

Shame, Regret, and Contract Design

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SHAME, REGRET, AND CONTRACT DESIGN

ERIC A. ZACKS*

This Article examines whether contract design can influence the post-formation behavior of the non-drafting party. If it can, contract preparers may be able to obtain significant transactional advantages. This Article suggests that several contractual features can be explained in terms of their ability to exploit the cognitive biases of, and to induce particular “advantageous” emotions from, the non-drafting party after the contract has been executed. These features may include arbitration provisions, disclosures in capital letter or bold face type, “reliance” language, and language framing possible losses in particular ways. Contracts can encourage individuals to feel shame, to blame themselves, to believe that contracts are sacred promises that should be specifically performed, to utilize faulty judgment heuristics when determining contract costs, and to rely on misperceived social norms with respect to challenging or breaching contracts. This may influence them not to breach or challenge an otherwise uneconomical, unconscionable, or illegal contract. Consequently, contract preparers may be able to enjoy the benefits of promises that often would not be realized if the non-drafting party were profit-maximizing like the contract preparer.

I. INTRODUCTION	697
II. SHAME AND CONTRACT DESIGN.....	701
A. The Shame Experience in Contract	702
B. Shame and Contracting Behavior	705
C. Shame, Contract, and Moral Promises.....	711

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D. Shame, Contract, and Social Norms.....	718
III. COGNITIVE LIMITATIONS AND CONTRACT DESIGN	726
A. Information Gathering Strategies	727
B. Framing.....	729
C. Regret Theory	732
D. Social Proof.....	734
E. Authority	736
F. Attribution Theory	737
IV. CONSEQUENCES OF SHAME AND REGRET	741
V. CONCLUSION.....	746

“We suppose ourselves the spectators of our own behaviour, and endeavour to imagine what effect it would, in this light, produce upon us. This is the only looking-glass by which we can, in some measure, with the eyes of other people, scrutinize the propriety of our own conduct.”

—Adam Smith¹

“[Y]et, now that I recall all the circumstances, I think I can see a little into the springs and motives which being cunningly presented to me under various disguises, induced me to set about performing the part I did, besides cajoling me into the delusion that it was a choice resulting from my own unbiased freewill and discriminating judgment.”

—Herman Melville²

I. INTRODUCTION

Contracts can be “experienced” in a number of settings. Non-drafting parties will encounter them at some point in time prior to execution, adjudicators may examine them in the event of a contractual dispute, and the non-drafting parties may return to the contract in the event of a problem or dispute. If these experiences can be anticipated, one would expect competitive drafting parties to prepare contracts that attempt to influence the behavior of each of these different parties. As profit-maximizers (and often repeat-players), contract preparers are compelled to engage in this type of behavior or risk losing to competitors in the marketplace.³ Such contracts may be effective in influencing behavior to the extent based on an understanding of human behavioral and psychological processes, including an understanding of human emotions and cognitive biases.⁴ Accordingly, the contracting behavior of non-drafting parties before and after the time of execution

1. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 112 (D.D. Raphael & A.L. Macfie eds., Clarendon Press 1976) (1759).

2. HERMAN MELVILLE, *MOBY-DICK: OR, THE WHALE* 23–24 (Signet Classics 2013) (1851).

3. See, e.g., Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 726 (1999) (arguing that “[c]ognitive biases present profit-maximizing opportunities that manufacturers [and presumably all contract preparers] must take advantage of in order to stay apace with competition. Whether by design or not, the market will evolve to a state in which only firms that capitalize on consumer cognitive anomalies survive”).

4. See *id.* at 635.

as well as the behavior of adjudicative parties may be anticipated and exploited within the written contract with the goal of ensuring a particular contractual result.

This Article explores the unique and important issue of whether contract design can influence the post-formation behavior of the non-drafting party. If it can, contract preparers may be significantly advantaged. This Article suggests that several contractual features can be explained in terms of their ability to exploit the cognitive biases of, and to induce particular “advantageous” emotions from, the other party after the contract has been executed. These features may include arbitration provisions, disclosures in capital letter or bold-face type, “reliance” language, and language framing possible losses in particular ways.⁵ Contracts can encourage individuals to feel shame, to blame themselves, to believe that contracts are sacred promises that should be specifically performed, to utilize faulty judgment heuristics when determining contract costs, and to rely on misperceived social norms with respect to challenging or breaching contracts.⁶ This may influence them not to breach or challenge an otherwise uneconomical, unconscionable, or illegal contract.⁷ Consequently, contract preparers may be able to enjoy the benefits of promises that often would not be realized if the other contracting party were profit-maximizing like the contract preparer.⁸

Contract design may influence the decision-making behavior of the party that did not prepare the contract at the time of contract negotiation and execution and also influence adjudicators in the event of a dispute.⁹ This Article extends the analysis of contract design to the

5. See *infra* Parts II.D, III.B, III.E, IV.

6. See *infra* Parts II–III.

7. See Samuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 216 (2010) (noting that consumers may “tend to perceive” contracts with unconscionable terms as binding).

8. See, e.g., Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 971–72 (2010).

9. See, e.g., Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1079 (2009) (explaining the design of subprime mortgage contracts “can be explained as a rational market response to the imperfect rationality of borrowers,” specifically that “[i]f myopic and optimistic borrowers focus on the short term and discount the long term, then lenders will offer deferred-cost contracts with low short-term prices and high long-term prices”); Eric A. Zacks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169, 171 (2012) (suggesting that contract preparers can anticipate and exploit the

context of the *ex post* behavior of the contracting parties themselves. Contractual features that may seem irrelevant to the business deal or to *ex ante* contracting behavior may be very influential upon *ex post* contracting behavior.¹⁰

