestling with the Endowment Effect, or How To Do Law and Economics Without the Coase Theorem*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 300, 300–01 (Eyal Zamir & Doron Teichman eds., 2014). Korobkin notes that, according to the Westlaw database, by the year 2012 the terms “endowment effect” and “status quo bias” appeared in law journal articles 1619 times. *Id.* at 301.

6. See EYAL ZAMIR, LAW, PSYCHOLOGY, AND MORALITY: THE ROLE OF LOSS AVERSION (2015) (applying loss aversion to human behavior in diverse legal contexts, and using this cognitive phenomenon to explain and justify basic features of the law).

7. Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 576–81 (1998). A recent Westlaw search revealed 1293 law review articles alluding to the term “hindsight bias.” Doron Teichman, *The Hindsight Bias and the Law in*

research on this effect is relatively new: although a few studies of the IE date back to the 1990s,⁸ most experiments have been carried out in the last decade or so.⁹

The IE is the tendency of people to react more strongly toward identified individuals than toward unidentified ones. In the context of monetary donations, for example, it was found that people are significantly more willing to help someone if she is even minimally identified—say by a photo, name, or even a number—rather than completely anonymous.¹⁰ Thus, charitable contributions to aid a tsunami victim were larger when the person in need was identified by his or her name.¹¹ In other contexts, such as blameworthy behavior, identification may turn out to be detrimental, resulting in people being less willing to help the person at fault¹² or supportive of increasing the severity of the punishment.¹³ Notably, identification can generate such effects even when it conveys no meaningful information about the individuals in question.

Awareness of this psychological phenomenon is important for lawmaking, as some legal decisions are made without reference to the identity of those involved while others concern identified individuals. Prime illustrations are legislation and adjudication, respectively: while legislators typically craft rules that apply to unidentified people, judges ordinarily deal with identified litigants. The IE suggests that the very existence of identification may lead to different outcomes in these two types of decisions. Depending on the circumstances, judgments formed with respect

Hindsight, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW, *supra* note 5, at 354.

8. *E.g.*, Karen E. Jenni & George Loewenstein, *Explaining the “Identifiable Victim Effect,”* 14 J. RISK & UNCERTAINTY 235 (1997).

9. *E.g.*, Tehila Kogut & Ilana Ritov, “*One of Us*”: *Outstanding Willingness To Help Save a Single Identified Compatriot*, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 150 (2007) [hereinafter Kogut & Ritov, “*One of Us*”]; Ezra M. Markowitz, Paul Slovic, Daniel Västfjäll & Sara D. Hodges, *Compassion Fade and the Challenge of Environmental Conservation*, 8 JUDGMENT & DECISION MAKING 397 (2013); Ilana Ritov & Tehila Kogut, *Ally or Adversary: The Effect of Identifiability in Inter-Group Conflict Situations*, 116 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 96 (2011) [hereinafter Ritov & Kogut, *Ally or Adversary*].

10. *See* Gary Charness & Uri Gneezy, *What’s in a Name? Anonymity and Social Distance in Dictator and Ultimatum Games*, 68 J. ECON. BEHAV. & ORG. 29, 32 (2008) (demonstrating that knowledge of a person’s family name increases generosity in a laboratory game); Tehila Kogut & Ilana Ritov, *The “Identified Victim” Effect: An Identified Group, or Just a Single Individual?*, 18 J. BEHAV. DECISION MAKING 157, 161–62 (2005) (finding that donations to a sick child increase when identified by a photograph); Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5, 8–10 (2003) (showing that identification of a recipient by number enhances subsequent donations).

11. Kogut & Ritov, “*One of Us*,” *supra* note 9, at 152–53.

12. *See* Tehila Kogut, *Someone To Blame: When Identifying a Victim Decreases Helping*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 748, 750–51, 754 (2011) (finding that an identified AIDS victim who is perceived to be responsible for contracting the disease receives fewer donations than an unidentified one).

13. *See* Deborah A. Small & George Loewenstein, *The Devil You Know: The Effects of Identifiability on Punishment*, 18 J. BEHAV. DECISION MAKING 311, 315–16 (2005) (observing that participants inflicted a harsher financial penalty on people who behaved uncooperatively in a social dilemma game when the people were identified by number).

to identified individuals may be either more lenient or more severe than judgments relating to unidentified ones. Insofar as such a divergence is undesirable, lawmakers should take measures to minimize it. One possible strategy is to adopt the types of legal norms that are less affected by identification, such as rules instead of standards.¹⁴

More generally, the IE is potentially relevant to any lawmaking that involves identified and unidentified people. When lawmakers craft legal norms and choose the rule that would best achieve their goal, they should bear in mind that identifiability in the application of a given rule (or its absence) could affect the intended result. Some legal norms—such as rules of property, contract, and family law—regulate day-to-day interactions between individuals on a nonanonymous basis. Other legal norms—such as rules of taxation—pertain to the relationship between individuals and the state and involve no direct interactions between people. Thus, when lawmakers consider whether to redistribute welfare in society exclusively through taxes or by means of rules of private law as well, they should take into account that from the transferors' point of view, the beneficiaries of redistribution are unidentified in the former instance and identified in the latter. This factor may affect the welfare of all parties to the redistribution scheme and its prospects of success.¹⁵

The little legal literature that exists on the IE has focused on health-related issues, such as environmental protection¹⁶ and medical care.¹⁷ Most of these studies mention the IE only in passing and rely on the findings of psychological experiments that were not tailored to legal issues.¹⁸ Indeed, to date, the IE has never been experimentally examined in legal contexts.

This Article offers a preliminary investigation of the implications of the IE for the law and addresses the lacuna in the literature in three ways. First, it shows that the IE is relevant not only to matters of life or health but to lawmaking in general, including more common, everyday situations to which legal rules apply. Expanding the discussion beyond its narrow current scope demonstrates the importance of the IE for diverse fields of law and several legal debates. Second, the Article's analysis is based on the most recent psychological findings about the IE, which have yet to be addressed in the legal literature.¹⁹ Third, the Article reports on the findings of two

14. See *infra* notes 172–93 and accompanying text.

15. See *infra* notes 205–22 and accompanying text.

16. E.g., Shi-Ling Hsu, *The Identifiability Bias in Environmental Law*, 35 FLA. ST. U. L. REV. 433 (2008) (critiquing the consequences of identifiability of those harming the environment and nonidentifiability of those who would benefit from environmental regulation).

17. E.g., Johann Frick, *Treatment Versus Prevention in the Fight Against HIV/AIDS and the Problem of Identified Versus Statistical Lives* (discussing the IE in the context of allocating resources between prevention measures and treatment of people already suffering from AIDS), in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE, *supra* note 1, at 182.

18. See, e.g., Ronen Avraham, *Private Regulation*, 34 HARV. J.L. & PUB. POL'Y 543, 566 n.69 (2011) (mentioning the IE as one of the reasons that malpractice suits would not solve the problem of optimal medical care).

19. Thus, for example, the legal literature neglects to point out that the IE was observed in experimental studies mainly with regard to a single identified individual and that this

original experiments by the authors, which are the first to directly test the IE in legal contexts.²⁰ Specifically, our experiments examined the choices made by participants with respect to private law remedies and fines in two types of lawmaking—comparing the judgments they made as policy makers formulating rules for *unidentified* people with their judgments as decision makers concerning certain *identified* individuals. We found an identifiability effect that favored the wrongdoer—namely, that the participants were more lenient toward wrongdoers, and more considerate of their interests, when responding in their capacity as decision makers than when acting as policy makers. This finding indicates that even minimal, meaningless identification may affect the legal outcome and sometimes lead to unequal treatment of similar cases. Such a finding has potentially far-reaching normative implications for the law.

Before proceeding, a caveat is in order. Legal debates typically involve complex considerations, and this Article does not claim that considerations based on the IE should necessarily be decisive. However, it does argue that this cognitive phenomenon should be taken into account, along with other relevant factors. The weight assigned to the IE may vary from one context to another.

The Article is structured as follows. Part I.A surveys the existing literature on the IE, and Part I.B addresses explanations for this phenomenon and the limitations of current studies. Part II then presents our experiments and discusses our findings. Part III moves from positive to normative analysis. It opens with the question of whether the IE can—and should—be debiased.²¹ Next, we demonstrate the implications of the IE for two central legal issues: the choice between rules and standards,²² and the redistribution of welfare through private-law norms, alongside tax-and-transfer mechanisms.²³

I. THE IDENTIFIABILITY EFFECT

Although the IE is a recently explored phenomenon, experimental studies have mapped its basic features, scope, and causes. Below, we review the current literature and note its limitations with respect to the field of law.

A. Defining Identifiability

Psychological studies have demonstrated that people react more strongly toward identifiable individuals than toward anonymous or statistical individuals. The major line of research on the IE examined prosocial behavior, such as monetary donations. It found that people are significantly more willing to help another person if the latter is identified rather than unidentified. Thus, for example, Kogut and Ritov elicited the willingness of individuals to contribute money to children who need a certain costly medical treatment.²⁴ They found, *inter alia*, that people were willing to contribute

phenomenon may not extend to an identified group of individuals. *See infra* notes 38–46 and accompanying text.

20. *See infra* Part II.

21. *See infra* Part III.A.

22. *See infra* Part III.B.

23. *See infra* Part III.C.

24. Kogut & Ritov, *supra* note 10, at 160–62.

much more money to a child identified by a photo than to an anonymous child.²⁵ These results were replicated in experiments involving real-life contributions.²⁶

Importantly, identifiability increases people's generosity toward others even when it conveys no meaningful information about the recipient. Knowing a person's name, for example, does not really make them more familiar or deserving of help than an unnamed person²⁷—and yet that is enough to induce people to allocate more money to them, even at their own expense.²⁸ Charness and Gneezy demonstrated this in a dictator game setting, in which one player unilaterally determines how to divide a sum of money (the “pie”) between herself and another player. Since the recipient must accept whatever the dictator offers, the dictator can decide to keep all the money for herself.²⁹ The authors found that although the players did not interact face-to-face, dictators who were told the other player's family name³⁰ gave them a significantly larger share of the pie—fifty percent more on average—than dictators who were not so informed.³¹ In a similar vein, Small and Loewenstein showed that even identifying a recipient by a number increases subsequent, anonymous monetary donations to them, compared with recipients who remained completely anonymous at the time of the allocation decision.³² To date, the IE has been observed mainly with regard to human beings, although one study found this effect in relation to endangered animals.³³

25. *Id.* at 161–63.

26. Tehila Kogut & Ilana Ritov, *The Singularity Effect of Identified Victims in Separate and Joint Evaluations*, 97 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 106, 109 (2005).

27. See also Tehila Kogut & Ilana Ritov, *The Identifiable Victim Effect: Causes and Boundary Conditions*, in THE SCIENCE OF GIVING: EXPERIMENTAL APPROACHES TO THE STUDY OF CHARITY 133, 134 (Daniel M. Oppenheimer & Christopher Y. Olivola eds., 2011) (“[I]t is unlikely that social benefits will be maximized when resources are made available to identified victims more than to unidentified ones.”).

28. Charness & Gneezy, *supra* note 10, at 32.

29. *Id.* at 31. However, experiments with this game demonstrate that many dictators do not fully exploit their advantageous position and allocate a positive—albeit low—sum to the other player. Elizabeth Hoffman, Kevin McCabe & Vernon Smith, *Reciprocity in Ultimatum and Dictator Games: An Introduction*, in 1 HANDBOOK OF EXPERIMENTAL ECONOMICS RESULTS, *supra* note 4, at 411, 412–15.

30. The anonymity of the dictators themselves was preserved in all conditions. See Charness & Gneezy, *supra* note 10, at 32.

31. *Id.* Dictators in the totally anonymous condition only knew that the recipient was from a different University. *Id.* at 31–32. In another study, Burnham found that dictators who viewed a photograph of the recipient prior to their decision subsequently allocated more money than dictators who had not seen a photograph. Terence C. Burnham, *Engineering Altruism: A Theoretical and Experimental Investigation of Anonymity and Gift Giving*, 50 J. ECON. BEHAV. & ORG. 133, 137–38, 140–41 (2003).

32. Small & Loewenstein, *supra* note 10, at 8–10; see also Donald A. Redelmeier & Amos Tversky, *Discrepancy Between Medical Decisions for Individual Patients and for Groups*, 322 NEW ENG. J. MED. 1162, 1163 (1990) (finding that physicians give more weight to a patient's personal interests when they consider the case of a patient identified by initials and more weight to the publicly oriented criterion of effectiveness when they consider unidentified patients as a group).

33. See Markowitz et al., *supra* note 9, at 397, 401–03 (finding an IE in the context of

Some experimental studies have shown that identification is not always beneficial to the identified person; indeed, in certain situations it can prove detrimental. Specifically, a few studies have examined the effect of identifiability on a person's reaction to blameworthy behavior. It was found that when an individual is seen as responsible for her own plight, identifiability heightened other people's negative feelings toward her—such as anger or blame—and decreased their willingness to help. Kogut, for example, elicited donations for an expensive cocktail of medicines for people with AIDS.³⁴ The recipient was either a single identified individual (by name and photo) or a group of unidentified individuals, who contracted the disease either as a result of drug use or by being born to a carrier mother.³⁵ Perceived responsibility for the illness significantly reduced donations only when the victim was identified.³⁶ Similarly, Small and Loewenstein found that the identifiability of a wrongdoer leads to a significant increase in punishment, in comparison with an unidentified one, even if the type of identification—number only—conveyed meaningless information about the wrongdoer.³⁷ In summary, depending on the specific context, identifiability causes people to react either more generously or more punitively toward others.

In reality, identified persons—in contrast to unidentified ones—are usually encountered as single individuals, rather than as a group.³⁸ Such is the case, for example, of a fundraising campaign for a person who needs a life-saving operation. When researchers directly tested the relevance of this factor, they found that the IE occurs only with regard to a single identified person (at least in certain circumstances) and does not extend to a group of identified people.³⁹ Thus, in one study, Kogut and Ritov examined the effect of identifiability on participants' willingness to contribute money to either a single sick child or a group of eight sick children.⁴⁰ They found that while the single identified individual elicited significantly higher contributions than the unidentified single one, the group of identified individuals did not receive

donations to save pandas and polar bears). No one has yet tested whether an identifiability effect exists with regard to inanimate objects.

34. Kogut, *supra* note 12, at 749–51.

35. *Id.* at 750.

36. *Id.* at 750–51, 754; *see also* Tehila Kogut, *The Role of Perspective Taking and Emotions in Punishing Identified and Unidentified Wrongdoers*, 25 *COGNITION & EMOTION* 1491, 1497 (2011) (showing, in a student-teacher scenario, that identifiability may either increase or reduce willingness to punish depending on whether the punisher adopts the perspective of the injured party or that of the wrongdoer).

37. Small & Loewenstein, *supra* note 13, at 315–16. In this study, the “wrongdoers” were participants who behaved uncooperatively in a laboratory social dilemma game. Participants who behaved cooperatively in the first stage of the game were given the opportunity to inflict a monetary penalty on either an identified or unidentified wrongdoer. *Id.* at 313–15.

38. Kogut & Ritov, *supra* note 27, at 134.

39. *Id.* at 134–36.

40. Kogut & Ritov, *supra* note 10, at 160–62. The authors used the same eight photographs of children (four boys and four girls) either separately, for the identified single child condition, or jointly, for the identified group condition. In the single-child scenarios, there was no significant difference between the contributions to each of the eight children. *Id.* at 160–61, 164.

higher contributions than the unidentified group.⁴¹ Moreover, the contribution to the single identified recipient considerably *exceeded* the contribution to the group of eight identified recipients.⁴² The latter, intriguing result was replicated in subsequent experiments.⁴³ Some studies have demonstrated that even the smallest possible group—two identified members—invoked less assistance than a single identified recipient.⁴⁴ This phenomenon has been named the *singularity effect*.⁴⁵

Notably, the singularity effect has been observed even when the proportion of those successfully helped within the relevant reference group, and the total cost of providing help, remained constant. In other words, the singularity effect is not due to a decrease in effectiveness or an increase in cost when the number of those requiring help rises.⁴⁶

Nonetheless, a few studies have found an IE in scenarios involving groups. Ritov and Zamir have shown that affirmative-action policies receive less support when the individuals who stand to lose from implementation of the policies are identified, rather than not.⁴⁷ Thus, identifiability reduced respondents' willingness to adopt procedures that adversely affect others—even when, in all the experimental scenarios, those affected constituted a group and not a single individual.⁴⁸ In another study, Nordgren and Morris McDonnell examined the effect of the size of a group of

41. *Id.* at 161–62.