For example, this Article argues that contracts may be purposely prepared to evoke particular emotions from the contract parties after the time of contract execution. Thus, one should identify and scrutinize contractual features that portray the promises contained within the contract as having a moral component. The idea of breaching a “moral” promise might be able to instill anticipatory shame, guilt, or fear in the non-drafting party.¹¹ For example, a contract may contain provisions intended to induce a party *ex post* to believe that the breach of, or challenge to, the contracts as written would be immoral, even though economically the party may be better off if she breached or challenged the contract and the party may have substantial legal grounds to challenge the promises made within the written contract. By preparing the contract to reinforce the belief that contractual promises have a moral component (whether through particular contract language or features or the inclusion of particular provisions that reinforce the social norm of contract compliance, such as an arbitration provision), the contract preparer can prepare more advantageous contracts (even those that contain illegal or unenforceable terms) with the knowledge that the contracts rarely will be challenged. Shame and other negative emotions are powerful, often unconscious or uncontrollable, and can inhibit a contracting party from acting in her best interest.¹² Similarly, and even more problematically, given the depiction of the moral nature of the promise, the contract preparer can expect an adjudicator to be particularly harsh in judging a breach of such promises.¹³

As another example, contract preparers may utilize arbitration provisions within all of their contracts, which are usually ignored or not negotiated by the other contract party.¹⁴ The contract preparer may

cognitive biases of adjudicators (as opposed to the contracting parties themselves) to induce them to blame or otherwise feel a particular way about the other contract party).

10. See Becher & Unger-Aviram, *supra* note 7, at 206.

11. See Tess Wilkinson-Ryan & Jonathon Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 406 (2009) (suggesting that “people are quite sensitive to the moral dimensions of a breach of contract”).

12. See *infra* Part II.B.

13. See Wilkinson-Ryan & Baron, *supra* note 11, at 420–21; Zacks, *supra* note 9, at 182.

14. See Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP.

include such a provision not because of cost efficiency or the possibility of more favorable judgments (as compared with standard litigation), although such factors may be important as well. Instead, the confidential nature of the arbitration proceedings for all similarly situated contracting parties (in each instance, the party that did not prepare the contract) may be the most attractive feature of an arbitration provision.¹⁵ Confidentiality regarding disputes reinforces the social norm of not challenging an unfavorable contract, whether the challenge is in the form of a decision to breach or to contest the enforcement of a contract.¹⁶ If contract parties do not perceive others as challenging particular contracts or particular contractual provisions, then they may be less likely to do so themselves. By relying on social proof, or looking to the practices of others, contracting parties may be acting with incomplete information when the actual practices of others cannot be detected (because of the confidential nature of any proceedings in which one would challenge a particular contract).¹⁷

Thus, the framework and formatting of the written contract may not be explicitly negotiated, but these and other features will have effects beyond the express promises contained in the contract. By utilizing language and formats designed to induce passivity after the contract has been executed, contract preparers may be able to enforce or enjoy the benefits of promises that often would not be enjoyed if the other contracting party was a profit-maximizer and repeat-player like the contract preparer.

The consequences of this critique are significant. The result is a further distortion and undercutting of the model of contracting parties

PROBS. 55, 73 (2004) (“[T]his study provides little basis for believing that consumers are making informed decisions when they ‘agree’ to arbitrate”); *id.* at 56 (“Perhaps most central to the debate are concerns that consumers do not fully understand the terms of these agreements, and that, even if they did, they cannot negotiate those terms, which are offered on a ‘take-it-or-leave-it’ basis.” (footnote omitted)); *see also* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 173 (2006) (suggesting that “there is every reason to believe” that credit card holders will not act upon disclosure of an arbitration clause).

15. *See* Eric A. Zacks, *Unstacking the Deck? Contract Manipulation and Credit Card Accountability*, 78 U. CIN. L. REV. 1471, 1497 (2010) (stating that “arbitration proceedings typically are confidential and leave a limited (if any) written record. The result of this lack of publicity and public record can restrict societal awareness of any wrongdoing” (footnote omitted)).

16. *See id.*; *see also* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1672 (2005).

17. *See, e.g.*, Sternlight, *supra* note 16, at 1672.

as rational actors acting with perfect information. It can hardly be said that many contracting parties are aware that they can be induced to act in a particular way based on contract presentation. Instead, contracting parties are just assessing the bargain (if they do anything at all) at the time of contract execution. The results, of course, may not be problematic if everyone viewed (or did not view) the promises made in contracts as being sacred.¹⁸ The issue is, as stated above, individuals may do so while the repeat players (the contract preparers) generally do not, resulting in a disequilibrium where particular social norms are reinforced to the economic detriment of a subordinate group. It is through the perpetuation of the norms of sacred or moral promise, and by evoking anticipatory negative emotions in the contracting party when deciding whether to breach or challenge a contract, that repeat players maintain the ability to enjoy the benefits of one-sided or unenforceable contracts.

This Article proceeds as follows: Part II introduces shame as an example of a primary negative emotion and examines its relevance to the perpetuation of social norms that reinforce contracts as sacred moral promises. Shame will also be examined in light of its effect, generated in part by particular features or formatting of written contracts, upon the post-contract formation behavior and decision-making processes of contracting parties. Next, Part III examines how, in a similar fashion, particular cognitive biases and judgment heuristics of contracting parties in the post-contract formation context may be anticipated and exploited by the contract preparer. This Article then addresses the implications of these practices in Part IV. Part V concludes that the lack of transparency regarding contract design practices and the effects of such practices on post-contract formation behavior severely undermine the normative goals of contract law. Without the awareness and critical examination of such practices, contract law may permit the creation and reinforcement of artificial cultural and social norms that do not reflect or address the goals of all contracting parties.

II. SHAME AND CONTRACT DESIGN

Contract preparers may be able to design contracts to induce the other contract party to experience (or anticipate the experience of)

18. See Andrew Galbraith & Jason Dean, *China Often Snubs Business Norms*, WALL ST. J., Sep. 6, 2011, at B2 (describing how contractual promises have less moral significance in particular countries).

negative emotions such as shame. Analyzing the emotions, internal beliefs, physiology, and behaviors associated with shame may enable a better understanding of the importance of shame in human decision-making and actions.¹⁹ Shame is a distressing and difficult emotion, and the behaviors associated with shame or avoiding shame can help explain human behavior and, in particular, human contracting behavior.²⁰ This Part describes shame from biological, behavioral, and social perspectives and suggests possible uses of anticipatory feelings of shame in contract preparation.

A. *The Shame Experience in Contract*

Described as “perhaps the most negative and disturbing emotional experience,” the experience of shame “follows events in which the individual violates rules of a moral nature that apply to core aspects of the self.”²¹ Shame is often understood as a negative emotional experience as well as a set of internal beliefs about one’s self or behaviors demonstrating shame.²² It is experienced as a self-conscious emotional response, associated with physiological and behavioral responses, to a situation in which one determines that her behavior or self would be judged unfavorably.²³ This self-assessment is based on

19. Tara L. Gruenewald et al., *A Social Function for Self-Conscious Emotions: The Social Self Preservation Theory*, in *THE SELF-CONSCIOUS EMOTIONS: THEORY AND RESEARCH* 68, 82 (Jessica L. Tracy et al. eds., 2007) (describing the “premise that has existed since the time of Darwin that shame serves an important function essential to social life”).

20. As has been noted elsewhere, emotions have an “apparent immunity to conscious control,” meaning that “[m]ost people cannot simply change their emotional state by an act of will based on deciding what they want to be feeling right now.” ROY F. BAUMEISTER, *THE CULTURAL ANIMAL: HUMAN NATURE, MEANING, AND SOCIAL LIFE* 252 (2005). Accordingly, individuals cope with their emotions with different strategies. *Id.* at 253.

21. Dacher Keltner & Lee Anne Harker, *The Forms and Functions of the Nonverbal Signal of Shame*, in *SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE* 78, 78 (Paul Gilbert & Bernice Andrews eds., 1998).

22. Paul Gilbert, *What is Shame? Some Core Issues and Controversies*, in *SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE*, *supra* note 21, at 3, 3–4; Jessica L. Tracy & Richard W. Robins, *The Self in Self-Conscious Emotions: A Cognitive Appraisal Approach*, in *THE SELF-CONSCIOUS EMOTIONS: THEORY AND RESEARCH*, *supra* note 19, at 3, 4–5 (contrasting basic emotions such as happiness or sadness with “self-conscious emotions” and “cognition-dependent emotions” such as shame).

23. Gruenewald et al., *supra* note 19, at 69 (“[S]hame appears to be a common emotional response to threat to the social self, the activation of specific physiological systems often accompanies shame responses to social-self threat, and these psychobiological responses are associated with specific behavioral reactions . . .”). In general, “social harmony and order are maintained, not by the subject’s feelings for others, but by the subject’s feelings concerning how they are regarded by others: the opposite pull of pride and shame keep the

how others might or do perceive the individual.²⁴ Accordingly, given the importance of the social self to life success, “shame may be one of the most basic of human emotions.”²⁵ Further, it appears that it is not simply related to failure to meet a particular standard, but instead connected to being perceived as “unattractive” in some way.²⁶ Shame may then influence individuals’ “biobehavioral responses” to the threat or experience of believing that others do or will perceive them as being unattractive.²⁷

From a contracting standpoint, one can understand shame as being actually experienced or anticipated in multiple settings. If one breaches a contract and is sued or is sent a notice of the breach, one may feel shame associated with the public nature of a lawsuit alleging that one does not abide by her promises. Similarly, one may feel anticipatory shame if one suffers a loss under the contract: an individual may feel shame for suffering a loss that she perceives no one else as suffering and a loss that, if known by others, would result in others judging her harshly.²⁸ Thus, it could be the anticipation of these shame feelings that

rope of social restraint tight.” J.M. BARBALET, *EMOTION, SOCIAL THEORY, AND SOCIAL STRUCTURE: A MACROSOCIOLOGICAL APPROACH* 108 (2001); Gilbert, *supra* note 22, at 6 (“Shame is . . . often defined as acute arousal or fear of being exposed, scrutinized, and judged negatively by others.”); Tracy & Robins, *supra* note 22, at 6 (describing how “[s]elf-conscious emotions [such as shame] facilitate the attainment of complex social goals” (emphasis omitted)); Thomas J. Scheff, *Shame and Conformity: The Deference-Emotion System*, 53 AM. SOC. REV. 395, 398 (1988) (“[S]hame is caused by the perception of negative evaluations of the self.” (emphasis omitted)).

24. Gilbert, *supra* note 22, at 17 (“Generally, shame seems to focus on either the social world (beliefs about how others see the self), the internal world (how one sees oneself), or both (how one sees oneself as a consequence of how one thinks others see the self).”); Gruenewald et al., *supra* note 19, at 68–69 (noting that shame may be experienced “when the fundamental goal of maintaining a positive *social self* is threatened,” which is experienced based on “an actual or likely loss of social esteem, status, or acceptance”).

25. Gruenewald et al., *supra* note 19, at 68. Accordingly, “[m]oral emotions [such as shame] provide the motivational force—the power and the energy—to do good and to avoid doing bad.” June Price Tangney et al., *What’s Moral about the Self-Conscious Emotions?*, in *THE SELF-CONSCIOUS EMOTIONS: THEORY AND RESEARCH*, *supra* note 19, at 21, 25 (citing Jerome Kroll & Elizabeth Egan, *Psychiatry, Moral Worry, and the Moral Emotions*, 10 J. PSYCHIATRIC PRAC. 352 (2004)).

26. Gilbert, *supra* note 22, at 19; *see also* Michael Lewis, *Shame and Stigma*, in *SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE*, *supra* note 21, at 126, 126 (“Shame is elicited when one experiences failure relative to a standard (one’s own or other people’s), feels responsible for the failure, and believes that the failure reflects a damaged self.”).