42. *Id.* at 161, 164. This result was observed in studies of both hypothetical willingness to donate and real-life monetary contributions. *Id.*

43. Kogut & Ritov, *supra* note 26 (studying actual monetary contributions to an organization aiding cancer victims). The mean contribution for a single identified recipient was over twice the mean contribution for a group of eight identified recipients. There was no significant difference between the contributions to an unidentified single person or group. *Id.* at 109–10.

44. Markowitz et al., *supra* note 9, at 403 (observing that nonenvironmentalists contributed more money to help a single identified panda bear than to help two or eight identified bears); Paul Slovic, David Zions, Andrew K. Woods, Ryan Goodman & Derek Jinks, *Psychic Numbing and Mass Atrocity* (reporting that monetary donations to help a single identified starving child were higher than those for two identified children), in *THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY* 126, 132–33 (Eldar Shafir ed., 2013).

45. Kogut & Ritov, *supra* note 26, at 114–15; Markowitz et al., *supra* note 9, at 398. A recent empirical study has observed a similar phenomenon outside the lab. See Jeff Galak, Deborah Small & Andrew T. Stephen, *Microfinance Decision Making: A Field Study of Prosocial Lending*, 48 *J. MARKETING RES.* S130 (2011). The authors examined data from Kiva.org, a microfinancing organization that connects borrowers and lenders through the internet and strives to alleviate poverty in the developing world. *Id.* at S130. The borrowers are either single individuals or groups. *Id.* They submit proposals for small uncollateralized loans to fund their entrepreneurial projects, describe themselves and their business, and typically attach photographs. Lenders review proposals online and decide whether to make an interest-free loan and in what amount. *Id.* at S130–31. It was found that people prefer to lend money to single individuals than to groups and that loan amounts decrease as the size of the borrower group increases. *Id.* at S132–33.

46. See Kogut & Ritov, *supra* note 26, at 109–11; Markowitz et al., *supra* note 9, at 403.

47. Ilana Ritov & Eyal Zamir, *Affirmative Action and Other Group Tradeoff Policies: Identifiability of Those Adversely Affected*, 125 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 50, 53–57 (2014).

48. See *id.* at 53–55, 58.

victims on respondents' perception of the severity of a crime and the appropriate punishment.⁴⁹ The authors found, paradoxically, that increasing the number of people victimized by a crime—from two or three to, respectively, twenty or thirty—actually decreased its perceived severity in the subjects' eyes and led them to recommend shorter jail sentences.⁵⁰ However, the differences between small and large groups disappeared when participants were shown a photo of one member from within the group⁵¹—thus demonstrating that the IE can exist in relation to groups and can be dependent on their size.⁵² Moreover, it showed that identifying a specific person from within a large group can elicit judgments similar to those given with respect to a small group.

The significance of context to the existence and scope of the IE was further demonstrated in studies exploring the interaction between identifiability and perceptions of group belonging. In a series of experiments, Ritov and Kogut examined the relevance of two factors: whether the aid recipient belongs to the donor's own group (*in-group*) or to another one (*out-group*), and whether the two groups are viewed to be in conflict.⁵³ They found that in situations that are not perceived as involving a conflict, identifiability increased donations to a member of one's own group, and decreased donations to an out-group member, in comparison with an unidentified individual.⁵⁴ For example, a tsunami victim who is identified by name received larger monetary contributions when they belonged to the same nationality as the contributor (Israeli), and less aid when they belonged to a different nationality (Indian).⁵⁵ Moreover, a single identified victim from the contributor's own country received more help than a group of seven victims (whether identified or not) from the contributor's country.⁵⁶ In contrast, in scenarios perceived to involve intergroup conflict,

49. Loran F. Nordgren & Mary-Hunter Morris McDonnell, *The Scope-Severity Paradox: Why Doing More Harm Is Judged To Be Less Harmful*, 2 SOC. PSYCHOL. & PERSONALITY SCI. 97 (2011). The experimental scenarios referred to financial fraud and tainted food products. *Id.* at 98–99.

50. *Id.* at 98–99. This laboratory finding was supported by archival data of actual punitive damages awards in toxic-tort cases. The data revealed that juries required defendants to pay higher punitive damages when their negligent behavior harmed fewer people. *Id.* at 100–01.

51. *Id.* at 99. Arguably, however, this technique was only partially successful, because participants should have regarded a crime toward a large group as more severe than a crime against a small group (rather than equally severe). *Id.* at 100–01.

52. In one experiment, after evaluating the severity of the crime (financial fraud) and recommending the appropriate punishment, participants were asked to imagine and describe one of the victims. *Id.* at 98–99. Participants in the small group condition described the hypothetical victim in greater detail than participants in the large group. *Id.* This finding supports the argument that the victims in the small group were more identifiable to the participants.

53. Kogut & Ritov, "One of Us," *supra* note 9, at 152–53; Ritov & Kogut, *Ally or Adversary*, *supra* note 9, at 97, 99–100.

54. Kogut & Ritov, "One of Us," *supra* note 9, at 153.

55. *Id.* at 152.

56. *Id.* at 152–53. In the out-group conditions, however, the differences between the contributions to a single victim and to a group of victims were not significant. *Id.* at 153. These results were replicated in a second experiment involving sick children (identified by photograph) who required costly medication. *Id.* at 153–55.

identifiability increased generosity toward an individual from the *opposing* out-group.⁵⁷ Thus, when eliciting contributions for someone of a rival group—such as a member of another political faction or a fan of a competing soccer team⁵⁸—identifying them increased people’s willingness to contribute.⁵⁹ It appears that identifiability leads to stronger feelings of sympathy and relatedness toward a person from an opposing group.⁶⁰ This interesting result is supported by a study on donations to the conservation of endangered animals,⁶¹ which found that identification affected only those subjects who defined themselves as non-environmentalist.⁶² This suggests that when individuals do not care deeply about a given issue—and are therefore more likely to perceive it as conflicting with their own priorities—identifying a member from the out-group can increase their empathy and willingness to contribute to the cause.⁶³

B. Explanations and Limitations of Previous Studies

What is the explanation for the IE? The chief source of this phenomenon is the stronger emotional reactions elicited by an identified individual.⁶⁴ In the context of helping behavior, empathic emotions—such as sympathy, compassion, and distress at the plight of another—are preconditioned on adopting the other person’s perspective and imagining how he or she feels.⁶⁵ This is more likely to occur when an individual is identified rather than anonymous or statistical.⁶⁶ Similarly, when blameworthy behavior is involved, people may find it easier to attribute responsibility or feel anger toward an actual, identified person than toward abstract individuals.⁶⁷ Researchers have also found that people process individuals and groups differently: a single person—unlike a group—is regarded as a psychologically coherent unit, and therefore stronger impressions are formed about them.⁶⁸ People more readily and confidently make attributions and judgments about a single individual than about a

57. Ritov & Kogut, *Ally or Adversary*, *supra* note 9, at 101.

58. *Id.* at 97, 100.

59. *Id.* at 98–101. Quite surprisingly, identification *decreased* contributions to members of one’s own ideological group (although overall donations to identified in-group members still exceeded overall donations to either identified or unidentified out-group members). *Id.* It may be that feelings of shared group belonging are very intense when the ideological element is salient, and consequently highlighting a specific individual can only decrease perceived affinity. *Id.* at 97, 102.

60. *Id.* at 101–02.

61. Markowitz et al., *supra* note 9, at 399, 403.

62. *Id.* at 401–02. Nonenvironmentalists were willing to donate more money to help a single identified polar bear than to help the entire population of polar bears. In contrast, subjects who defined themselves as environmentalist did not react differently toward identified and unidentified endangered animals and donated similar sums in both cases. *Id.*

63. *Id.* at 404.

64. Kogut & Ritov, *supra* note 27, at 135; Markowitz et al., *supra* note 9, at 398.

65. Kogut & Ritov, *supra* note 10, at 158.

66. *Id.* at 158–59.

67. Kogut, *supra* note 12, at 754; Kogut, *supra* note 36, at 1492.

68. Markowitz et al., *supra* note 9, at 398; Slovic et al., *supra* note 44, at 132.

group,⁶⁹ so emotions are more likely to play a decisive role when the identifying details concern an individual than a group.⁷⁰ This difference between how individuals and groups are perceived may explain the intriguing finding that, in some circumstances at least, the IE is mostly observed in relation to a single identified person, rather than an identified group.⁷¹

Other, complementary explanations for the IE emphasize the importance of perceptions of responsibility and effectiveness. Experimental studies have found, for example, that people are significantly more generous toward others when they feel themselves responsible for the recipient's condition than when responsibility is potentially shared with other benefactors.⁷² Feelings of responsibility are stronger when one is asked to help a particular, identified individual, rather than an anonymous person or a group.⁷³ Similarly, people are more likely to contribute if they believe that their contribution will have an impact.⁷⁴ Furthermore, the smaller the proportion

69. David L. Hamilton & Steven J. Sherman, *Perceiving Persons and Groups*, 103 PSYCHOL. REV. 336, 337–46, 351–52 (1996); Joshua Susskind, Kristin Maurer, Vinita Thakkar, David L. Hamilton & Jeffrey W. Sherman, *Perceiving Individuals and Groups: Expectancies, Dispositional Inferences, and Causal Attributions*, 76 J. PERSONALITY & SOC. PSYCHOL. 181, 183–86, 190 (1999); see also Clayton R. Critcher & David Dunning, *Thinking About Others Versus Another: Three Reasons Judgments About Collectives and Individuals Differ*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 687, 691–96 (2014) (reviewing evidence that people tend to be more positive in their assessments of an individual than a group and suggesting explanations for this phenomenon, such as stronger aversion to applying a negative judgment to a person than to a collective, and a functional faith in the goodness of a person as opposed to people in general).

70. Kogut & Ritov, *supra* note 10, at 159, 165; Kogut & Ritov, *supra* note 27, at 134–35. Some writers have offered an evolutionary explanation for the different emotional reactions toward individuals and groups: humans evolved and developed their emotionally based intuitive responses in an environment made up of small communities, where everyone knew one another and were often related to one another. Since they did not interact with faraway strangers, they did not develop similar responses toward anonymous people's needs and transgressions. Furthermore, helping familiars held the promise of reciprocity and strengthening one's own gene pool. Paul H. Rubin, *How Humans Make Political Decisions*, 41 JURIMETRICS J. 337, 344–45 (2001).

71. See *supra* notes 38–52 and accompanying text. The above explanation for the different reaction toward individuals and groups is supported by a recent study on group entitativity. Robert W. Smith, David Faro & Katherine A. Burson, *More for the Many: The Influence of Entitativity on Charitable Giving*, 39 J. CONSUMER RES. 961 (2013). The authors elicited monetary contributions to help poor African children. *Id.* at 965–66. They found that when a group of victims is perceived as a coherent unit, it receives greater assistance than a similar group with low entitativity, and is treated no differently than a single victim. *Id.* Specifically, six African children, identified by their name and photograph, received higher donations when they were described as belonging to the same family (siblings) than when they were described as a group of unrelated children. *Id.* at 965–66, 969–70. In contrast, there was no significant difference between donations to a family and to a single identified child. *Id.* at 969.

72. Cynthia E. Cryder & George Loewenstein, *Responsibility: The Tie that Binds*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 441, 442–43 (2012).

73. Jenni & Loewenstein, *supra* note 8, at 251.

74. Cynthia E. Cryder, George Loewenstein & Richard Scheines, *The Donor Is in the Details*, 120 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 15, 16 (2013).

of those helped in relation to the size of the given reference group, the lower the perceived importance of helping them, even when the absolute number of those helped is held constant.⁷⁵ Thus, in one study, subjects placed a higher priority on a medical project that was expected to save two lives out of four than on an identical project that was expected to save two lives out of 1700.⁷⁶ Perception of high effectiveness is likely to be particularly salient in the case of an identified, single individual: since there is only one person in the relevant reference group, helping that person is tantamount to a total success of the endeavor.⁷⁷ In contrast, when the target of help is anonymous or a group, donors may feel less confident about the effectiveness of their contribution.⁷⁸

It is important to note that the IE is much broader than the effect commonly referred to under the heading of *statistical lives*—that is, people’s tendency to excessively discount risks (typically to life or health) that will materialize only in the future, to some people, with a certain probability. Since the harm has not yet occurred, those affected do not exist, and as such are “unidentified.” Scholars have long been aware of this problem. The economist Thomas Schelling was one of the first to observe that

[t]here is a distinction between individual life and a statistical life. Let a six-year-old girl with brown hair need thousands of dollars for an operation that will prolong her life until Christmas, and the post office will be swamped with nickels and dimes to save her. But let it be reported that without a sales tax the hospital facilities of Massachusetts will deteriorate and cause a barely perceptible increase in preventable deaths—not many will drop a tear or reach for their checkbooks.⁷⁹

Similarly, some legal scholars have argued that the interests of statistical people do not receive sufficient consideration. For example, while the people burdened by environmental regulation—such as farmers and fishermen—are concrete and their resulting hardship visible, those who would die in the future from environmental

75. Jenni & Loewenstein, *supra* note 8, at 238–39, 248, 252–53; Markowitz et al., *supra* note 9, at 398, 399–401.

76. Jenni & Loewenstein, *supra* note 8, at 252.

77. *Id.* at 253 (observing, in the context of saving lives, that “[i]dentified victims constitute their own reference group, 100% of whom will die if steps are not taken to save them”); see also Cryder et al., *supra* note 74, at 17–21 (showing that tangible details about a charity’s activities that promote donors’ sense of impact increase their subsequent donations); Slovic et al., *supra* note 44, at 130 (reporting that people’s support for airport-safety measures that are expected to save 150 lives declines as the percentage of lives that would be saved is reduced).

78. Note that perceived impact is a more persuasive explanation for people’s differential reaction toward identified versus *statistical* victims. When a certain victim is anonymous but not statistical, then, arguably, the chances of effectively helping her are equivalent to those of helping an identified victim. Nonetheless, it still may be the case that people feel less sure of being effective when the aid recipient remains unidentified.

79. THOMAS C. SCHELLING, *The Life You Save May Be Your Own*, in CHOICE AND CONSEQUENCE 113, 115 (1984).

degradation—such as air pollution—are abstract, and so their interests are overly discounted.⁸⁰

The IE pertains to any situation in which people react differently toward identified and unidentified persons, and therefore includes the cases discussed under “statistical lives.” However, it also embraces all situations in which one reacts differently toward highly specific and nonprobabilistic individuals—depending on whether or not they are identified. For example, when a charity raises donations for needy individuals somewhere, those beneficiaries might be either identified (say, by a photo) or left anonymous. In addition, the literature on statistical lives—in keeping with its name—focuses on risks to life or health. The IE, in contrast, is not limited to such cases, and is potentially relevant to any decision concerning others, including decisions about everyday situations. Although most psychological experiments on the IE have examined it with respect to life-threatening events,⁸¹ some have documented it occurring when no risk to life or health was involved.

For instance, Kogut found that educators (teachers, psychologists, and principals) are more willing to change their school’s regulations in favor of students, and give less weight to the school’s needs, when the decision pertained to a specific student (identified by first name only) instead of an unidentified student or a group of students.⁸² The identifiability of a particular student appears to invoke a more individual-oriented approach—whereas nonidentifiability, or considering a group of students, results in a more public-oriented approach.⁸³ Likewise, Sah and Loewenstein demonstrated that people in a financial conflict of interest give more biased advice to multiple recipients, or to a single unidentified recipient, than to a

80. For a discussion of this issue, see Lisa Heinzerling, *Knowing Killing and Environmental Law*, 14 N.Y.U. ENVTL. L.J. 521 (2006), and Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189 (2000). See also W. KIP VISCUSI, *FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK* 19–22 (1992) (explaining how statistical lives are valued in policy decisions and acknowledging that “[s]ociety exhibits greater life valuations when saving identified lives than for policies with small effects on statistical lives”); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 710, 740–41 (2005) (arguing, in the context of the public debate on capital punishment, that the person to be executed is highly salient, whereas the innocents whose lives would be saved by the deterrent effect of the death penalty are statistical and therefore less vivid).

81. See, e.g., Jenni & Loewenstein, *supra* note 8, at 247–48, 251–52 (various life-saving scenarios); Kogut & Ritov, “*One of Us*,” *supra* note 9, at 152 (aid to tsunami victims); Kogut & Ritov, *supra* note 26, at 109 (contributions for cancer patients); Markowitz et al., *supra* note 9, at 402, 403 (saving endangered species); Slovic et al., *supra* note 44, at 132–33 (donations to starving children). For an examination of medical contexts that are not life-threatening, see Redelmeier & Tversky, *supra* note 32. The authors observed that “physicians are more likely to order an additional test, expend time directly assessing a patient, avoid raising some troubling issues, and recommend a therapy with a high probability of success but the chance of an adverse outcome” when the decision is made with respect to an individual patient (identified by initials) rather than a group of comparable patients. *Id.* at 1163.