27. Gruenewald et al., *supra* note 19, at 69.

28. Gilbert, *supra* note 22, at 6–7 (“In shame, the self is both the agent and object of observation and disapproval, as shortcomings of the defective self are exposed before an

serves as an impetus to avoiding breach or challenging the contract.²⁹ Shame feelings may function to “warn” an individual that she will be “punished” through shame by acting in a particular manner, and she is influenced accordingly.³⁰ Rather than actually experiencing shame upon a breach or notice of a breach, the individual may decide not to breach because she anticipates such negative feelings.³¹

In yet another setting, one may feel anticipatory shame if one is contemplating challenging or willfully breaching a contract. If one perceives that the group norm is to comply with contractual promises without question or challenge, then one may feel anticipatory feelings of

internalized observing ‘other.’” (quoting June Price Tangney & Rowland S. Miller, *Are Shame, Guilt, and Embarrassment Distinct Emotions?*, 70 J. PERSONALITY & SOC. PSYCHOL. 1256, 1257 (1996))).

29. Deborah F. Greenwald & David W. Harder, *Domains of Shame: Evolutionary, Cultural, and Psychotherapeutic Aspects*, in SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE, *supra* note 21, at 225, 225 (discussing shame as “a signal that orients one to potential, but usually avoidable, negative social consequences”); James Macdonald, *Disclosing Shame*, in SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE, *supra* note 21, at 141, 148 (describing studies demonstrating that “avoidance was associated with the *threat* of shame or embarrassment”); Marcel Zeelenberg, *The Use of Crying Over Spilled Milk: A Note on the Rationality and Functionality of Regret*, 12 PHIL. PSYCHOL. 325, 326 (1999) (“[W]hen making decisions we not only predict the utility that will be provided by these options, as assumed in rational choice theory, we also predict the emotions that arise from comparing the result of that option with the results of options foregone.”). Zeelenberg notes, however, that “we may sometimes overestimate the duration of our future emotions and also overestimate the intensity of emotional reactions to events,” which can “cause inaccurate predictions of experience utility, and thus lead to irrational (i.e. inaccurate) choices.” *Id.* at 333 (citing Daniel T. Gilbert et al., *Immune Neglect: A Source of Durability Bias in Affective Forecasting*, 75 J. PERSONALITY & SOC. PSYCHOL. 617 (1998)). Perhaps, as I have argued in this Article, individuals are induced to overestimate their own reactions, whether by overstating the likelihood or impact of the consequences.

30. Macdonald, *supra* note 29, at 146 (describing “ideoaffective structures” or “scripts” that “are constructed by individuals around various core affects, and the function of these theories is to guide the interpretation, experience, and reaction to events in one’s environment” (citing 2 SILVAN S. TOMKINS, *AFFECT IMAGERY CONSCIOUSNESS* 422 (1963))). The shame affect script is intended to assist the individual in avoiding the negative affect (shame). *Id.*

31. See Greenwald & Harder, *supra* note 29, at 235 (“A premonition of shame, rather than an intense experience of the affect, can serve as a signal to avoid those behaviors in each domain that might give rise to a full-blown shame state.”); see also BAUMEISTER, *supra* note 20, at 267 (describing how negative emotions operate via anticipation, as “[w]hen you face a decision on how to act, you realize that one action could lead to your feeling guilty, and so you tend to avoid that course of action. Guilt [and presumably shame] can therefore exert a great deal of influence over behavior without the person feeling guilty [or shameful] very often, because people simply avoid doing things that will make them feel guilty [or shameful]”).

shame associated with actions that would, if undertaken, challenge the group norms (and result in public degradation). The group norm, as described below, can be enhanced or depicted in a particular way through the written contract itself.³² Thus, “[a]ffects such as shame and guilt play a useful, even essential, role in guiding individuals’ behavior to match well with the values of their particular group.”³³ It should be noted that guiding behavior in this sense does not mean guiding behavior towards the economically efficient outcome, although that is not necessarily precluded.³⁴

B. Shame and Contracting Behavior

With respect to shame behavior or decisions, one who feels or anticipates shame is likely to act in a submissive fashion to “accept” or “hide from” the shame.³⁵ As “an inner experience of self as an unattractive social agent,” an individual typically feels “pressure to limit possible damage to self via escape or appeasement.”³⁶ Interestingly,

32. See *infra* Part II.D.

33. Greenwald & Harder, *supra* note 29, at 226.

34. See *id.*

35. Gilbert, *supra* note 22, at 22 (“One of the most common beliefs about shame is that it motivates hiding and desires to ‘sink into the ground.’”); Keltner & Harker, *supra* note 21, at 78 (describing how “[s]hame is characterized by . . . the pronounced desire to withdraw and disappear”); Macdonald, *supra* note 29, at 142 (describing the “reasonable consensus among theorists, researchers, and lay people that the experience of shame involves an impulse to get away from other people, an action tendency of interpersonal avoidance”); Allan N. Schore, *Early Shame Experiences and Infant Brain Development*, in SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE, *supra* note 21, at 57, 71 (describing the “classical conception of shame as a feeling of being visible and exposed to the eyes of an Other, which leads to an urge to hide and cover one’s face” (citing ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 222–24 (1st ed. 1950))). Macdonald also describes other research suggesting “that shame can have preemptive functions and, in this capacity, prompt a considerable range of behaviors designed to conceal and protect the self.” Macdonald, *supra* note 29, at 147 (citing ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 236 (1959); TOMKINS, *supra* note 30); see also ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 7–10 (1963).

36. Gilbert, *supra* note 22, at 22; see also Greenwald & Harder, *supra* note 29, at 227 (“Phenomenologically, shame has been described as a self-conscious awareness that one is being viewed, or might be viewed, by others with an unflattering gaze.” (internal citations omitted) (citing David W. Harder, *Shame and Guilt Assessment, and Relationships of Shame and Guilt-Proneness to Psychopathology*, in SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE 368 (June Price Tangney & Kurt W. Fischer eds., 1995); RICHARD S. LAZARUS, EMOTION & ADAPTATION 240 (1991); HELEN B. LEWIS, SHAME AND GUILT IN NEUROSIS 197–200, 202 (1971); Janice Lindsay-Hartz et al., *Differentiating Guilt and Shame and Their Effects on Motivation*, in SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND

shame and shame responses typically are accompanied by particular physiological symptoms or experiences often connected or associated with submissive behavior.³⁷ For example, shame is often associated with a “rapid inhibition of excitement, a sudden decrement in mounting pleasure, and cardiac deceleration” as well as activation of the orbitofrontal cortex, which is an area of the brain associated with internal inhibition.³⁸

PRIDE, *supra* at 274; Tamara J. Ferguson et al., *Children’s Understanding of Guilt and Shame*, 62 CHILD DEV. 827 (1991); June Price Tangney, *Situational Determinants of Shame and Guilt in Young Adulthood*, 18 PERSONALITY & SOC. PSYCHOL. BULL. 199, 199 (1992); Frank W. Wicker et al., *Participant Descriptions of Guilt and Shame*, 7 MOTIVATION & EMOTION 25 (1983)); Lewis, *supra* note 26, at 126 (“Shame is best understood as an intense negative emotion having to do with the self in relation to standards, responsibility, and such attributions as global self-failure.” (citing MICHAEL LEWIS, SHAME: THE EXPOSED SELF 1–6 (1992))).

37. Gruenewald et al., *supra* note 19, at 69 (describing how “the activation of specific physiological systems often accompanies shame responses to social-self threat”).

38. Schore, *supra* note 35, at 69–70. It appears that “[t]he involvement of orbitofrontal-vagal connections in shame is suggested by the ‘active restraining quality’ of this affect, which brakes arousal and triggers a ‘partial paralysis of outer activity.’” *Id.* at 70 (quoting Peter H. Knapp, *Purging and Curbing: An Inquiry into Disgust, Satiety and Shame*, 144 J. NERVOUS & MENTAL DISEASE 514 (1967)). These are different from “‘fight-flight’ active coping strategies,” and instead involve “passive coping mechanisms expressed in immobility and withdrawal associated with” conceding defeat, submitting to the superior party, and seeking a place to hide. *Id.* at 72. Similarly, particular hormonal levels and activity associated with stress regulation appear to be activated and affected by the shame or anticipatory shame experience. Gruenewald et al., *supra* note 19, at 74 (describing the “empirical evidence of activation of these systems in response to social threat in both humans and other animals, and associations between biomarkers of these systems and shame experience”). For example, the hypothalamic-pituitary-adrenal (HPA) system is associated with three hormones that are often released in socially stressful situations. *Id.* at 74 (describing how corticotropin-releasing hormone (CRH), adrenocorticotrophic hormone (ACTH), and cortisol are responsive to situations in which the “social self” is threatened). *Id.* at 74–75. The levels of these hormones are linked with submissive behavior in other animals. *Id.* at 76. These behaviors “are often considered to represent a primitive analogue of submission and shame behaviors in humans,” thus suggesting “evidence for a connection between shame displays and HPA hormone activity in both humans and other animals.” *Id.* (citing Paul Gilbert & Michael T. McGuire, *Shame, Status, and Social Roles: Psychobiology and Evolution*, in SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE, *supra* note 21, at 99; Dacher Keltner et al., *Appeasement in Human Emotion, Social Practice, and Personality*, 23 AGGRESSIVE BEHAV. 359 (1997)). Another system that appears to be responsive in shame situations is the proinflammatory immune system, which is associated with (as the name suggests) an inflammation response involving heightened immune and repair response. *Id.* Interestingly, this system may be more likely to be triggered when others are present than when they are not, suggesting that it is an individual’s self-conscious awareness of others evaluating her that triggers the physiological response. *Id.* at 77. The inflammation response, which is typically associated with injury or sickness, may help trigger withdrawal in social situations where one has been threatened or dominated. *Id.* at 78. “Sickness behavior is thought to represent an

The purpose of shame behaviors is important on a number of levels. First, shame behaviors may operate to appease others by demonstrating an acknowledgement of wrongdoing.³⁹ Such behaviors are informative (i.e., they demonstrate to the other party the current emotions felt by such party) and instrumental (i.e., the negative associations with shame behaviors can be a deterrent against improper behavior).⁴⁰ Submissive displays or other appeasement behavior also are evocative in that they are intended to lead to reconciliation between the shamed party and the aggrieved party.⁴¹ In other words, the community will forgive, and refrain from acting aggressively towards, those who display the “proper” shame.⁴²

Shame can be understood as an “evolved mechanism,” which suggests a connection between the physiological and behavioral systems of humans involved with shame and those of animals acting submissively.⁴³ For example, self-awareness, which is an important part

adaptive complex of cognitive, affective, and behavioral changes that motivate organisms to withdraw from the social environment Social disengagement of this type may also be adaptive under conditions of social dominance threat to decrease the likelihood of attack from more dominant animals” *Id.* Accordingly, this system’s response “in response to social-self threat and in conjunction with the experience of shame in humans . . . may also support similar disengagement and appeasement functions that are adaptive in such contexts.” *Id.*

39. Keltner & Harker, *supra* note 21, at 80 (“An appeasement analysis of shame suggests that the nonverbal display of shame (1) follows transgressions of social and moral rules that govern behavior and experience related to the sense of virtue and character, . . . and (2) is expressed in a distinct display that resembles submissive, appeasement-related behavior, which (3) restores social relations by reducing aggression and evoking social approach in observers.”).

40. *Id.* at 79.

41. *Id.* at 92. Based on the prosocial aspects of shame, some have advocated the use of government-sanctioned “shaming” to promote or regulate behavior. See Daniel M. T. Fessler, *From Appeasement to Conformity: Evolutionary and Cultural Perspectives on Shame, Competition, and Cooperation*, in *THE SELF-CONSCIOUS EMOTIONS: THEORY AND RESEARCH*, *supra* note 19, at 174, 186–88 (describing the advocates of such an approach). As Fessler notes, the benefits of any increases in prosocial behavior arising from institutional shaming “are not free, but rather are accompanied by costs that . . . outweigh them.” *Id.* at 188. Shaming sanctions may stifle innovation, for example. *Id.* See generally Joshua D. Blank, *What’s Wrong with Shaming Corporate Tax Abuse*, 62 *TAX L. REV.* 539, 540–41 (2009) (describing the consequences of utilizing shame sanctions as part of a tax regulatory and punishment regime).