82. Tehila Kogut, *Public Decisions or Private Decisions? When the Specific Case Guides Public Decisions*, 22 J. BEHAV. DECISION MAKING 91, 94, 97–98 (2009).

83. *Id.* at 98–99.

single identified one.⁸⁴ Advisors appear to experience more empathy, are more aware of possible bias, and have greater motivation to reduce it when their advice affects a single identified person.⁸⁵ The documentation of an identifiability effect in contexts such as punishment for uncooperative behavior,⁸⁶ support for affirmative action,⁸⁷ and willingness to finance an educational program for gifted children⁸⁸ similarly attests to the presence of the effect in instances far removed from life- and health-threatening situations.

Although the law regulates almost every sphere of people's lives, and the IE is potentially relevant to any of these spheres, the little legal literature that exists on the IE is focused on health-related issues, such as medical care and malpractice,⁸⁹ public health law,⁹⁰ and environmental protection.⁹¹ Furthermore, even in this context, the IE is usually mentioned only in passing.⁹² Notable exceptions to the latter tendency are a full-length article on the implications of the IE for environmental law⁹³ and a recently published book that resulted from a conference on identified versus statistical lives.⁹⁴ Even these writings, however, focus on the field of public health⁹⁵ and are based on early psychological studies of the IE. New experimental findings question some of the legal analysis and recommendations.⁹⁶ Moreover, the legal literature

84. Sunita Sah & George Loewenstein, *More Affected = More Neglected: Amplification of Bias in Advice to the Unidentified and Many*, 3 SOC. PSYCHOL. & PERSONALITY SCI. 365, 367–69 (2012).

85. *Id.* at 365, 370.

86. Small & Loewenstein, *supra* note 13, at 315–16.

87. Ritov & Zamir, *supra* note 47, at 53–57.

88. Kogut & Ritov, *supra* note 26, at 112–14.

89. Ronen Avraham, *Clinical Practice Guidelines: The Warped Incentives in the U.S. Healthcare System*, 37 AM. J.L. & MED. 7, 12–13 (2011) (noting that the IE may cause judges to overcompensate patients, even when the doctors are not negligent).

90. Wendy E. Parmet, *Valuing the Unidentified: The Potential of Public Health Law*, 53 JURIMETRICS J. 255, 255 (2013) (discussing the limited ability of public health law to protect the health of the unidentified, general population).

91. Shi-Ling Hsu, *Fairness Versus Efficiency in Environmental Law*, 31 ECOLOGY L.Q. 303, 332–35 (2004) (arguing that due to the IE, fairness analysis favors the identified polluter, who would be adversely affected by environmental regulation).

92. *E.g.*, Avraham, *supra* note 18, at 566 n.69 (citing the IE as one reason that malpractice suits do not solve the problem of optimal medical care); Stephen M. Johnson, *Competition: The Next Generation of Environmental Regulation?*, 18 SE. ENVTL. L.J. 1, 15 (2009) (noting that since the people adversely affected by environmental regulation are identified, whereas those that would benefit from the regulation are not, the latter's interests are excessively discounted).

93. Hsu, *supra* note 16.

94. I. Glenn Cohen, Normal Daniels & Nir Eyal, *Acknowledgements*, in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE, *supra* note 1, at ix.

95. The applications discussed in *Identified Versus Statistical Lives* focus on environmental class actions and regulation, and the fight against HIV/AIDS. *Id.* at 161–218.

96. For instance, Hsu assumes that the IE is equally applicable to an identified individual and an identified group. Hsu, *supra* note 16, at 437, 440; *see also* Cohen et al., *supra* note 1, at 1–2 (defining the identifiability bias as a greater inclination to assist identified persons and groups than unidentified persons and groups). Therefore, Hsu claims that by identifying the group of beneficiaries of environmental regulation, we can overcome the bias in favor of those

on the IE is entirely theoretical—that is to say, based on general psychological studies of the effect that did not test law-related issues. Indeed, to date, the IE has not been examined directly in legal contexts.

To fill the gap in the literature, the following Parts discuss lawmaking in general. Expanding the discussion beyond its rather narrow current scope underscores the importance of the IE for the law.

II. TESTING THE IDENTIFIABILITY EFFECT IN LEGAL CONTEXTS

To demonstrate the significance of the IE for the law in general, we focused our experiment on the basic distinction between two types of lawmaking—policy making and decision making—which cuts across fields of law and legal debates. Furthermore, to extend the study of the IE beyond life and health matters, we tested its incidence with regard to more common, less dramatic situations—namely, legal remedies in various areas of private law and fines for relatively minor offenses.

A. *New Experiments*

When legal decisions are made, the affected individuals may be either identified or unidentified. Our experiments aimed to examine whether an identifiability effect occurs in this context—namely, whether the decisions of those who formulate the rules differ from the decisions of those who apply them to specific cases. The former category includes legislators and regulators (*policy makers*), and the latter includes judges, among others (*decision makers*).⁹⁷

Typically, when policy makers set rules or establish guidelines, the people who are affected by them are unidentified. In contrast, when these rules and guidelines are subsequently applied by decision makers, they usually affect identified individuals, such as particular plaintiffs and defendants. Moreover, decision makers usually encounter such people as individuals rather than as a group, which may also trigger the singularity effect. Although policy making and decision making in real life are plausibly influenced by several factors, a central feature that distinguishes these two types of lawmaking is the existence (or absence) of identifiability. Our experiments focus on this main differentiating characteristic.

economically burdened by such regulation. Hsu, *supra* note 16, at 482–85. However, as explained above, new experimental findings suggest that the IE may not be observed with regard to groups, in contrast to single individuals. *See supra* notes 38–46 and accompanying text. Consequently, in the former case, identification may have a different effect than commonly assumed in the legal literature.

97. Of course, judges are not the only ones to apply rules to specific cases. The activities of administrative agencies may include both rulemaking and adjudication. Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 529–32 (2005). Therefore, here and throughout this Article, the term “decision maker” refers to any lawmaking official who makes judgments with regard to identified, specific individuals.

Experiment 1

In the first experiment, we sought to discover whether minimal identification would affect the resulting decision by presenting respondents with a certain legal issue from the perspective of either a policy maker or a decision maker. The scenarios pertained to various matters of private law, and respondents were asked to decide the appropriate remedy against someone who had infringed upon another person's right. For example, respondents had to determine whether to order specific performance or payment of damages for breach of contract or to reduce a damages award because the injurer is poor. The policy-making versions related to unidentified individuals. The identifying information in the decision-making versions was minimal and irrelevant to the decision—the first name of the parties to the conflict. Our first, general hypothesis was that the IE is a broad phenomenon that is not limited to life and health contexts. Therefore, it will manifest itself also in legal decision making that applies to common, everyday situations, such as breach of a commercial contract. The second, more specific hypothesis was that policy makers' judgments regarding the appropriate remedy would differ from those of decision makers, even when they pertain to similar facts and situations. We had no clear hypothesis as to whether identification (in the decision-maker versions) would lead to more lenient or to harsher treatment of the rights infringer. On the one hand, a few studies have found that identification can be detrimental to the identified person when blameworthy behavior is involved.⁹⁸ On the other hand, most studies of the IE showed that identification is advantageous.⁹⁹ We thus sought to discover whether identification would impact the right infringer's treatment, and if so, in what direction.¹⁰⁰

Participants. A total of 522 students from the Hebrew University of Jerusalem and Ben-Gurion University—34.5% men and 65.5% women—took part in the experiment. Of these, 80% were undergraduates, 16% were graduate students, and 4% were unspecified. They ranged in age from eighteen to sixty-two, with a mean of twenty-five. Of the 522 respondents, 409 answered a comprehension question correctly. We report the analyses of the data from these respondents in the main text

98. See *supra* notes 34–37 and accompanying text.

99. See *supra* notes 24–33 and accompanying text.

100. To date, as described above, there is scant experimental literature that tested the IE in the context of policy making versus decision making and none that has examined this issue in legal settings. Redelmeier and Tversky focused on the decisions of physicians and did not mention the IE as such. Redelmeier & Tversky, *supra* note 32. They found that physicians give more weight to the personal concerns of the patient when they consider an individual patient and more weight to general criteria of effectiveness when they consider patients as a group. *Id.* at 1163. Kogut examined the decisions of school educators with respect to their school and found that consideration of a certain pupil evoked a more private-oriented approach while consideration of a group of pupils resulted in a more public-oriented approach. See *supra* notes 82–83 and accompanying text. Importantly, in both the identified and unidentified scenarios, the educators' decisions were applicable to a particular school. Kogut, *supra* note 82, at 93–94. In other words, this study did not examine general policy making that would be applied to specific cases by others in the future.

below. Analyses of the entire sample yielded very similar results and are reported in a footnote.¹⁰¹

Experimental Design. The experiment involved five types of scenarios: damage to property caused by a poor person's cow; good-faith encroachment on another person's land; breach of a sales contract in order to mitigate losses; breach of a sales contract in order to make extra profits; and defamation. Each of the five scenarios had two judgment versions: one as a policy maker, the other as a decision maker.¹⁰² The type of scenario and type of judgment varied from one participant to the next—that is to say, each participant was given only one scenario, from the perspective of *either* a policy maker or a decision maker. Participants were asked to choose the appropriate remedy against a rights infringer from among five options (marked 1 to 5). In all the scenarios, the options were ordered from the harshest, least considerate of the injuring party's interests (option 1) to the mildest, most considerate one (option 5). In addition, we asked participants to indicate, on a scale from 1 (*Not at all*) to 7 (*Very much*), the degree to which they felt three types of emotion—anger, sympathy, and pity—toward the rights holder and the rights infringer, and the degree to which consideration of the injurer's interests, as depicted, was fair. The order of the emotion questions was counterbalanced between subjects using two presentation orders.¹⁰³ Thus, the experiment included a total of 20 different questionnaires (5 vignettes x 2 types of judgment x 2 emotion orders).

The questionnaires were posted on a website designed for controlled judgment and decision-making experiments. Participants were students from diverse fields who had expressed willingness to answer online questionnaires. They were invited by e-mail to log onto the website and fill out a questionnaire. The different questionnaires were randomly assigned to the participants as they logged on. To encourage participation, the participants were entered into a lottery to win fifteen prizes of fifty shekels each.¹⁰⁴

The two versions of the breach-of-contract-to-mitigate-losses scenario may serve as an illustration of the wording of the vignettes. The policy-maker version read as follows:

Imagine that you have to lay down the rules that would apply in cases in which sellers breach a contract to sell an asset, such as iron products, to buyers. Sometimes, after the formation of a contract with a certain buyer, the seller realizes that the costs of production are higher than he expected and that he would lose money if he performs the contract. The seller may then decide to breach the contract with the buyer and not supply the iron.

101. While a 21.6% failure rate in the comprehension question may seem high, it is not uncommon when respondents are not inherently motivated to answer a questionnaire diligently. See Daniel M. Oppenheimer, Tom Meyvis & Nicolas Davidenko, *Instructional Manipulation Checks: Detecting Satisficing To Increase Statistical Power*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 867 (2009) (discussing the use of manipulation checks in experiments and reporting a 28.7% failure rate). The percent of correct answers did not differ between policy makers and decision makers (78.5% and 79%, respectively).

102. See *infra* App. A for the full text of the vignettes.

103. That is to say, half the participants indicated their emotions toward the injuring party first, and the other half toward the injured party first.

104. One New Israeli Shekel is approximately equal to \$0.25.

In such cases, the buyer may be awarded one of two remedies. One possibility is to grant specific performance—that is, to order the seller to supply the iron to the buyer. Another possibility is to require the seller to pay the buyer monetary damages for all the losses the buyer incurred due to nondelivery of the iron on time, including the inconvenience of purchasing substitute iron from another supplier and the increase (in the event that there is one) in the market price of iron.

You have to establish guidelines on whether to grant specific performance or monetary damages in such cases. Please choose one of the following options:

1. An order for specific performance of the contract with the buyer should be issued, irrespective of the magnitude of the seller's expected loss from performing the contract.
2. An order for specific performance of the contract with the buyer should be issued, even if the seller's expected loss from performing the contract is high.
3. An order for specific performance of the contract with the buyer should not be issued if the seller's expected loss from performing the contract is high.
4. An order for specific performance of the contract with the buyer should not be issued, even if the seller's expected loss from performing the contract is low.
5. An order for specific performance of the contract with the buyer should not be issued in any case, but rather an order for monetary damages.

The decision-maker version read as follows:

Imagine that you have to determine the remedy that would be given in a case in which Michael breached a contract to sell iron products to Ethan. After the formation of the contract with Ethan, Michael realized that the costs of production are higher than he expected and that he would lose money if he performed the contract. Michael breached the contract with Ethan and did not supply the iron. Ethan may be awarded one of two remedies. One possibility is to grant specific performance—that is, to order Michael to supply the iron to Ethan. Another possibility is to require Michael to pay Ethan monetary damages for all the losses Ethan incurred due to nondelivery of the iron on time, including the inconvenience of purchasing substitute iron from another supplier and the increase (in the event that there is one) in the market price of iron.

You have to decide whether to grant specific performance or monetary damages. Please choose one of the following options:

1. I would order specific performance of the contract with Ethan, irrespective of the magnitude of Michael's expected loss from performing the contract.
2. I would order specific performance of the contract with Ethan, even if Michael's expected loss from performing the contract is high.

3. I would not order specific performance of the contract with Ethan, if Michael's expected loss from performing the contract is high.
4. I would not order specific performance of the contract with Ethan, even if Michael's expected loss from performing the contract is low.
5. I would not order specific performance of the contract with Ethan in any case, but rather an order for monetary damages.

The other four types of events similarly presented participants with a legal issue from either a policy-making or decision-making perspective and asked them to choose between five options with regard to the appropriate private law remedy.

Results. To compare the distribution of responses in the two roles (policy maker versus decision maker), we treated the responses as ratings on a numerical scale, ranging from 1 (harshes) to 5 (mildest). The results, as shown in Figure 1 below, confirmed our hypothesis: across scenarios, decision makers, whose judgment pertained to a specific identified person, were more lenient toward the injurer than policy makers, whose judgement pertained to unidentified injurers (Kruskal-Wallis—a nonparametric test for comparison of the distribution of two groups—yielded a highly significant result, $p = .006$).¹⁰⁵ Indeed, across the five scenarios the modal response among the decision makers was the most lenient one (option 5), whereas the modal response in the policy-maker conditions was the second-harshes one (option 2). A more detailed analysis employed an ANOVA of the rating by the respondent's assigned role and scenario. The effect of role was statistically significant ($F(1, 399) = 6.988, p = .009$).¹⁰⁶ Furthermore, while the magnitude of the gap between the judgments of policy makers and decision makers appeared to vary between the five scenarios, the different scenarios were not significantly different from each other with

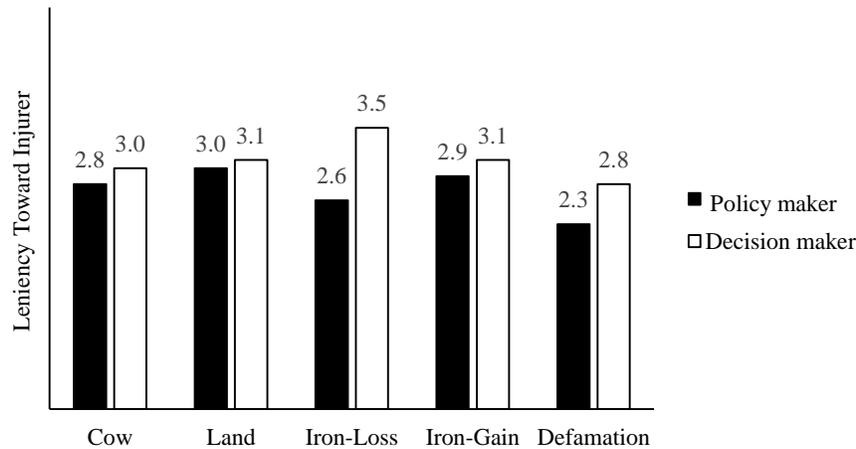


Figure 1. Results of Experiment 1

105. A Kruskal-Wallis test relies only on the rank order of the responses, without making assumptions about the normality of their distribution.

106. Similar results were observed in the entire sample: $F(1, 509) = 6.868, p = .009$.

respect to that gap¹⁰⁷: across scenarios, decision makers gave more weight to the injuring party's interests than policy makers did.¹⁰⁸

To examine the respondents' emotions toward the injurer and the injured in each scenario, we computed an emotion scale by subtracting the rating of the negative emotion (anger) from the averaged rating of the positive emotions (pity and sympathy): the higher the computed average, the more overall positive the emotions evoked by the target. Across the scenarios, while the injured party evoked greater overall positive emotions than the injurer among the policy makers, for the decision makers there was no significant difference.¹⁰⁹

Judgment of fairness was correlated with the decision ($r = .526, p < .001$). Not surprisingly, respondents who thought it more fair to take into account the injurer's interests tended to be more lenient toward the injurer in their decision. The judgment of fairness varied between scenarios but was not affected by the respondent's role.¹¹⁰ Furthermore, repeating the analysis of the decision by role and scenario, while controlling at the same time for fairness and emotions, still yields a significant effect of role.¹¹¹ Thus, the difference between the decisions of policy makers and decision makers cannot be fully accounted for either by their emotions or by considerations of fairness.