42. Keltner & Harker, *supra* note 21, at 92–93.

43. Gilbert, *supra* note 22, at 4; see also BARBALET, *supra* note 23, at 109 (“With the extension of the division of labor, and its consequent psychological leveling, each person might experience shame through the supposed regard of any other, irrespective of rank. The conformity of all to a general moral order can in principle now . . . be achieved through

of the shame experience, may in fact have “evolved for the coordination of social behavior.”⁴⁴ Shame behaviors may be an evolved response to particular group situations, where “submissive responses would (usually) turn off or lessen the ‘attack-mode’ of the attacker.”⁴⁵ As

ostensibly internal processes: the regard of others in the generation of pride and shame.”); Fessler, *supra* note 41, at 176 (describing how “[n]atural selection has presumably favored the evolution of the capacity to experience emotions that motivate animals to strive for dominance because access to resources (e.g., food, mates, refuge) is a primary determinant of survival and reproductive success. Viewed in this light, the aversive shame-like emotion experienced by subordinate individuals is part of a motivational system that leads actors to fight for higher rank”); Paul H. Robinson et al., *The Origins of Shared Institutions of Justice*, 60 VAND. L. REV. 1633, 1653 (2007) (“Once the intuitions [of justice] exist in a group, actions that violate others’ intuitions invite censure and punishment.”).

44. Gilbert & McGuire, *supra* note 38, at 119; see also Jennifer L. Goetz & Dacher Keltner, *Shifting Meanings of Self-Conscious Emotions Across Cultures: A Social-Functional Approach*, in THE SELF-CONSCIOUS EMOTIONS: THEORY AND RESEARCH, *supra* note 19, at 153, 154 (“Emotions, therefore, have been shaped by evolutionary forces: they are genetically encoded and embedded in the human psyche, linked to biological maturation, and involve coordinated physiological, perceptual, communicative, and behavioral processes that are meant to produce specific changes in the individual’s interaction with the social and physical environments.” (citing Dacher Keltner & Jonathan Haidt, *Social Functions of Emotions*, in EMOTIONS: CURRENT ISSUES AND FUTURE DIRECTIONS 192 (Tracy J. Mayne & George A. Bonanno eds., 2001))); Greenwald & Harder, *supra* note 29, at 226 (“From the evolutionary perspective, then, the capacity, or potential, to experience the universal emotions of shame and guilt are hardwired into the brain’s neural circuitry by natural selection.” (internal citations omitted) (citing Paul Ekman, *All Emotions Are Basic*, in THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 15, 17 (Paul Ekman & Richard J. Davison eds., 1994); Alan J. Fridlund et al., *Facial Expressions of Emotion: Review of Literature, 1970–1983*, in NONVERBAL BEHAVIOR AND COMMUNICATION 143 (Aron W. Siegman & Stanley Feldstein eds., 2d ed. 1987); Harald G. Wallbott & Klaus R. Scherer, *Cultural Determinants in Experiencing Shame and Guilt*, in SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE, *supra* note 36, at 465, 481)); Scheff, *supra* note 23, at 400 (“It seems likely . . . that shame has a biological basis and is genetically programmed”); Philip E. Tetlock, *An Alternative Metaphor in the Study of Judgment and Choice: People as Politicians*, 1 Theory & Psychol. 451, 473 (1991) (arguing that “[p]eople are in a fundamental sense politicians who depend on the good will of the constituencies to whom they are accountable”).

45. Gilbert, *supra* note 22, at 5–6; see also Goetz & Keltner, *supra* note 44, at 154 (noting that “given their highly social nature, humans face numerous problems and opportunities related to functioning within social groups These are the problems of group governance. Self-conscious emotions like pride and shame have likely evolved as solutions to them”); Gruenewald et al., *supra* note 19, at 73 (noting how “[r]udimentary forms of shame . . . serve as evidence of the adaptive function of shame across the phylogenetic hierarchy. Submission and appeasement behaviors in social animals are central to the communication of the social status position, a function that serves reproductive and survival needs” (citing PAUL D. MACLEAN, THE TRIUNE BRAIN IN EVOLUTION: ROLE IN PALEOCEREBRAL FUNCTIONS (1990))); Schore, *supra* note 35, at 71 (describing one view of shame as “the organismic strategy ‘to conserve energies and strive to avoid attention, to foster survival by the risky posture of feigning death, to allow healing of wounds and restitution of depleted resources by

acceptance within groups has evolved to be dependent on signals indicating acceptance or rejection, individuals within the group are extremely sensitive to shame signals.⁴⁶ By being able to experience shame, individuals are able to comply with social norms (through the experience of social signals such as shame indicating compliance or non-compliance with those social norms), which advantages them with respect to group inclusion and perpetuation.⁴⁷

Importantly, feelings of shame and related behavioral responses “may be against the conscious wishes of a person, who may feel overwhelmed by these highly charged internal experiences.”⁴⁸ Instead of a “rational system,” shame appears to implicate an “experiential system,” which “seems to use heuristics, takes short cuts to reach conclusions quickly, uses crudely integrated information, is reliant on affect and how something feels, is preconscious, and possibly relies on earlier experience and conditioned emotional responses.”⁴⁹ This is not to say that the psychological processes or requirements are simple. Instead, shame and other self-conscious emotions require that brain functions permit one to perceive one’s self, that others are assessing the individual, and that there are social norms that determine whether an individual’s acts are appropriate.⁵⁰ To the extent that any of these

immobility” (quoting WILLIAM E. POWLES, HUMAN DEVELOPMENT AND HOMEOSTASIS: THE SCIENCE OF PSYCHIATRY 213 (1992))).

46. Gilbert & McGuire, *supra* note 38, at 99.

47. Greenwald & Harder, *supra* note 29, at 226; Gruenewald et al., *supra* note 19, at 82 (concluding that “[s]hame appears to be part of a psychobiological system designed to alert organisms to the presence of threat to the social self and to support appropriate behavioral responses to these threats”); Tracy & Robins, *supra* note 22, at 4 (describing how “[s]hame mediates the negative emotional and physical health consequences of social stigma”); Scheff, *supra* note 23, at 397 (describing the argument that “shame is the primary social emotion, generated by the virtually constant monitoring of the self in relation to others. Such monitoring . . . is not rare but almost continuous in social interaction, and, more covertly, in solitary thought”).