Turning to the specific scenarios, the breach-of-contract-to-mitigate-losses vignette (scenario 3, quoted above) involved a judgment about the appropriate remedy when a contract for the delivery of iron is breached. Respondents had to choose between specific performance and expectation damages.¹¹² We found that policy makers were more inclined to the view that specific performance should be granted, even when losses to the seller from performing the contract were significant. In contrast, decision makers, who were faced with an identified losing seller, were more inclined to award monetary compensation to the buyer, even when the losses from performance in kind were not very high.

It is interesting to compare this scenario with the breach-of-contract-to-make-extra-profits scenario (scenario 4). This vignette was identical to scenario 3 in all

107. $F(4, 499) = .632, p = .640$. Similar results were observed in the entire sample: $F(4, 509) = 1.169, p = .324$.

108. Gender did not significantly interact with any of the factors.

109. Although qualified by further interactions with order of questions and scenario, role interacted with target ($F(1, 389) = 10.374, p = .001$). Separate comparisons for policy makers and decision makers (across scenarios) yielded a significant difference between feelings for injured and injurer (.640 and .138, for injured and injurer, respectively; $t(193) = -2.725, p = .007$) among policy makers, while the corresponding comparison among decision makers did not yield a significant difference (.508 and .366, respectively; $p = .4$).

110. The only significant effects in an ANOVA of fairness by role, scenario, and question order were those of scenario ($F(1, 389) = 6.044, p < .001$) and order ($F(1, 389) = 5.655, p = .018$). No other main effects or interactions yielded significant results.

111. ANOVA of decision by role and scenario, with fairness judgment, feelings toward injurer, and feelings toward injured as covariates, yields significant effects of role ($F(1, 396) = 5.048, p = .025$) and of fairness ($F(1, 396) = 139.494, p < .001$). No other effects are significant.

112. Expectation damages are the sum of money that would put the injured party "in as good a position as [she] would have been in had the contract been performed." 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 190 (3d ed. 2004).

respects, except for the *motivation* for the contract breach: while in scenario 3 it was to mitigate losses, in scenario 4 it was because the seller had found another buyer who was willing to pay more for the iron, thereby yielding him a greater profit. Even though a breach for the purpose of increased gain might be perceived as morally less justified than a breach to avoid out-of-pocket losses,¹¹³ decision makers still tended to be more lenient toward the breaching party than policy makers were—that is, they were more willing to award monetary compensation in lieu of specific performance.¹¹⁴

Besides breach of contract, the experiment also examined remedies for defamation, damage to property by a person's cow, and good-faith encroachment on land. In the defamation scenario (scenario 5), respondents were told that when someone besmirches another person's good name, the injured party usually suffers not only a pecuniary loss, but an emotional one, as well. The emotional loss may be dealt with either by increasing the amount of monetary compensation or by requiring the injurer to publicly apologize. Participants were asked to choose between five options, ranging from the one that most infringes upon the libeler's autonomy to the one most considerate of his autonomy. Thus, an apology could be always required; required even when the emotional loss is relatively small; required only when the loss is significant; required only when it is severe; or never imposed upon the libeler.¹¹⁵ Participants made their judgment either as policy makers setting guidelines in this matter

113. Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 413–14, 420–21 (2009) (finding that people view breach of contract to attain greater profits as more immoral than a breach aimed at cutting losses and therefore think that, in the former case, the injured party should receive damages surpassing her losses); see also EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 265 (2010) (“While many people might justify nonperformance in impossibility-like situations, it is doubtful that they would justify it when nonperformance is not meant to avoid losses but rather to facilitate larger profits.”).

114. The greater tendency of decision makers to suffice with a monetary remedy seems to accord with the *efficient breach doctrine*. In a nutshell, this doctrine holds that a promisor may breach a contract whenever breach is more efficient than performance; that is, whenever the promisor's profits from the breach exceed the losses to the promisee. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 328–30 (6th ed. 2012). In scenario 4, the breach is presumably efficient because the asset is transferred to the person who values it most (the second buyer) while minimizing transaction costs, and the first buyer is fully compensated. For criticism of the efficient-breach doctrine from a behavioral and experimental perspective, see Daphna Lewinsohn-Zamir, *Can't Buy Me Love: Monetary Versus In-Kind Remedies*, 2013 U. ILL. L. REV. 151, 159–63, 169–74, 178–84.

115. In some countries, such as Japan and South Korea, apologies can be coerced. Pierre-Dominique Ollier & Jean-Pierre Le Gall, *Various Damages*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW pt. 2, at 1, 89–93 (André Tunc ed., 1986). In contrast, the remedy of court-ordered apology is generally unavailable in civil proceedings in the United States. Jennifer K. Robbennolt, John M. Darley & Robert J. MacCoun, *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1147 n.114 (2003). However, voluntary apologies and retractions of defamatory statements can be offered by defendants in mitigation of damages. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 479–80 (1986).

or as decision makers who must award either of the two remedies in a specific case. As in the breach-of-contract scenarios, decision makers were more considerate of the libeler than policy makers were. Decision makers required a somewhat larger emotional loss to coerce an apology.

A similar tendency was revealed in the damage-to-property scenario (scenario 1), involving damage caused by livestock to a neighboring property. Respondents had to decide whether the cow owner's financial circumstances should affect the sum of compensation to be paid.¹¹⁶ In the policy-maker version, respondents were asked to set the guidelines on the extent to which the injurer's financial situation should be taken into account. In the decision-maker version, they had to determine whether the compensation paid by a certain cow owner should be reduced. The five options were as follows: no reduction in compensation; a reduction only if the sum of damages is very high; only if it is quite high; even if the sum is quite low; and a reduction in all instances where the injurer is financially constrained. Once again, decision makers faced with an identified poor injurer were more willing to reduce the damages to be paid than policy makers who dealt with unidentified poor injurers. Policy makers tended to condition a reduction of damages on the existence of a higher compensation burden.

Finally, the encroachment-on-land scenario (scenario 2) depicted individuals who—unintentionally and in good faith—have built on someone else's land without permission. The two possible remedies were demolishing the building (and returning the land to its former state) or compensating the landowner (while allowing the building to remain).¹¹⁷ The five options linked the demolition option to the value of the encroaching building in relation to the value of the land on which it was built. For example, respondents could order demolition irrespective of the value of the building; allow the building to remain only if its value surpasses that of the encroached land; allow the building to remain even if its value is less than that of the encroached land; and so forth. Although the difference between the judgments of decision makers and policy makers was slight, the same pattern was observed: decision makers were more considerate of good-faith encroachers than policy makers and made demolition of the building contingent on it being of somewhat lesser relative value than the land in question.

Experiment 2

The remedial options in Experiment 1 were ordered from the harshest remedy, least considerate of the injuring party's interests, to the mildest, most considerate remedy. Nevertheless, the various remedies involved different attributes, which could arguably receive different subjective weights. In order to test for the generality of the effect found in Experiment 1 and remove any alleged ambiguity in the remedy rankings, we ran a second experiment with different scenarios, in which only an increase or a decrease in a certain fine was to be decided. This was done in the context

116. Possessors of livestock are held strictly liable for the damage caused by their intruding animals. RESTATEMENT (SECOND) OF TORTS § 504(1) (AM. LAW INST. 1977). Thus, there is no need to prove that the animal owner was negligent.

117. For discussion of different remedies for land encroachment, see Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 80–81 (1987).

of sanctioning first-time versus repeat offenders. Furthermore, unlike the civil disputes depicted in the first experiment, in the context of fines, attending to the interests of the identified wrongdoer does not come at the expense of any other person, identified or not.

In Experiment 2, we sought to discover whether minimal identification would affect a decision regarding the appropriate size of a fine when subjects consider the question as either policy makers or decision makers. The experiment inquired whether the fact that this is the wrongdoer's first offense should reduce the fine to be paid, and, vice versa, whether a repeat offense should lead to an increase in the fine. As in Experiment 1, the policy-making versions related to unidentified individuals and the identifying information in the decision-making versions was minimal and irrelevant to the subsequent decision—the first name of the wrongdoer. We hypothesized that policy makers' judgments regarding the amount of the fine would differ from those of decision makers. We aimed to find out whether the leniency toward an identified wrongdoer (observed in Experiment 1) would be replicated in the context of fines and whether repeat offenders would be treated differently than first-time offenders.

Participants. A total of 488 students from the Hebrew University of Jerusalem and Ben-Gurion University—33.2% men and 66.8% women—took part in the experiment. Of these, 84% were undergraduates, 15% were graduate students, and 1% were unspecified. They ranged in age from eighteen to sixty-two, with a mean of twenty-five. Of the 488 respondents, 410 answered a comprehension question correctly. We report the analyses of the data from these respondents.¹¹⁸

Experimental Design. The experiment employed a 2 x 2 x 2 between-subject design. Two scenarios were used: littering in a public park and violating the conditions of a building permit. Each scenario had a first-time-offense version and a repeat-offense version. In addition, each of the resulting four scenarios had two judgment versions: one as a policy maker, the other as a decision maker. Each participant received only one scenario, from the perspective of either a policy maker or a decision maker, and was asked to determine the appropriate fine from among five options (marked 1 to 5). The options involved either a decrease (in the first-time-offense conditions) or an increase (in the repeat-offense conditions) in fines. Option 1 represented no reduction/increase in the fine, and option 5 represented a very large reduction/increase in the fine. In addition, we asked participants to indicate, on a scale from 1 (*Not at all*) to 7 (*Very much*), the degree to which they felt three types of emotion—anger, identification, and pity—toward the wrongdoer and how severe they perceived the offense to be.¹¹⁹

The questionnaires were posted on the same website as in Experiment 1, and students from diverse fields were invited to answer an online questionnaire by the same method as in the first experiment.

Two examples from the littering-in-the-park scenario may illustrate the wording used in the vignettes. The first-time-offense, policy-making version read as follows:

118. Analyses of the entire sample yielded very similar results. See *infra* note 121.

119. For the full text of the vignettes, see *infra* app. B.

Imagine that you have to lay down the rules that would apply in cases in which people litter in public parks. As a rule, littering in a park is subject to a fine. However, when determining the fine to be paid, one can take into account various factors that would reduce the amount to be paid.

You have to establish guidelines on whether, in such cases, to take into account the fact that it is a first-time offense and reduce the fine to be paid by a person who littered in a park. Please choose one of the following options:

1. I would stipulate that the fine should not be reduced at all because it is a first-time offense of a litterer.
2. I would stipulate that the fine should be reduced to a small extent because it is a first-time offense of a litterer.
3. I would stipulate that the fine should be reduced to a medium extent because it is a first-time offense of a litterer.
4. I would stipulate that the fine should be reduced to a large extent because it is a first-time offense of a litterer.
5. I would stipulate that the fine should be reduced to a very large extent because it is a first-time offense of a litterer.

The repeat-offense, decision-making version read as follows:

Imagine that you have to determine the fine to be paid by Daniel, who littered in a public park. As a rule, littering in a park is subject to a fine. However, when determining the fine to be paid, one can take into account various factors that would increase the amount to be paid.

You have to decide whether to take into account the fact that it is a repeat offense of Daniel and increase the fine that he would pay. Please choose one of the following options:

1. I would not increase the fine at all because it is a repeat offense of Daniel, the litterer.
2. I would increase the fine to a small extent because it is a repeat offense of Daniel, the litterer.
3. I would increase the fine to a medium extent because it is a repeat offense of Daniel, the litterer.
4. I would increase the fine to a large extent because it is a repeat offense of Daniel, the litterer.
5. I would increase the fine to a very large extent because it is a repeat offense of Daniel, the litterer.

Results. To compare the distribution of responses in the two roles (policy maker versus decision maker), we treated the responses as ratings on a numerical scale, ranging from 1 (harshest) to 5 (mildest). For that purpose we inverted the scale in the repeat offense conditions, such that the largest increase of the fine gets the value of 1, and the no-increase gets the value of 5.

The results, as shown in Figure 2 below, confirmed our hypothesis: across scenarios and first-time/repeat offense, decision makers, whose judgment pertained to an identified person, were more lenient toward the wrongdoer than policy makers, whose judgement pertained to unidentified wrongdoers.

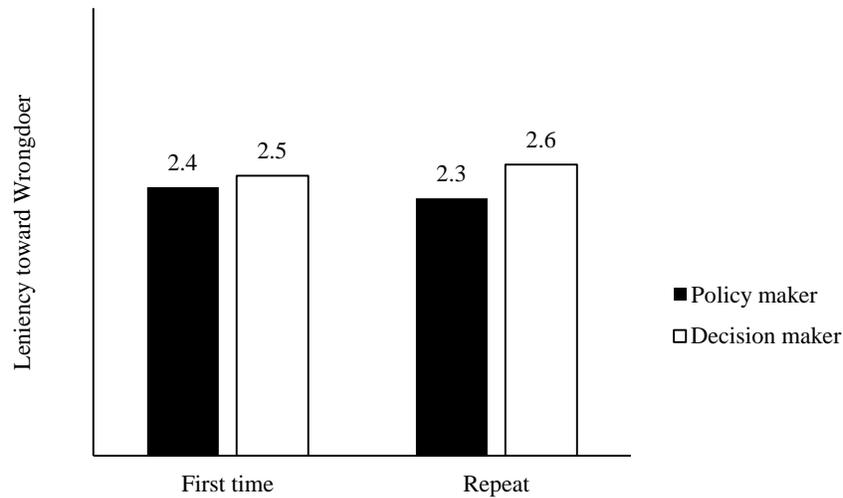


Figure 2. Results of Experiment 2. Leniency toward first-time offenders means reducing the amount of the fine, whereas leniency toward repeat offenders means attenuating the increase in the fine.

An ANOVA of the rating by the respondent's assigned role (policy maker versus decision maker), scenario, and first-time/repeat offense, yielded a statistically significant effect of role ($F(1, 402) = 4.052, p = .045$). Although the gap between the judgments of policy makers and decision makers appears to be larger for repeat offenders than for first-time offenders, the interaction between role and first/repeat offense was not statistically significant ($p > .2$). No other effects approached a significant level,¹²⁰ except for a marginally significant three-way interaction of role, scenario, and first/repeat offense ($F(1, 410) = 3.735, p = .054$). This suggests that the gap between policy makers and decision makers regarding the treatment of first-time offenders is more pronounced in the building-violation scenario than in the littering-in-the-park scenario.¹²¹

120. Thus, for example, in terms of the extent of leniency, we observed no significant difference between first-time and repeat offenders. Note, however, that since leniency toward first-time offenders means reducing the fine, whereas leniency toward repeat offenders means attenuating the increase in the fine, a nonsignificant difference in leniency between the two categories of offenders does *not* mean that their level of punishment is the same.

121. Repeating the same analysis with all respondents yields similar results with respect to the main effect of role ($F(1, 480) = 3.836, p = .05$). In this analysis, the effect of first/repeat offense is also significant ($F(1, 480) = 10.554, p = .001$). As in the analysis reported above, here too the three-way interaction of role, scenario, and first/repeat offense is marginally significant ($F(1, 480) = 3.649, p = .057$).

The respondents' perspective—policy maker or decision maker—did not significantly affect their judgment of the severity of the offense. Judgment of severity varied significantly by scenario ($F(1, 402) = 17.694, p < .001$), where littering in a park was regarded as more severe than a building violation, and by first/repeat offense ($F(1, 402) = 15.579, p < .001$), where, as expected, a repeat offense was considered to be more severe than a first-time offense. However, role did not significantly affect severity judgments ($p = .203$), nor did it interact with the other factors. While judgment of severity was not affected by role, evoked emotions seem to depend on one's perspective. To examine the respondents' emotions toward the wrongdoer in each scenario, we computed, as in Experiment 1, an emotion scale by subtracting the rating of the negative emotion (anger) from the averaged rating of the positive emotions (pity and identification); the higher the computed average, the more overall positive the emotions evoked by the target. Across scenarios, the wrongdoer evoked greater overall positive emotions among the decision makers than among the policy makers ($F(1, 402) = 5.294, p = .022$). Furthermore, the effect of perspective on leniency judgments was mediated in this study by the evoked emotions: including the emotion rating as a covariate in the model predicting leniency from the three independent factors renders the effect of role nonsignificant ($p = .222$). This result suggests that the source of the gap in leniency between policy makers and decision makers stems from the more positive emotional reaction experienced by decision makers who face an identified wrongdoer.

B. Discussion

The experiments found a similar pattern in all scenarios: the respondents' decisions were affected by whether the individuals in question were identified or not. In both private law and fine scenarios, the respondents' judgments as policy makers with regard to unidentified people differed from their judgments as decision makers with regard to identified individuals. Specifically, identifiability resulted in more lenient treatment of the identified wrongdoer. Thus, for example, decision makers were more willing than policy makers to refrain from ordering specific performance of a losing contract, and to avoid ordering a libeler to apologize. An identifiability effect was triggered even though, in the decision maker version of each scenario, the information about the individual in question was minimal and conveyed no meaningful data: identification by no more than a first name. More generally, the experiments demonstrated that the IE is a powerful phenomenon that extends beyond the fairly limited contexts tested in the literature to date. This psychological effect is therefore highly relevant to the field of law and is not limited to situations involving risks to life or to health. Below, we highlight a few more aspects of our experimental findings.

A few studies of the IE have demonstrated that identification is not always advantageous but can be detrimental to the identified person when her behavior is perceived to be blameworthy: it may, for example, trigger a more punitive reaction, even if the identifying information is minimal.¹²² Interestingly, in our experiments we did not observe such a reaction. Although all the scenarios in both experiments involved

122. See *supra* notes 33–37 and accompanying text.

remedies or sanctions against wrongdoers, we found that identifiability always resulted in *more favorable* treatment of the wrongdoer. Even when the issue was whether to increase the fine for a repeat offender, identifiability led to lesser inclination to raise the sanction. One possible explanation is that the transgressions in the scenarios—such as breach of contract to mitigate losses, failing to prevent one’s cow from damaging a neighbor’s property, or littering in a public park—were comparatively mild and did not involve moral turpitude. (Arguably, the cases involving breach of contract to make extra profits or defamation are different in this regard. However, the study’s participants may have thought the former to be somewhat understandable in commercial contexts¹²³ or that the libeler had not acted with malicious intent.)¹²⁴ This explanation is supported by the fact that in Experiment 1, across scenarios, respondents who were cast in the role of decision maker were marginally less angry at the injuring party than those responding as policy makers ($t(407) = 1.928, p = .055$). Furthermore, in Experiment 2, across scenarios, the wrongdoer evoked greater overall positive emotions among decision makers than among policy makers ($F(1, 402) = 5.294, p = .022$).

Another possible reason that identification did not result in harsher treatment is that the identified wrongdoer in our experiments had not harmed the decision maker. In one of the studies documenting an adverse effect of identifiability, the greater willingness to penalize was in response to blameworthy behavior toward the respondents themselves.¹²⁵ Another study, however, had found a similar effect when the respondents were not involved or suffered no injury.¹²⁶ It appears, then, that this issue is context-dependent, and more experimentation is necessary to understand the correlation between personal injury and the adverse effect of identification. Such experiments would be highly relevant for the law. Although legal decision makers—such as judges—were not personally harmed by the individual whose case they must decide, during the judicial process they are exposed to far more detailed information about the blameworthiness of that individual than a respondent who is answering a questionnaire.¹²⁷

Note that the fact that Experiment 1 found an IE benefiting the identified individual does not mean that respondents were uninfluenced by the fact that this individual had infringed upon someone else’s rights. The identifiability effect might have been stronger, and the divergence between the judgments of policy makers and decision makers more pronounced, had the scenarios involved a more innocuous behavior. In

123. The wrongdoer’s behavior may have been viewed as understandable especially since it was stated that the buyer would receive monetary compensation to cover all his losses.

124. The defamation event did not state whether the libeler knew that the information he was spreading was a lie.

125. Small & Loewenstein, *supra* note 13, at 313–16 (finding that participants who behaved uncooperatively in the first stage of a laboratory game later received a higher monetary penalty from the cooperative participants if these wrongdoers were identified, rather than unidentified).

126. Kogut, *supra* note 12, at 750–51, 754 (showing that an identified AIDS victim who contracted the disease as a result of drug abuse received smaller donations toward expensive medication than an identical victim who remained unidentified).

127. See also *infra* notes 132–38 and accompanying text.

other words, the fact that the vignettes in this study involved an injury to rights may have reduced the favorable IE, but not eliminated it entirely.

A related, noteworthy issue is that Experiment 1 found an identifiability effect in favor of the rights infringer, even though the rights holder was also identified in the decision-maker scenarios. Does this mean that identifiability has no effect on the decision makers' attitudes toward the injured party, or that the beneficial effect of identification for the rights holder is less than that for the rights infringer? On this point, it is difficult to draw any definitive conclusions from this experiment. Although both parties were identified by their first name, the vignettes still focused respondents' attention on the remedial burden appropriate for the injuring party. Thus, for example, the damages-to-property scenario centered on whether the injurer's financial situation should affect the damages he pays, and the breach-of-contract case highlighted his losses or gains. Consequently, it is not surprising if identification mainly affected the respondents' responses toward the rights infringer. (Kogut, it should be noted, suggested that identifiability would increase or decrease punishment depending on whether the punisher adopts the perspective of the injured party or the wrongdoer).¹²⁸

The results of Experiment 2 rule out the possibility that the identifiability of the injured party was essential to the results of Experiment 1. The fine scenarios employed in Experiment 2 referred to largely victimless offenses and, in any case, no victim—identified or not—was mentioned in the vignettes. In the context of such fines, the only identified person is the offender. We found a similar effect of identifiability as in Experiment 1: decision makers, whose judgment pertained to an identified person, were more lenient toward the wrongdoer than policy makers, whose judgment pertained to unidentified people.

In summary, the present experiments are a preliminary investigation of the IE's relevance for the law in general, and for lawmaking in particular. They demonstrate the fruitfulness of testing this understudied psychological phenomenon. Part III suggests initial normative implications.

III. NORMATIVE IMPLICATIONS

Before we discuss the implications of the IE, two caveats are in order. First, when shifting from experimental results to normative recommendations, one major concern is external validity. Like many other studies of the IE, our experiments tested it with laypeople. One might argue that professionals, such as judges, would be less susceptible to the IE. While we concede the need for caution in this regard, preliminary evidence suggests that experienced professionals are not immune to this effect. Thus, for example, Redelmeier and Tversky showed that practicing physicians make different medical decisions when evaluating an individual patient than when considering comparable patients in general.¹²⁹ Kogut demonstrated a similar difference in judgment when school educators considered an issue affecting their school from the perspective of an identified student or that of a group of students.¹³⁰ Although the IE

128. Kogut, *supra* note 36, at 1497.

129. Redelmeier & Tversky, *supra* note 32, at 1163.

130. Kogut, *supra* note 82, at 94, 97–99.

has yet to be tested with regard to judges and other legal professionals, it is extremely unlikely that they are unsusceptible to it. A host of experimental studies have demonstrated that judges tend to use the same heuristics and display the same cognitive biases as other people,¹³¹ and a recent study by Wistrich, Rachlinski, and Guthrie— involving the responses of practicing judges to questionnaires concerning hypothetical legal cases—seems particularly pertinent.¹³² They found that the judges' feelings about the litigants, as described in the cases, influenced their decisions.¹³³ Specifically, cases that were similar in all legally relevant respects were decided differently depending on the litigant's likability.¹³⁴ For example, in a scenario involving an illegal immigrant, sympathy or lack of sympathy for the defendant¹³⁵ affected the judges' ruling on a pure question of law, as well as on the length of the prison sentence: a likable defendant was much more likely to receive a favorable ruling and a more lenient sentence than a less likable one.¹³⁶ Since the explanation for the IE is rooted primarily in the stronger emotional reaction elicited by an identified individual,¹³⁷ it is reasonable to believe that legal professionals, including judges, would be influenced by it as well.¹³⁸ It should also be noted that our experiments found an identifiability effect even in a short questionnaire that provided very little identifying information—whereas in real life, such as a courtroom, identification is much more detailed, intimate, and prolonged. Plausibly, therefore, it would be just as likely, if not more so, to give rise to an identifiability effect.¹³⁹

131. See generally Doron Teichman & Eyal Zamir, *Judicial Decision-Making: A Behavioral Perspective*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW, *supra* note 5, at 664, 690–92.

132. Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015).

133. *Id.* at 862.

134. *Id.* at 898–900.

135. The only difference between the scenarios concerned the reason that the illegal immigrant entered the United States. *Id.* at 877–78. One group of judges was told that the defendant had been hired by a drug cartel to track down someone who had stolen drugs from it, and the second group was informed that the defendant was a father who wanted to earn more money to pay for a liver transplant for his daughter. *Id.*

136. *Id.* at 876–80. Basically similar results were obtained in questionnaires involving issues such as possession of medical marijuana, a constitutional challenge to strip-searching, credit card debt, and environmental pollution. In all these cases, judges were more likely to interpret and apply the law in favor of the more sympathetic litigant than in favor of the less sympathetic one. *Id.* at 898–900; see also Teichman & Zamir, *supra* note 131, at 690–91 (summarizing the literature showing that judges are also susceptible to various cognitive biases).

137. See *supra* notes 64–71 and accompanying text.

138. For a short survey of the literature on decision making by professionals, see ZAMIR, *supra* note 6, at 33–36; see also Paul Brest, *Quis Custodiet Ipsos Custodes? Debiasing the Policy Makers Themselves* (assuming that professional policy makers are also prone to various decision-making biases, and suggesting strategies to mitigate them), in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY, *supra* note 44, at 481.

139. Cf. Vicki L. Fishfader, Gary N. Howells, Roger C. Katz & Pamela S. Teresi, *Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention, and Level of Emotionality*, 20 LAW & HUM. BEHAV. 565, 568–70 (1996) (finding that subjects who

Second, the normative debates discussed below involve complex, sometimes conflicting, considerations. This Article highlights the relevance of the IE to these debates. We do not argue that considerations based on the IE should necessarily trump other considerations—but rather, that the possibility of an identifiability effect should be recognized and taken into account, along with other relevant factors. The actual weight assigned to this phenomenon should vary with the relevant context and circumstances.

A. *Debiasing the Identifiability Effect?*

A normative issue that commonly arises with respect to behavioral phenomena is whether the law should attempt to debias individuals and steer them toward a more rational path.¹⁴⁰ One might, for example, accept that people are inclined to react differently toward identified and unidentified others but insist that this tendency be counteracted—that is, that measures be taken to ensure that people respond in a similar fashion to identified and unidentified individuals. In that regard, two questions should be addressed: Is the IE an irrational and undesirable bias? and can the IE be debiased (at a reasonable cost and without significant negative side effects)?

Many scholars believe that the IE is irrational,¹⁴¹ but this matter is quite complex. It would be useful to differentiate between people's reactions toward statistical versus nonstatistical individuals, and their reactions to anonymous versus non-anonymous individuals. We address each of these distinctions in turn.

On the face of it, it seems irrational to spend far greater resources on saving, for example, a few miners trapped in a mine shaft (nonstatistical victims) than on safety measures that would prevent mining accidents in the first place, thereby plausibly saving more lives in the long run (statistical victims).¹⁴² Philosophers, however, have offered justifications for people's greater concern for nonstatistical lives. For example, it was argued that rational persons may seek to reduce not only the total number of deaths in society but also the despair and dread that accompanies the awareness of being in grave peril of death, which occurs only in the nonstatistical case.¹⁴³ From

watched a video of a trial experienced stronger emotional reactions than subjects who had only read the transcripts).

140. For discussions of debiasing through law, see generally Jeremy A. Blumenthal, *Emotional Paternalism*, 35 FLA. ST. U. L. REV. 1 (2007); Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006).

141. *E.g.*, Kogut & Ritov, *supra* note 26, at 114 (“[I]t is unlikely that social benefits will be maximized when resources are made available to identified victims more than to unidentified ones.”); Small et al., *supra* note 2, at 143–44 (acknowledging the possibility that excessive resources are expended on identified victims at the expense of statistical ones); Sunstein & Vermeule, *supra* note 80, at 723 (noting that paying less attention to statistical deaths is a “cognitive failure”); *see also* James K. Hammitt & Nicolas Treich, *Statistical vs. Identified Lives in Benefit-Cost Analysis*, 35 J. RISK & UNCERTAINTY 45, 62, 64 (2007) (stating that a systematic premium for identified lives is not supported by cost-benefit analysis and cost-effectiveness analysis); John McKie & Jeff Richardson, *The Rule of Rescue*, 56 SOC. SCI. & MED. 2407, 2408 (2003) (arguing that conventional cost-benefit analysis is impersonal and does not favor identifiable persons over unidentifiable ones).

142. Charles Fried, *The Value of Life*, 82 HARV. L. REV. 1415, 1416–17 (1969).

143. *Id.* at 1433–37; Mark Kelman, *Saving Lives, Saving from Death, Saving from Dying:*

the standpoint of standard economic analysis, welfare is maximized by the satisfaction of individuals' actual preferences, whatever they may be—thus, catering to people's greater concerns about identified victims appears to be justified.¹⁴⁴ But even under ideal-preferences theories, which discount at least some objectionable or irrational preferences,¹⁴⁵ there seems to be no compelling reason to ignore or try to change preferences for allocating significant resources to minimize certain types of death, for example.¹⁴⁶ This argument is not limited to matters of life and death but extends to other allocation trade-offs between statistical and nonstatistical individuals, as well. For the purposes of this Article, however, we need not take a stand on this issue. Suffice it to say that the greater compassion exhibited toward nonstatistical persons is not necessarily irrational.

In contrast, the different reaction toward anonymous and nonanonymous individuals does appear to be irrational, since in both cases we are dealing with actual, nonstatistical individuals. Identifying information such as a name or a number does not provide a good reason for favoring or disfavoring the identified person.¹⁴⁷ However, it should be noted that the problem may lie not with the stronger reaction to identifiable individuals per se, but in the disparate attitude toward, or treatment of, anonymous and nonanonymous individuals. That is to say, it may not always be clear which of these two reactions is "correct." Take, for example, instances where greater donations are given to an identified person than to an anonymous person; one could view this as meaning that the donations to the identified individual are excessive—but equally possible is that the interests of the anonymous recipient are being unduly discounted and that minimal identification corrects this bias.¹⁴⁸ The same

Reflection on 'Over-Valuing' Identifiable Victims, 11 YALE J. HEALTH POL'Y, L. & ETHICS 51, 58, 74–88 (2011); see also RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 277–80 (2011) (arguing, based on the value of human dignity, that there is a stronger moral duty to rescue a stranger if he or she is identifiable, rather than statistical and anonymous, and his or her need is local and immediate, rather than physically distant or in the future). For criticism of various justifications for favoring nonstatistical, identified lives, see McKie & Richardson, *supra* note 141, at 2413–17; Kenneth W. Simons, *Dworkin's Two Principles of Dignity: An Unsatisfactory Nonconsequentialist Account of Interpersonal Moral Duties*, 90 B.U. L. REV. 715, 718, 721–24 (2010). For discussion of philosophical arguments in favor—as well as against—prioritizing identified over statistical victims, see IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE, *supra* note 1, at 43–157.

144. See JOHN BROOME, ETHICS OUT OF ECONOMICS 3–4 (1999); JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE 10 (1986).

145. According to an ideal-preferences theory, a person's well-being is enhanced to the extent that her ideal preferences—those 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—are fulfilled. SHELLY KAGAN, NORMATIVE ETHICS 38 (1998).

146. See McKie & Richardson, *supra* note 141, at 2411–12 (acknowledging that if individuals derive utility from knowing that they live in a compassionate society who rescues those in desperate need, then this utility should be taken into account).

147. As explained above, identification can be either beneficial or detrimental for the identified person, depending on the circumstances. See *supra* notes 24–37 and accompanying text.

148. Cf. Small et al., *supra* note 2, at 144 (observing, in the context of donations to charitable causes, that it cannot be generally stated that “the identifiable victim effect” is a bias to give *too much* to identifiable victims or to give *too little* to statistical victims”; instead, “[t]he

may be said about the singularity effect: although it seems irrational to donate more money to a single identified individual than to a group of identified people,¹⁴⁹ this discrepancy may be due either to a disproportionate response toward single beneficiaries or to an inadequate psychological processing of groups.¹⁵⁰ Thus, the desirability of debiasing is closely related to the particular context: one must first decide whether identification is likely to cause an overvaluation or correct an undervaluation, and only in the former case is debiasing of the IE plausibly justified.