48. Gilbert & McGuire, *supra* note 38, at 105–06; *see also* BARBALET, *supra* note 23, at 115 (“A positive evaluation of pride or a negative evaluation of shame has behavioral consequences in the form of a generalized outcome of conforming behavior.”); Greenwald & Harder, *supra* note 29, at 236 (noting how the shame associated with being unconventional “seems to evoke more a wish to be invisible in front of those who conform more acceptably”); Gruenewald et al., *supra* note 19, at 69 (describing how the “psychobiological responses [of the shame experience] are associated with specific behavioral reactions (e.g., appeasement, submission) to such threats [to the social self]”).

49. Gilbert, *supra* note 22, at 16.

50. Jennifer S. Beer, *Neural Systems for Self-Conscious Emotions and Their Underlying Appraisals*, in THE SELF-CONSCIOUS EMOTIONS: THEORY AND RESEARCH, *supra* note 19, at 53.

perceptions can be anticipated and manipulated, one's conduct may be accordingly affected.⁵¹

The discussion above is instructive in several ways with respect to contract preparation. A reaction to a contractual situation (post-formation) based upon feelings of shame or anticipation of shame would be advantageous to the contract preparer if these feelings or anticipation of feelings lead to seemingly illogical decisions by the other party that are economically beneficial to the contract preparer. Contract preparers already should be incentivized to encourage passivity on the part of contract parties contemplating a breach or challenge to a contract. Consequently, negative emotions such as shame may be useful to a contract preparer given the association of such emotions with submissive behavior. If contracts can help communicate the experience (actual or anticipated) of shame to the other contracting party, the contract preparer may be able to enjoy a higher level of contract compliance than might otherwise be experienced.

An individual may avoid help-seeking behavior, such as sharing her contractual situation with others, because she is scared of feeling shame once her situation is known.⁵² If one believes she is worthy of shame, either because of her past or contemplated actions, then she will acquiesce to the superior party, avoid sharing her shame with others, and avoid actions that may trigger future shame feelings.⁵³ In

51. See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 30 (2011).

52. Gilbert, *supra* note 22, at 23–24.

53. The reactions and behaviors associated with negative emotional states are not perfectly predictable or divisible, of course. Humiliation, for example, may be considered close to shame and overlap in some instances. Some believe, however, that humiliation is more directly related to an unjust exercise of power by one over another “purely for [one’s] own pleasure or purpose.” *Id.* at 9–10; see also Wilkinson-Ryan & Baron, *supra* note 11, at 412 (noting that “people might also be more averse to losses coming from someone who has promised to confer a benefit (e.g., a promisor) than from someone with a neutral status (a negligent tortfeasor),” suggesting that contract preparers perhaps should be inclined to position themselves as benevolent promisors who did all they could to help the other contracting party rather than harsh-promise enforcers who may be seen as humiliating or unaccommodating to the other contracting party). If one feels humiliation as opposed to shame, then one’s behaviors accordingly may be difficult, as “people believe they deserve their shame; they do not believe they deserve their humiliation.” Gilbert, *supra* note 22, at 10 (emphasis omitted) (quoting Donald C. Klein, *The Humiliation Dynamic: An Overview*, 12 J. PRIMARY PREVENTION 93, 117 (1991)). If humiliated, individuals may respond with “rageful anger.” Greenwald & Harder, *supra* note 29, at 236. Thus, if a contractual outcome is perceived as being “humiliating” versus “shaming,” then the suffering party may choose to challenge or, at least, not to comply with the contract. By way of contrast, with humiliation,

contractual terms, she may not contest enforcement of the contract, strategically default, consult an attorney, or otherwise publicize her situation.⁵⁴

As will be discussed below, contracts appear to have features designed to trigger shame or the anticipation of shame, whether through the reinforcement of social norms regarding compliance,⁵⁵ the inclusion of legal language that triggers deference,⁵⁶ or language that implicates the immoral nature of a breach.⁵⁷

C. Shame, Contract, and Moral Promises

This Article suggests that an individual's perception that a contract has a "moral" component is important to a self-evaluation of attractiveness (and avoiding possibly feeling shame) when determining whether to breach or challenge a written contract. Thus, it is not merely the act of contractual breach or the situation of suffering damages alone that results in shame, but it is also the personal belief that one does not want to be publicly associated with the breach of a "moral" promise and

one perceives that the other party (the "humiliator") is the cause of the problem, resulting in a desire for revenge. Gilbert, *supra* note 22, at 10 ("Humiliation involves: (1) a focus on the other as bad rather than the self; (2) external rather than internal attributions for harmful events; (3) a sense of injustice and unfairness; and (4) a burning desire for revenge."). If, for example, the contract terms are presented (perhaps hidden) in a manner that is perceived to be unfair, then perhaps the other party will feel as though the contract preparer was exercising power unfairly. *See id.* For example, White notes how "strategic defaulters [of home mortgages] tend to direct most of the blame, and thus their anger, toward financial institutions and the government for causing, or allowing, the housing meltdown." Brent T. White, *Take this House and Shove it: The Emotional Drivers of Strategic Default*, 63 SMU L. REV. 1279, 1305 (2010). Their "anger is only compounded by the sense that their lenders are giving them the runaround, being callous and uncaring, looking out only for their own economic self-interest, and refusing to help despite being bailed out by taxpayers themselves," and "[t]his anger turns out to be cathartic for many strategic defaulters, relieving their guilt and justifying a tit-for-tat response to banks." *Id.* at 1305–06 (footnotes omitted). Had lenders been able to alleviate some of this anger (or possibly preclude it through a different contract), perhaps the incidence of strategic default on home mortgages would have been lower. If the contract preparer is perceived to be humiliating the other party or otherwise deemed to be the cause of the unfortunate contract situation, then the other contracting party's emotions, beliefs, and behaviors may be different. Thus, this Article distinguishes between contractual features that may be employed towards a shame-based reaction, rather than a humiliation-based reaction or other reactions involving an external attribution of causation.