Can the IE be successfully debiased? Even if one assumes that the IE is irrational or inefficient, it is possible that the strong emotional response toward identified persons cannot be curbed, or that the weaker response toward unidentified persons and groups (both identified and unidentified) cannot be strengthened. In real life, situations involving either identified or unidentified individuals are usually encountered separately. When faced with one type of decision, people do not consider the other. The well-known, lamentable inaction of governments and individuals to atrocities perpetrated across the globe demonstrates the gap between people's reaction to the plights of identified individuals and groups of unidentified people.¹⁵¹

Experimental attempts to debias the IE and the singularity effect have not yielded encouraging results. Kogut and Ritov succeeded in eliminating the significant difference between the actual sums of money donated, separately, to a single identified recipient and to an identified group¹⁵² by presenting respondents with both cases simultaneously and giving them a chance to evaluate the cases on a comparative basis. Respondents in the joint evaluation conditions were either allowed to donate to both the individual and the group or were asked to choose between the two.¹⁵³ In the former case, most people contributed similar sums to the single person and the group; in the latter, most preferred to contribute to the group (i.e., to help more

bias is simply that people care inconsistently" (emphasis in original)); *see also* Till Bärnighausen & Max Essex, *From Biology to Policy: Ethical and Economic Issues in HIV Treatment-as-Prevention* (suggesting the possibility that the identifiability of the people currently suffering from AIDS has led to a normatively correct level of investment in treatment, whereas prevention efforts are being underfunded due to the unidentifiability of future HIV victims), in IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE, *supra* note 1, at 203, 209.

149. *See supra* notes 38–46 and accompanying text.

150. *Cf.* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 892–93 (2006). Schauer points out a virtue of lawmaking by the courts: it is done with respect to a live controversy, and therefore enables the lawmaker to see the real world implications of various rules. *Id.* In contrast, when there is no actual dispute, the lawmaker must speculate, and such speculation may be misguided. *Id.* at 892; *see also* Rachlinski, *supra* note 97, at 549–50 (noting that emotions may provide a useful guide with respect to interpretation and decision and thus lead to sensible rather than foolish rules). In a similar vein, perhaps the outcome reached in situations where the stakeholders are identified is superior to that reached in situations where they are not.

151. Slovic et al., *supra* note 44, at 126.

152. Kogut & Ritov, *supra* note 26, at 109–10, 112 (finding that the mean contribution for a single identified sick child was significantly higher than the mean contribution for a group of identified children).

153. *Id.* at 111.

people).¹⁵⁴ Notably, however, the *overall* donation to the single person and the group in each type of joint evaluation was *less* than the donations to the single identified recipient in the separate evaluation.¹⁵⁵ In other words, the debiasing mechanism achieved greater equality (and perhaps also more rationality) only at the price of considerably reducing the overall size of the donations “pie.”

Similarly, Small and her colleagues examined contributions to alleviate starvation in Africa and compared donations to a single identified child versus anonymous children.¹⁵⁶ They attempted to debias the significant observed IE either by explicitly educating potential donors about this psychological phenomenon or by providing them with statistics about the extent of starvation in Africa, alongside a request for donation for an identifiable victim.¹⁵⁷ Both techniques succeeded only in *reducing* the sum contributed to the single identified victim, bringing it down to the level of donations for the anonymous, numerous victims.¹⁵⁸ The two debiasing techniques undermined feelings of sympathy and compassion toward the identified recipient without kindling such emotions toward unidentified recipients. As a result, overall generosity was reduced.¹⁵⁹

In summary, psychological studies suggest that, even in the laboratory, debiasing the IE is not a viable option. Debiasing the IE in the real world is likely even more difficult, if possible at all. Furthermore, where debiasing is both justifiable and achievable, it can probably be carried out only in one direction—that of “leveling down.”¹⁶⁰ Such debiasing is desirable only if one is confident that identification would lead to an excessive (positive or negative) reaction toward the identified person. Obviously, this was not the case in the donation studies mentioned above. The limited desirability and/or possibility of debiasing should be a factor in our policy recommendations. In this section, we offer some general observations; in the following sections we will address more specific applications.

When contemplating how to take the IE into account in policy or decision making, two main strategies come to mind. One is to harness the IE to achieve desirable ends. This strategy is appropriate when we are fairly certain that in the unidentified state, a relevant interest, consideration, or goal is *undervalued*. In such situations, deliberate identification aims to correct what would otherwise be a suboptimal outcome. Charitable organizations commonly employ this approach, by featuring a single victim on their posters, or by offering donors the possibility of earmarking their contribution for a specific beneficiary or even being in touch with him or her through

154. *Id.* at 112.

155. *Id.*

156. Small et al., *supra* note 2, at 145–46.

157. *Id.* at 145–46, 148.

158. *Id.* at 146, 149.

159. *Id.* at 150–51.

160. One extreme example of leveling down is to enhance equality between the blind and the sighted by blinding the sighted. LARRY S. TEMKIN, *INEQUALITY* 247–48 (1993); Derek Parfit, *Equality and Priority*, 10 *RATIO* (n.s.) 202, 210–11 (1997). While some writers support equality measures that only lower the level of the better-off, others argue that we should mitigate inequality by raising the level of the worse-off. The latter view does not focus on equality per se but rather on giving priority to those who are worse off. TEMKIN, *supra*, at 245–82; Parfit, *supra*, at 211–12.

correspondence or some other means.¹⁶¹ The law, too, perhaps, can utilize this strategy to achieve desirable social outcomes, such as promoting equality or enhancing public support for redistributive measures.¹⁶²

The question as to whether it is legitimate for the state to harness psychological phenomena to achieve desirable social goals is beyond the scope of this study. While some scholars favor the use of cognitive insights to enhance people's welfare,¹⁶³ others see it as excessively paternalistic or manipulative.¹⁶⁴ However, even the latter scholars concede that transparency by the state about its use of such phenomena can alleviate the problem of manipulation.¹⁶⁵

A second way to deal with the IE is to adopt the types of rules and remedies that are less prone to the effect. This strategy is suitable whenever identification of the relevant parties is unavoidable and likely to lead to *overvaluation* of an interest or consideration, or when it is difficult to estimate the impact of the IE in advance. If we lack sufficient knowledge in this regard, it may be wise to bypass potentially problematic situations altogether. In this way, the law can minimize the non-egalitarian effects of identification. As explained below (and all else being equal), opting for rules instead of standards may reduce these downsides of the IE.¹⁶⁶

161. For an artistic demonstration of this technique, see Jack Nicholson's memorable performance in the film *ABOUT SCHMIDT* (New Line Cinema 2002). Nicholson portrays a man who, after retirement and the death of his wife, finds new meaning in life through sponsoring an African boy named Ndugu. *Id.*

162. *See infra* Part III.C.

163. *E.g.*, Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHL. L. REV. 1159, 1161–62, 1172–73, 1175–77 (2003). Sunstein and Thaler proposed that regulators use psychological phenomena such as the inertia and status quo biases to shape individuals' preferences, and nudge them in a welfare-promoting direction. *Id.* This can be done, for example, by adopting a default rule that enrolls employees automatically in a retirement savings plan but allows them to opt out of this arrangement. *Id.* at 1172–73. It was found that participation in savings plans dramatically increases if the default is participation rather than nonparticipation. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. ECON. 1149 (2001). In a similar vein, an empirical study compared postmortem organ donations in countries where people are considered donors unless they register not to be, and countries in which people must register in order to become donors. It was found that the donation rate in most presumed-consent countries is close to 100%, while in the explicit-consent countries it ranges from 4.25% to 27.5%. Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 SCIENCE 1338 (2003).

164. *E.g.*, Daniel M. Hausman & Brynn Welch, *Debate: To Nudge or Not To Nudge*, 18 J. POL. PHIL. 123, 128–32 (2010) (arguing that exploitation of imperfections in human judgment and decision making undermines people's control over their evaluations and choices and is therefore injurious to their autonomy); *see also* Luc Bovens, *The Ethics of Nudge* (comparing such use of cognitive biases to subliminal advertising on TV), in *PREFERENCE CHANGE: APPROACHES FROM PHILOSOPHY, ECONOMICS AND PSYCHOLOGY* 207, 216–17 (Till Grüne-Yanoff & Sven Ove Hansson eds., 2009).

165. Bovens, *supra* note 164, at 217; Hausman & Welch, *supra* note 164, at 135.

166. *See infra* notes 183–93 and accompanying text.

B. Policy Making Versus Decision Making, and Rules Versus Standards

Our experimental results directly point to one major implication of the IE for lawmaking: because of the IE, the outcomes of general policy making and decision making in particular cases may differ, even when they pertain to similar situations.¹⁶⁷ Policy makers typically deal with unidentified individuals, while decision makers interact with identified ones. Consequently, depending on the circumstances, the judgments made by decision makers may be either more or less favorable to the identified individual. Although jurists have acknowledged that adjudication and legislation can produce different answers to similar legal questions, they have attributed this to other causes, such as differences in political pressures, goals, or jurisdictional authority between legislators and courts.¹⁶⁸ However, awareness of the IE is important for reasons beyond the introduction of a new source of divergence. It implies that even if all other differences were eliminated, the presence of even minimal identification—including one that conveys no meaningful information—would likely affect the legal outcome, at least in some cases. Identifiability in adjudication and other concrete decisions, and nonidentifiability in legislation, are largely unavoidable features of these two processes.

Policy makers should be cognizant of the potential influence of the IE. Assuming that they establish legal norms with a certain outcome in mind, they should be aware of the fact that, because of the IE, the application of their rules, regulations, or guidelines may result in a more lenient or more severe outcome than they intend. When it is possible to foresee whether a subsequent decision-making outcome would be either milder or harsher, policy makers can take measures in advance to counteract the effect. For instance, if decision makers are usually more lenient than policy makers would like them to be in a certain context, the policy could set a stricter legal norm.¹⁶⁹ However, such generalizations are not always possible. The actual (beneficial or detrimental) effect of identification may depend on the circumstances of the particular case and the characteristics of the specific parties involved.¹⁷⁰ This means not only that the outcome intended by policy makers might not be realized in practice but also that similar cases may not be treated alike. Although the possibility of inconsistency or unequal treatment is a recognized disadvantage of case-by-case decision making, the IE appears to exacerbate this problem. Thus, scholars have argued that the case-by-case approach might cause lawmakers to excessively focus on the personalities and unique features of the parties to the dispute, at the expense of general, systematic

167. Cf. Redelmeier & Tversky, *supra* note 32, at 1164 (observing that the discrepancy between medical decisions with regard to an individual patient and patients as a group can cause tensions between health policy makers and practitioners, even when the relevant facts are accepted by both).

168. E.g., Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 934–35 (2006).

169. At the same time, policy makers should also take into account the expressive message conveyed by a harsher legal norm. For example, it would be unreasonable to significantly increase a legal sanction just to counteract the effect of identifiability on decision makers.

170. See Kogut, *supra* note 36, at 1497–98 (demonstrating that identifiability may either increase or decrease willingness to punish, depending on whether the punisher adopts the perspective of the injuring or injured party).

variables.¹⁷¹ The IE, however, indicates that even if decision makers do not focus unduly on individuating variations, the very fact that they are dealing with *identified* people can lead them in different directions. One possible response—if not solution—to this problem is to adopt legal mechanisms that mitigate the undesirable effects of identifiability. This leads us to the *rules versus standards* debate.

Legal norms are conventionally classified as belonging to one of two forms: rules or standards.¹⁷² Rules determine the required conduct in advance, based on well-specified, easily ascertainable facts. A typical example is setting the speed limit to fifty-five miles per hour.¹⁷³ Rules aim to curtail the discretion of decision makers by confining them largely to questions of fact.¹⁷⁴ Standards, in contrast, are more open-ended and abstract: they provide a general description of the required conduct, based on substantive objectives and values. In the context of speed limits, for instance, a standard might state that drivers travel “no faster than is reasonable.”¹⁷⁵ Thus, a standard entails an evaluation of the circumstances of the case in light of the value embodied therein, and affords decision makers broader discretion as to whether a person in a particular instance abided by the legal norm.¹⁷⁶

There is a vast legal literature on the choice between rules and standards and their relative costs and benefits.¹⁷⁷ A detailed discussion of this issue exceeds the scope of this Article—however, in a nutshell, rules are regarded as having the advantage of clarity and certainty in guiding behavior¹⁷⁸ but can turn out to be either under- or overinclusive.¹⁷⁹ In addition, formulating precise and detailed rules is costly.¹⁸⁰ Conversely, standards lack the same degree of clarity or predictability but are relatively cheap to craft and less prone to under- or overinclusiveness.¹⁸¹ At the same time, taking all the relevant factors into account on a case-by-case basis is also costly and can result in decision-making errors or misuse.¹⁸² Thus, the choice between rules and standards requires a tradeoff between these various advantages and shortcomings. Generally speaking, it is argued that rules may be preferable to standards when the

171. Rachlinski, *supra* note 168, at 936–37, 940–42; Schauer, *supra* note 150, at 893–99.

172. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685–88 (1976).

173. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).

174. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

175. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 23 (2000).

176. Kennedy, *supra* note 172, at 1688, 1690; Sullivan, *supra* note 174, at 58–59, 66.

177. Major contributions include Kaplow, *supra* note 173; Kennedy, *supra* note 172, at 1687–713; Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Sullivan, *supra* note 174, at 56–69; and Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 969–96 (1995).

178. Kennedy, *supra* note 172, at 1688.

179. FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 31–34 (1993); Kennedy, *supra* note 172, at 1689, 1695.

180. Gideon Parchomovsky & Alex Stein, *Essay, Catalogs*, 115 COLUM. L. REV. 165, 175 (2015).

181. Sullivan, *supra* note 174, at 58–59.

182. SCHAUER, *supra* note 179, at 145–49.

regulated conduct is recurrent and relatively homogeneous (such as driving a car) and vice versa when the relevant conduct does not form a recurrent pattern or is infrequent.¹⁸³

Without attempting to delineate the correct division of labor between rules and standards, our findings add another important consideration to the debate. The experiment indicates that legal decision makers may be susceptible to the IE. Identification is largely unavoidable in many decision-making situations, such as adjudication. However, rules have an advantage over standards in this regard, as they can reduce the potential adverse effect of identifiability. Since rules are formulated with relative precision when the people to whom they will apply are still *unidentified*, there can be no favorable or unfavorable effect of *identification*. In the implementation stage, rules typically leave less discretion than standards do. The more limited the discretion of decision makers, the narrower would be the possible divergence in the treatment of similar cases, depending on whether identification proves to be beneficial or detrimental to the identified person.

True, in reality, the dividing line between rules and standards is not always clear-cut, and the differences between these two forms of legal commands should not be overstated. On the one hand, rules can greatly vary in their level of specificity: while some rules are simple and their application involves mainly fact-finding and little discretion, others may include distinctions, provisos and exceptions and entail complex questions of interpretation and law.¹⁸⁴ In addition, it is not always clear which rule, among several, should apply to any given set of facts.¹⁸⁵ Consequently, even with rules, decision makers sometimes enjoy considerable discretion.¹⁸⁶ On the other hand, the broad discretion afforded by standards is indirectly constrained in various ways. Factors such as the presence of advocates for both parties to the conflict, rules

183. Kaplow, *supra* note 173, at 573, 577, 585, 595; Parchomovsky & Stein, *supra* note 180, at 167, 176–77.

184. Korobkin, *supra* note 175, at 26–30; Teichman & Zamir, *supra* note 131, at 686–87.

185. Schlag, *supra* note 177, at 405–18. The American legal realists have generally argued that even detailed legal norms do not dictate the judicial outcome in any specific case. HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 17–26 (2013); see K.N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581, 598–604 (1940).

186. An experimental study with senior law students showed that when legal rules are highly detailed and elaborate, they do not yield more predictable outcomes than standards. M.P. ELLINGHAUS & E.W. WRIGHT WITH M. KARRAS, MODELS OF CONTRACT LAW: AN EMPIRICAL EVALUATION OF THEIR UTILITY 38–41 (2005). Above we described an experiment by Rachlinski, Wistrich, and Guthrie, which found that judges decided similar cases differently, depending on whether the litigant was likable or not. See *supra* notes 132–36 and accompanying text. The authors did not address the distinction between rules and standards. However, they repeatedly stated that the legal question in all their vignettes was difficult and that the legal norm was unclear or permitted judges wide discretion. Wistrich et al., *supra* note 132, at 902–03, 906, 911. Thus, their study does not preclude the possibility that the impact of identifiability would be smaller in relation to rules than in relation to standards, when the former are relatively clear and afford less discretion. See also *id.* at 911 (“Frequently, the law is perfectly clear and there is little doubt about the relevant facts. Emotion likely exerts little influence in such cases.”).

of evidence,¹⁸⁷ *stare decisis*,¹⁸⁸ the need to justify decisions in writing, and the right of appeal¹⁸⁹ all contribute to mitigating inequality and unpredictability under standards.¹⁹⁰

Nonetheless, it is generally true that on the continuum between no discretion and unfettered discretion, standards are frequently vaguer and leave more room for discretion than rules.¹⁹¹ Furthermore, the *perceptions* of decision makers about the scope of their discretion may also be a factor. Even assuming that similar discretion can theoretically be exercised under a system of rules and a system of standards, rules may be perceived by decision makers as precluding or restricting implementation of their value judgments, while standards may be regarded as permitting or legitimizing such implementation.¹⁹² Thus, standards such as “reasonableness,” “unconscionability,” “fairness,” or “good faith” may encourage decision makers to exercise their discretion more freely, thereby increasing the risk of unequal treatment due to the IE.

In summary, when choosing between rules and standards, the IE should be taken into account.¹⁹³ To the extent that open-ended standards afford more discretion to decision makers than rules do, the IE points to another advantage of rules over standards.

C. Redistribution Through Taxes Versus Private Law

Another important implication of the IE for lawmaking applies to the redistribution of welfare by the state. Many people would agree that promoting equality in society is an important governmental goal. Much more controversial, however, is the question as to what means should be used to redistribute welfare. Specifically,

187. *E.g.*, Rachlinski, *supra* note 168, at 951–52 (explaining that the evidentiary prohibitions on character evidence reduce the risk that judges or juries would make unwarranted inferences about criminal tendencies).

188. Courts draw analogies to similar cases and generally follow precedents. Emily Sherwin, *Judges as Rulemakers*, 73 U. CHI. L. REV. 919, 924–29 (2006).

189. *See* Rachlinski, *supra* note 168, at 952–55 (arguing that the appellate processes and the deliberation of similar issues by different panels of judges may mitigate the impact of biases in judicial decision making).

190. *Cf.* Brest, *supra* note 138, at 483–90 (discussing various factors that reduce the vulnerability of policy makers to cognitive biases).

191. *See* Sullivan, *supra* note 174, at 57 (“Rules, once formulated, afford decisionmakers less discretion than do standards.”); *see also* Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 FLA. ST. U. L. REV. 931, 980–83, 990–91, 996 (2012) (finding that a bright-line rule that requires the performance of an action within a certain time limit constrains decision makers’ discretion more than a standard of “reasonable time”).

192. *Cf.* Emad H. Atiq, *Why Motives Matter: Reframing the Crowding Out Effect of Legal Incentives*, 123 YALE L.J. 1070, 1108 (2014) (arguing that standards often incorporate moral concepts and therefore force actors to engage in normative deliberation).

193. *See also* Korobkin, *supra* note 175, at 43–57 (discussing other behavioral phenomena—such as the self-serving and hindsight biases and the endowment effect—that are relevant to the choice between rules and standards).

an ongoing legal debate has centered on whether redistribution should be accomplished solely through taxes and transfer payments (such as progressive taxation, negative taxes, unemployment compensation, and cash assistance to needy families) or through private law, as well. The latter includes substantive rules of property, tort, and contract law, such as mandatory quality standards in favor of tenants (hereinafter, legal rules).¹⁹⁴

Law-and-economics scholars have argued that legal rules should not be used for redistribution because they are costlier and less effective than the tax-and-transfer alternative.¹⁹⁵ When legal rules redistribute income in favor of the poor, so the argument goes, they distort people's incentives to work just as much as the tax system. People would respond to a redistributive legal rule much as they would to an increase in their marginal tax rates, and may consequently choose leisure over labor. Legal rules, however, create an additional inefficiency—a distortion in the very behavior that the legal rules aim to regulate. For example, a thirty percent marginal tax rate together with an inefficient tort rule that redistributes one percent of wealthy defendants' income to poor plaintiffs would distort work incentives to the same extent as a thirty-one percent tax rate coupled with an efficient tort rule. The former regime, however, entails the additional costs involved in defendants taking excessive precautions and refraining from efficient activities.¹⁹⁶ In addition, it has been argued that legal rules are less effective than taxes and transfers, in that they achieve less of the desired distributive outcomes. This is because in contractual settings (as opposed to circumstances in which bargaining is impractical) the market often responds in a way that wholly or partially offsets the redistribution.¹⁹⁷ Take, for example, a mandatory quality standard in favor of tenants, requiring landlords to rent out residential units that are fit for human habitation.¹⁹⁸ Increasing landlords' costs is liable to increase rents and reduce the supply of low-rent housing, thereby harming the poorest tenants.¹⁹⁹

Elsewhere, one of us has argued that behavioral studies strengthen the case for redistribution through legal rules as well.²⁰⁰ The conventional law-and-economics

194. Contributions to this debate include A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 147–56 (3rd ed. 2003); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1093–102 (1971); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–68 (1994); and Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797, 797–98 (2000).

195. *E.g.*, COOTER & ULEN, *supra* note 114, at 7–8, 106–08.

196. POLINSKY, *supra* note 194, at 148–49, 153, 155; Kaplow & Shavell, *supra* note 194, at 667–69, 677.

197. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 993, 1126 (2001); David A. Weisbach, *Should Legal Rules Be Used To Redistribute Income?*, 70 U. CHI. L. REV. 439, 448–49 (2003).

198. On warranties of habitability, see WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY §§ 6.38–40 (3rd ed. 2000).

199. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 645–48 (8th ed. 2011).

200. Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 362–72 (2006). For a different behavioral critique, based on the overoptimism phenomenon and the divergent probabilities that people assign to legal rules

argument assumes that the success of the redistribution should be evaluated according to the bare quantity of resources that people receive, regardless of how they were obtained. However, many experiments have shown that the benefit people derive from resources is dependent on complex factors, including the acts that generated the resources and the sources from which they are received. Thus, for example, an object attained “as of right,” through effort, or as a result of success, is valued much more highly than a similar object obtained through no entitlement, through chance, or due to failure.²⁰¹ In legal contexts, it has been found that factors such as how an outcome came about (e.g., through goodwill and cooperation or not), the identity of the parties involved (e.g., strangers or friends), the voluntariness or nonvoluntariness of their behavior, and the intentionality or nonintentionality of their acts significantly affect its valuation by laypersons and businesspeople alike.²⁰²

This body of research indicates that some methods of redistribution are likely to be perceived as humiliating, while others are likely to be regarded as more respectful and empowering. Taxes and transfer payments are often viewed as “charity giving,”²⁰³ whereas redistributive legal rules set the baseline for interactions between individuals and typically convey a message of entitlement.²⁰⁴ Consequently, a smaller quantity of goods obtained through legal rules may advance the recipients’ welfare to a greater extent than the same or even larger amount received through taxes and transfer payments. The implied warranty of habitability in landlord and tenant law, for instance, carries with it a message that the object of a lease can only be a house fit for human habitation. Accordingly, tenants have a right to habitable housing. This rule applies to all tenants, not only to poor ones, and thus does not carry with it a banner of “help for the needy.” Furthermore, redistribution that is

and to taxes, see Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1658–63 (1998).

201. Elizabeth Hoffman, Kevin McCabe, Keith Shachat & Vernon Smith, *Preferences, Property Rights, and Anonymity in Bargaining Games*, 7 GAMES & ECON. BEHAV. 346, 351, 361–62, 370 (1994); George Loewenstein & Samuel Issacharoff, *Source Dependence in the Valuation of Objects*, 7 J. BEHAV. DECISION MAKING 157, 159–65 (1994). Likewise, the identity of the person who has given an asset affects its valuation and subsequent use by the recipient. A. Peter McGraw, Philip E. Tetlock & Ori V. Kristel, *The Limits of Fungibility: Relational Schemata and the Value of Things*, 30 J. CONSUMER RES. 219, 222–26 (2003). These phenomena apply even to money. VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 3, 5, 200, 209, 211 (1994).

202. Daphna Lewinsohn-Zamir, *Taking Outcomes Seriously*, 2012 UTAH L. REV. 861, 867–84. In a similar vein, studies of procedural justice have demonstrated that people care not only about substantive outcomes but also about how they were achieved. The perceived fairness or unfairness of the process may affect how the outcome is accepted and how legitimate it is regarded to be. Tom R. Tyler, *Justice in the Political Arena*, in *THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 189, 207–21 (Robert Folger ed., 1984).

203. JAMES R. KLUEGEL & ELIOT R. SMITH, *BELIEFS ABOUT INEQUALITY: AMERICANS’ VIEWS OF WHAT IS AND WHAT OUGHT TO BE* 152–57, 163–65, 175, 293 (1986).

204. See JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 177 (2000) (“Legal rules structure the contours of the relationships within which bargaining occurs.”).

perceived as the recipients' entitlement is likely to encounter less resistance from nonrecipients than one that is viewed as a handout.²⁰⁵

The IE phenomenon lends support to these arguments. It points to another advantage of redistributive legal rules over taxes and transfer payments. Private law rules set the baseline for fair dealing, cooperation, and real-life interactions between nonanonymous, identified individuals: a landlord and her tenant, an employer and her employee, spouses, and so forth. As we have seen, identifiability increases people's generosity toward others and their willingness to help them.²⁰⁶ Identification can be expected to cause a beneficial effect in this context, rather than a detrimental one, because legal rules cultivate notions of entitlement and are therefore not likely to be associated with blameworthy behavior on the part of the recipients.²⁰⁷ Moreover, experimental studies show that identifiability is particularly beneficial in situations that are perceived to involve intergroup conflict. In such cases, the IE enhances the generosity toward an individual from the *opposing* group.²⁰⁸ To the extent that the parties to a tenancy, employment, or consumer relationship regard themselves as belonging to rival groups with conflicting interests, identification has the propensity to increase feelings of sympathy and relatedness to the other party. Thus, the IE suggests that redistributive legal rules are likely to be more successful than commonly believed. By deploying such rules, the state can harness the IE to promote prosocial behavior and enhance the public's support for redistributive measures.

In contrast to legal rules, taxes and transfer payments lack identifiability—namely, they do not address day-to-day interactions between identified persons. People interact with the government, which functions as a taker or a bestower of money, rather than among themselves. Thus, the “link” between the individual givers and recipients of the redistribution is severed, and the recipients remain anonymous. No notions of entitlement in mutual relationships can be formed, and no patterns of cooperation, fair dealing, or commitment can emerge.²⁰⁹ In such circumstances, it is reasonable to assume that the transferors would feel not only less sympathy toward the unidentified recipients but also less responsibility or confidence that they can effectively help them. As previously explained, people's empathy and generosity toward others decline when those in need are unidentified²¹⁰ and when perceptions of

205. For further elaboration, see Lewinsohn-Zamir, *supra* note 200, at 362–72, 380–89. Note that even if the implied warranty of habitability fails to redistribute income—because the market responds by raising the rents or altering other terms in the lease—it may still succeed in redistributing the objective good of minimal quality housing. *Id.* at 340–51. Furthermore, some writers argue that in certain circumstances, the implied warranty of habitability would successfully transfer wealth to tenants. Ackerman, *supra* note 194, at 1097–98, 1102–19, 1186–88; Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: “Milking” and Class Violence*, 15 FLA. ST. U. L. REV. 485, 497–506 (1987).

206. See *supra* notes 24–33 and accompanying text. Even if a certain landlord, for example, has several tenants (rather than just one), there is still a one-on-one contractual relationship with each tangible and identified tenant.

207. On the connection between perceptions of fault and adverse effect of identifiability, see *supra* notes 33–37 and accompanying text.

208. See *supra* notes 56–63 and accompanying text.

209. Lewinsohn-Zamir, *supra* note 200, at 360.

210. See *supra* notes 24–33, 64–66 and accompanying text.

personal responsibility or effectiveness are weak.²¹¹ It is not surprising, therefore, that taxes and transfer payments are often perceived, by nonrecipients and recipients alike, as a form of charity—other people’s money being transferred to possibly undeserving beneficiaries.²¹² Thus, income transfers—the method of redistribution recommended by standard economic analysis—encounter the greatest resistance.²¹³ To the extent that these perceptions and reactions are widely entrenched and unlikely to change,²¹⁴ we must take them into account when contemplating the optimal way to redistribute. For one thing, it would be difficult to sustain welfare programs over time in the face of unsympathetic public opinion.²¹⁵

Is it possible to change this state of affairs and increase public support by *identifying* the recipients of taxes and transfer payments? Alas, probably not. In almost all studies of the IE, subjects were able to help a particular individual—that is, the recipient was the identified individual herself, and not a representative of recipients in general or a member of some recipient group.²¹⁶ To the best of our knowledge, only one study observed an identifiability effect in the latter case.²¹⁷ Furthermore, studies of the IE show that, at least in some circumstances, this phenomenon is largely limited to single individuals and does not extend to groups.²¹⁸ Another relevant consideration is whether identifying a recipient might backfire and actually *weaken* public support for the redistributive measure. This can occur if the beneficiaries of taxes and transfer payments are regarded as “undeserving poor,”²¹⁹ since identification

211. See *supra* notes 71–80 and accompanying text.

212. LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 31–37 (2002) (describing and criticizing this common belief regarding redistributive taxes).

213. Public opinion surveys have found that direct income transfers and food stamps receive the least public support, because they are regarded as helping the undeserving poor. In contrast, the public widely supports measures to aid the working poor, such as job training and job creation. MARTIN GILENS, *WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY* 1–9, 60–79 (1999); KLUEGEL & SMITH, *supra* note 203, at 152–153, 163.

214. Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. REV. 1867, 1901–02 (2005) (criticizing the prevailing view that welfare payments constitute taking of pretax income of others but admitting that it may be impossible to change this belief).

215. James R. Kluegel & Masaru Miyano, *Justice Beliefs and Support for the Welfare State in Advanced Capitalism*, in *SOCIAL JUSTICE AND POLITICAL CHANGE: PUBLIC OPINION IN CAPITALIST AND POST-COMMUNIST STATES* 81, 81 (James R. Kluegel, David S. Mason & Bernd Wegener eds., 1995).

216. E.g., Charness & Gneezy, *supra* note 10, at 31–32; Kogut & Ritov, “*One of Us*,” *supra* note 9, at 152–54; Ritov & Kogut, *Ally or Adversary*, *supra* note 9, at 97, 99–101; Small & Loewenstein, *supra* note 10, at 8–9, 11–12.

217. Nordgren & Morris McDonnell, *supra* note 49; see *supra* notes 49–52 and accompanying text for discussion of this study.

218. See *supra* notes 38–46 and accompanying text. One possible exception is a group perceived to be highly entitative, such as a family. See Smith et al., *supra* note 71, at 961. It is doubtful if welfare recipients can be convincingly portrayed as a sufficiently coherent social group.

219. See GILENS, *supra* note 213, at 3 (“In large measure, Americans hate welfare because they view it as a program that rewards the undeserving poor.”).

may be detrimental when the identified individual can be blamed for his or her condition.²²⁰ That said, it is possible that this risk does not exist with respect to welfare payments that typically are not associated with fault—such as those aiding the very young, the old, or the handicapped.²²¹

For all these reasons, it is doubtful that identifying a particular recipient of welfare payments by photo and name, for example, would suffice to enhance public support for such monetary transfers. It would hardly be credible for the state to claim that funds raised from certain taxpayers are earmarked for a particular individual's needs, in the manner that charities enable donors to assign their contribution to a specific beneficiary and class actions feature a representative individual claimant who sues on behalf of herself and a larger group.²²² It would likely also be prohibitively costly to actually implement such a scheme in the context of taxation and other monetary welfare transfers.²²³

In summary, while identifiability is a natural, inherent feature of redistribution through legal rules and may contribute to their success, it is lacking in the context of taxes and transfer payments. We do not claim that redistributive legal rules should substitute tax-and-transfer arrangements: there may be various factors militating in favor of or against any given mode of redistribution.²²⁴ However, the IE lends additional support to the argument that legal rules are an important and unique redistributive tool that should be allowed to complement taxes and transfer payments. In addition, it would be worthwhile to examine whether identification of beneficiaries can, in practice, improve the low level of public support for the tax-and-transfer method of redistribution.

CONCLUSION

This Article highlighted the importance of a powerful, yet largely overlooked phenomenon—the identifiability effect—for the law. It relied on theoretical discussion and the results of original experiments to argue that the IE should be taken into account in lawmaking, alongside other relevant factors. The psychological data suggests that the very existence of even minimal identification can affect legal outcomes. Depending on the circumstances and the context, identifiability can lead either to

220. See *supra* notes 33–37 and accompanying text.

221. It may be, however, that public support for beneficiaries of this type is high in any event. Thus, there is little need to exploit the IE in such cases.

222. For discussion of this unique feature of class actions see I. Glenn Cohen, *Identified Versus Statistical Lives in US Civil Litigation: Of Standing, Ripeness, and Class Actions*, in *IDENTIFIED VERSUS STATISTICAL LIVES: AN INTERDISCIPLINARY PERSPECTIVE*, *supra* note 1, at 161, 170–72.

223. Another consideration against identification in this context is that it might stigmatize the identified beneficiary. Individuals may feel inferior or shamed when forced to reveal themselves to others as recipients of welfare. Cf. Lewinsohn-Zamir, *supra* note 200, at 394–95 (discussing this issue with regard to vouchers and food stamps).

224. Cf. Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 *UCLA L. REV.* 1745, 1781 (2005) (acknowledging that various redistributive taxes may differ in their public acceptability but arguing that the inefficiency of psychologically pleasing taxes might be too high to justify their adoption).

more lenient and considerate treatment of the identified person or to harsher and less considerate treatment. As a result, the decisions of policy makers and decision makers may differ substantially, even when pertaining to comparable facts and situations. In addition, those affected by the legal rules may react differently, depending on whether these rules involve interaction with identified persons or not.

The different reaction toward identified and unidentified people is advantageous in some situations and disadvantageous in others. When identification is likely to result in overvaluation of a certain interest, or unjustified differential treatment of similar cases, lawmakers should take measures to mitigate its impact. Conversely, when a particular interest is typically undervalued, the IE may be harnessed to correct this state of affairs to achieve a desirable social goal. This Article has offered some initial implications of the IE for lawmaking. Further studies are necessary to fully explore the potential of this cognitive phenomenon in the legal sphere.

* * *

The text of the vignettes used in our experiments is given below, after translation by the authors from Hebrew to English.

APPENDIX A

Scenario 1: Cow

Unidentified/Policy-Making Version

Imagine that you have to lay down the rules that would apply in cases in which livestock, such as a cow, enters neighboring land, causing damage to the neighbor's crops. Generally, the animal's owner is liable to compensate for the damage it has caused, even if he was not negligent in minding it. However, when determining the sum of compensation, one can take into account various factors that would reduce the amount of damages to be paid.

You have to establish guidelines on whether to take into account the animal owner's financial situation and reduce the damages award because he is poor. Please choose one of the following options:

1. The damages award should not be reduced at all in view of the animal owner's financial constraints, irrespective of the compensation he is required to pay.
2. The damages award should be reduced in view of the animal owner's financial constraints only if the compensation that he is required to pay is very high.
3. The damages award should be reduced in view of the animal owner's financial constraints if the compensation that he is required to pay is quite high.
4. The damages award should be reduced in view of the animal owner's financial constraints, even if the compensation that he is required to pay is quite low.
5. The damages award should be reduced in any case in view of the animal owner's financial constraints.

Identified/Decision-Making Version

Imagine that you have to determine the sum of compensation to be paid in a case in which a cow belonging to Abraham entered the land of his neighbor Jacob, causing damage to Jacob's crops. Generally, the animal's owner is liable to compensate for the damage it has caused, even if he was not negligent in minding it. However, when determining the sum of compensation, one can take into account various factors that would reduce the amount of damages to be paid.

You have to decide whether to take into account Abraham's financial situation and reduce the damages award because he is poor. Please choose one of the following options:

1. I would not reduce the damages award at all in view of Abraham's financial constraints, irrespective of the compensation he is required to pay.
2. I would reduce the damages award in view of Abraham's financial constraints only if the compensation that he is required to pay is very high.
3. I would reduce the damages award in view of Abraham's financial constraints if the compensation that he is required to pay is quite high.
4. I would reduce the damages award in view of Abraham's financial constraints, even if the compensation that he is required to pay is quite low.
5. I would reduce the damages award in any case in view of Abraham's financial constraints.

Scenario 2: Land

Unidentified/Policy-Making Version

Imagine that you have to lay down the rules that would apply in cases in which people unintentionally and in good faith build a building on land not belonging to them, without the permission of the land's owner. In such cases, the landowner may be awarded one of two remedies. One possibility is to grant an order to demolish the unlawful building and return the land to its former state. Another possibility is to allow the building to remain and order the builder to pay compensation to the landowner.

You have to establish guidelines on whether to grant a demolition order or a compensation order in cases in which a building was mistakenly built on another person's land. Please choose one of the following options:

1. A demolition order should be issued against the builder, irrespective of the value of the building.
2. A demolition order should not be issued against the builder, but a compensation order, if the building is worth more than the land on which it was built.
3. A demolition order should not be issued against the builder, but a compensation order, if the value of the building is roughly equivalent to the value of the land on which it was built.
4. A demolition order should not be issued against the builder, but a compensation order, even if the value of the building is lower than the value of the land on which it was built.
5. A demolition order should not be issued against the builder, but a compensation order, irrespective of the value of the building.

Identified/Decision-Making Version

Imagine that you have to determine the remedy that would be given in a case in which Isaac unintentionally and in good faith built a building on land not belonging to him, without the permission of David, the landowner. David may be awarded one of two remedies. One possibility is to grant an order to demolish the unlawful building and return the land to its former state. Another possibility is to allow the building to remain and order Isaac to pay compensation to David.

You have to decide whether to grant a demolition order or a compensation order, for the building that Isaac mistakenly built on David's land. Please choose one of the following options:

1. I would issue a demolition order against Isaac, irrespective of the value of the building.
2. I would not issue a demolition order against Isaac, but a compensation order, if the building is worth more than the land on which it was built.
3. I would not issue a demolition order against Isaac, but a compensation order, if the value of the building is roughly equivalent to the value of the land on which it was built.
4. I would not issue a demolition order against Isaac, but a compensation order, even if the value of the building is lower than the value of the land on which it was built.
5. I would not issue a demolition order against Isaac, but a compensation order, irrespective of the value of the building.

Scenario 3: Iron-Loss

Unidentified/Policy-Making Version

Imagine that you have to lay down the rules that would apply in cases in which sellers breach a contract to sell an asset, such as iron products, to buyers. Sometimes, after the formation of a contract with a certain buyer, the seller realizes that the costs of production are higher than he expected and that he would lose money if he performs the contract. The seller may then decide to breach the contract with the buyer and not supply the iron. In such cases, the buyer may be awarded one of two remedies. One possibility is to grant specific performance—that is, to order the seller to supply the iron to the buyer. Another possibility is to require the seller to pay the buyer monetary damages for all the losses the buyer incurred due to nondelivery of the iron on time, including the inconvenience of purchasing substitute iron from another supplier and the increase (in the event that there is one) in the market price of iron.

You have to establish guidelines on whether to grant specific performance or monetary damages in such cases. Please choose one of the following options:

1. An order for specific performance of the contract with the buyer should be issued, irrespective of the magnitude of the seller's expected loss from performing the contract.
2. An order for specific performance of the contract with the buyer should be issued, even if the seller's expected loss from performing the contract is high.
3. An order for specific performance of the contract with the buyer should not be issued if the seller's expected loss from performing the contract is high.
4. An order for specific performance of the contract with the buyer should not be issued, even if the seller's expected loss from performing the contract is low.
5. An order for specific performance of the contract with the buyer should not be issued in any case but rather an order for monetary damages.

Identified/Decision-Making Version

Imagine that you have to determine the remedy that would be given in a case in which Michael breached a contract to sell iron products to Ethan. After the formation of the contract with Ethan, Michael realized that the costs of production are higher than he expected and that he would lose money if he performed the contract. Michael breached the contract with Ethan and did not supply the iron. Ethan may be awarded one of two remedies. One possibility is to grant specific performance—that is, to order Michael to supply the iron to Ethan. Another possibility is to require Michael to pay Ethan monetary damages for all the losses Ethan incurred due to nondelivery of the iron on time, including the inconvenience of purchasing substitute iron from another supplier and the increase (in the event that there is one) in the market price of iron.

You have to decide whether to grant specific performance or monetary damages. Please choose one of the following options:

1. I would order specific performance of the contract with Ethan, irrespective of the magnitude of Michael's expected loss from performing the contract.
2. I would order specific performance of the contract with Ethan, even if Michael's expected loss from performing the contract is high.
3. I would not order specific performance of the contract with Ethan if Michael's expected loss from performing the contract is high.
4. I would not order specific performance of the contract with Ethan, even if Michael's expected loss from performing the contract is low.
5. I would not order specific performance of the contract with Ethan in any case but rather an order for monetary damages.

Scenario 4: Iron-Gain

Unidentified/Policy-Making Version

Imagine that you have to lay down the rules that would apply in cases in which sellers breach a contract to sell an asset, such as iron products, to buyers. Sometimes, after the formation of the contract with a certain buyer, the seller finds another buyer who is willing to pay him a higher price for the iron. The seller may then decide to breach the contract with the first buyer and sell the iron to the second buyer. In such cases, the first buyer may be awarded one of two remedies. One possibility is to grant specific performance—that is, to order the seller to supply the iron to the first buyer. Another possibility is to require the seller to pay the first buyer monetary damages for all the losses the first buyer incurred due to nondelivery of the iron on time, including the inconvenience of purchasing substitute iron from another supplier and the increase (in the event that there is one) in the market price of iron.

You have to establish guidelines on whether to grant specific performance or monetary damages in such cases. Please choose one of the following options:

1. An order for specific performance of the contract with the first buyer should be issued, irrespective of the magnitude of the seller's expected gain from performing the second contract.
2. An order for specific performance of the contract with the first buyer should be issued, even if the seller's expected gain from performing the second contract is high.
3. An order for specific performance of the contract with the first buyer should not be issued if the seller's expected gain from performing the second contract is high.
4. An order for specific performance of the contract with the first buyer should not be issued, even if the seller's expected gain from performing the second contract is low.
5. An order for specific performance of the contract with the first buyer should not be issued in any case but rather an order for monetary damages.

Identified/Decision-Making Version

Imagine that you have to determine the remedy that would be given in a case in which Michael breached a contract to sell iron products to Ethan. After the formation of the contract with Ethan, Michael found another buyer who was willing to pay him a higher price for the iron. Michael breached the contract with Ethan and sold the iron to the second buyer. Ethan may be awarded one of two remedies. One possibility is to grant specific performance—that is, to order Michael to supply the iron to Ethan. Another possibility is to require Michael to pay Ethan monetary damages for all the losses Ethan incurred due to nondelivery of the iron on time, including the inconvenience of purchasing substitute iron from another supplier and the increase (in the event that there is one) in the market price of iron.

You have to decide whether to grant specific performance or monetary damages. Please choose one of the following options:

1. I would order specific performance of the contract with Ethan, irrespective of the magnitude of Michael's expected gain from performing the second contract.
2. I would order specific performance of the contract with Ethan, even if Michael's expected gain from performing the second contract is high.
3. I would not order specific performance of the contract with Ethan if Michael's expected gain from performing the second contract is high.

4. I would not order specific performance of the contract with Ethan, even if Michael's expected gain from performing the second contract is low.
5. I would not order specific performance of the contract with Ethan in any case, but rather an order for monetary damages.

Scenario 5: Defamation

Unidentified/Policy-Making Version

Imagine that you have to lay down the rules that would apply in cases in which people spread lies that besmirch other people's good name. In such cases, the injured party usually suffers not only pecuniary loss but emotional loss, as well. The pecuniary loss is to be compensated for in any case by a monetary award, and you need to determine which of two possible remedies would be awarded for the emotional loss. One possibility is to grant additional monetary compensation (that is, to increase the compensation beyond the sum that would be given for only the pecuniary loss). Another possibility is to require the injurer to issue a public apology in the media.

You have to establish guidelines on whether to require the injurer in such cases to apologize or to increase the compensation sum that he would pay. Please choose one of the following options:

1. The injurer should be required to apologize in any case, rather than increasing the compensation amount.
2. The injurer should be required to apologize if the injured party suffered any emotional loss.
3. The injurer should be required to apologize if the injured party suffered a significant emotional loss.
4. The injurer should be required to apologize if the injured party suffered severe emotional loss.
5. The injurer should not be required to apologize in any case but rather the compensation amount should be increased.

Identified/Decision-Making Version

Imagine that you have to determine the remedy that would be given in a case in which Benjamin spread lies that besmirched Saul's good name. Saul has suffered not only pecuniary loss but emotional loss, as well. The pecuniary loss is to be compensated for in any case by a monetary award, and you need to determine which of two possible remedies would be awarded for the emotional loss. One possibility is to grant additional monetary compensation (that is, to increase the compensation beyond the sum that would be given for only the pecuniary loss). Another possibility is to require the injurer to issue a public apology in the media.

You have to decide whether to require Benjamin to apologize, or to increase the compensation sum that he would pay. Please choose one of the following options:

1. I would require Benjamin to apologize in any case, rather than increase the compensation amount.
2. I would require Benjamin to apologize if Saul suffered any emotional loss.
3. I would require Benjamin to apologize if Saul suffered a significant emotional loss.
4. I would require Benjamin to apologize if Saul suffered severe emotional loss.
5. I would not require Benjamin to apologize in any case but rather increase the compensation amount.

APPENDIX B

Scenario 1: Littering in a Park

Unidentified/Policy-Making Version

Imagine that you have to lay down the rules that would apply in cases in which people litter in public parks. As a rule, littering in a park is subject to a fine. However, when determining the fine to be paid, one can take into account various factors that would [reduce/increase] the amount to be paid.

You have to establish guidelines on whether, in such cases, to take into account the fact that it is a [first-time/repeat] offense and [reduce/increase] the fine to be paid by a person who littered in a park. Please choose one of the following options:

1. I would stipulate that the fine should not be [reduced/increased] at all because it is a [first-time/repeat offense] of a litterer.
2. I would stipulate that the fine should be [reduced/increased] to a small extent because it is a [first-time/repeat] offense of a litterer.
3. I would stipulate that the fine should be [reduced/increased] to a medium extent because it is a [first-time/repeat] offense of a litterer.
4. I would stipulate that the fine should be [reduced/increased] to a large extent because it is a [first-time/repeat] offense of a litterer.
5. I would stipulate that the fine should be [reduced/increased] to a very large extent because it is a [first-time/repeat] offense of a litterer.

Identified/Decision-Making Version

Imagine that you have to determine the fine to be paid by Daniel, who littered in a public park. As a rule, littering in a park is subject to a fine. However, when determining the fine to be paid, one can take into account various factors that would [reduce/increase] the amount to be paid.

You have to decide whether to take into account the fact that it is a [first-time/repeat] offense of Daniel and [reduce/increase] the fine that he would pay. Please choose one of the following options:

1. I would not [reduce/increase] the fine at all because it is a [first-time/repeat] offense of Daniel, the litterer.
2. I would [reduce/increase] the fine to a small extent because it is a [first-time/repeat] offense of Daniel, the litterer.
3. I would [reduce/increase] the fine to a medium extent because it is a [first-time/repeat] offense of Daniel, the litterer.
4. I would [reduce/increase] the fine to a large extent because it is a [first-time/repeat] offense of Daniel, the litterer.
5. I would [reduce/increase] the fine to a very large extent because it is a [first-time/repeat] offense of Daniel, the litterer.

Scenario 2: Building Violation

Unidentified/Policy-Making Version

Imagine that you have to lay down the rules that would apply in cases in which people build something contrary to the conditions of a building permit that they have received. As a rule, building contrary to a building permit is subject to a fine. However, when determining the fine to be paid, one can take into account various factors that would [reduce/increase] the amount to be paid.

You have to establish guidelines on whether, in such cases, to take into account the fact that it is a [first-time/repeat] offense and [reduce/increase] the fine to be paid by a person who built contrary to the conditions of a building permit. Please choose one of the following options:

1. I would stipulate that the fine should not be [reduced/increased] at all because it is a [first-time/repeat] offense of a builder.
2. I would stipulate that the fine should be [reduced/increased] to a small extent because it is a [first-time/repeat] offense of a builder.
3. I would stipulate that the fine should be [reduced/increased] to a medium extent because it is a [first-time/repeat] offense of a builder.
4. I would stipulate that the fine should be [reduced/increased] to a large extent because it is a [first-time/repeat] offense of a builder.
5. I would stipulate that the fine should be [reduced/increased] to a very large extent because it is a [first-time/repeat] offense of a builder.

Identified/Decision-Making Version

Imagine that you have to determine the fine to be paid by Daniel, who built something contrary to the conditions of the building permit that he had received. As a rule, building contrary to a building permit is subject to a fine. However, when determining the fine to be paid, one can take into account various factors that would [reduce/increase] the amount to be paid.

You have to decide whether to take into account the fact that it is a [first-time/repeat] offense of Daniel and [reduce/increase] the fine that he would pay. Please choose one of the following options:

1. I would not [reduce/increase] the fine at all because it is a [first-time/repeat] offense of Daniel, the builder.
2. I would [reduce/increase] the fine to a small extent because it is a [first-time/repeat] offense of Daniel, the builder.
3. I would [reduce/increase] the fine to a medium extent because it is a [first-time/repeat] offense of Daniel, the builder.
4. I would [reduce/increase] the fine to a large extent because it is a [first-time/repeat] offense of Daniel, the builder.
5. I would [reduce/increase] the fine to a very large extent because it is a [first-time/repeat] offense of Daniel, the builder.