54. The avoidance of publicity, of course, reinforces social proof regarding contract compliance. *See infra* Part II.D.

55. *See infra* Part II.D.

56. *See infra* Part II.D.

57. *See infra* Part II.C.

is struggling to avoid that association.⁵⁸

As seen above, whether one perceives her particular trait or act as undesirable will depend on the particular social and cultural context in which the decision is being made.⁵⁹ The shame “experience” may vary “[t]o the extent that cultures vary in self-evaluative processes, in the structure of relationships, or in terms of the values individuals chronically evaluate themselves against.”⁶⁰ Thus, “[i]t is likely that what is undesirable about the self is as much open to social and cultural constructions as what is desirable.”⁶¹ An individual will feel differently about her contract breach in a culture that values contract compliance as a moral virtue versus one in which contract compliance is compelled or demanded only by economic necessity or efficiency.⁶² This may explain, for example, the differing cultural beliefs about the morality of the promises contained in a written contract.⁶³ Contract preparers have a

58. See Fessler, *supra* note 41, at 181 (“The aversive nature of shame provides an anticipatory incentive to conform to cultural standards, and to be cognizant of the extent to which others are aware of any digressions.”); Goetz & Keltner, *supra* note 44, at 166 (“Self-conscious emotions, in particular shame, guilt, and forms of pride, are intimately intertwined with moral judgments of harm, character, and responsibility.”).

59. Gilbert & McGuire, *supra* note 38, at 118 (noting that “it is not always the case that traits and behaviors that are stigmatized by one group will result in shame. . . . Tolerance might relate to group identification—the judgments of others with whom we are, or desire to be, in close contact may be more powerful”).

60. Goetz & Keltner, *supra* note 44, at 153; see also ROSS & NISBETT, *supra* note 51, at 30 (describing Sherif’s experiments and his conclusions that “in the face of uncertainty or ambiguity people give weight to the judgments of their peers,” but, perhaps more importantly, “our most basic perceptions and judgments about the world are socially conditioned and dictated” (citing Muzafer Sherif, *An Experimental Approach to the Study of Attitudes*, 1 *SOCIOMETRY* 90 (1937))); Galbraith & Dean, *supra* note 18, at B2.

61. Gilbert, *supra* note 22, at 19; see also Gilbert & McGuire, *supra* note 38, at 118 (noting that “for internalized shame to occur the person has to accept the negative judgments of others as both true in some measure and undesired”); Lewis, *supra* note 26, at 126 (“Shame is elicited when one experiences failure relative to a standard (one’s own or other people’s), feels responsible for the failure, and believes that the failure reflects a damaged self.”); Scheff, *supra* note 23, at 400 (“For adults . . . it also seems certain that shame is not only a biological process, but also an overwhelmingly social and cultural phenomenon.”).

62. Goetz & Keltner, *supra* note 44, at 154 (describing how “self-conscious emotions serve to help the individual act according to group norms, and these group norms vary greatly across cultures,” which results “in variation in the specific events that tend to elicit self-conscious emotions, in the elaborate concepts around particular self-conscious emotions, and in the functional value and normative beliefs associated with self-conscious emotions”).

63. Galbraith & Dean, *supra* note 18 (describing how contractual promises have less moral significance in particular countries); see also Goetz & Keltner, *supra* note 44, at 167 (describing a study in which “Chinese participants were less likely to mention violations of social laws and moral principles as determinants of guilt and shame than were U.S. participants” (citing Deborah Stipek et al., *Testing Some Attribution—Emotion Relations in*

stake in this cultural construction and preparation of the contract to reinforce the contract as moral promise (or other group norm incentivizing contract compliance or deference) is one way in which their responses to this incentive can be examined.

Shavell has described the widely held “view that there is something wrong with a person’s breaking a contract, or, equivalently, that a person ought to meet his or her contractual obligations.”⁶⁴ As an example, he cites the *Restatement of Contracts*, which refers to the “sanctity of contract and the resulting moral obligation to honor one’s promises.”⁶⁵ Contractual promises are seen “as close to, or as even

the People’s Republic of China, 56 J. PERSONALITY & SOC. PSYCHOL. 109 (1989)). Goetz and Keltner theorize that “members of different cultures should vary in the extent to which they ‘moralize’ self-conscious emotions, that is, consider them matters of right and wrong, and as implicating punishment or sanctions.” *Id.*

64. Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439, 439 (2006); Wilkinson-Ryan & Baron, *supra* note 11, at 406 (“Most people agree that breaking a promise is immoral. Because the legal construct of contract is tied so closely to the moral notion of a promise, breach of contract would seem to fall into the same category of moral harm as a broken promise.”); *see also* Brent T. White, *The Morality of Strategic Default*, 58 UCLA L. REV. DISCOURSE 155, 157 (2010), available at <http://www.uclalawreview.org/pdf/discourse/58-8.pdf> (describing one of the primary arguments against strategic default of home mortgages, which is that “homeowners promised to pay their mortgages when they signed the mortgage contract, and it would be immoral to break this promise”); Seana Shiffrin, *Could Breach of Contract Be Immoral?*, 107 MICH. L. REV. 1551, 1552 (2009) (noting that breaching behavior, particularly efficient breaches, “is condemned by morality,” and that “[a]lthough the law need not enforce morality as such, it is problematic when the law, either directly, or by way of the justifications underlying the law, embraces and encourages immoral action”). Shiffrin goes on to suggest that “breach of contract may be immoral . . . because it disrespects two features of the moral significance of agreements,” namely the fact that the parties may especially prefer (or be motivated by the prospect of) performance and the actual agreement provided by parties (that is, “the background structure that required agreement as a prerequisite to performance presupposed that performance could not be demanded upon the proffer of the performer’s going rate. . . . [I]t matters whether or not she *in fact* agrees”). *Id.* at 1566–67. The disagreement about strategic default illustrates “the failure of either morality or efficiency as a unifying descriptive or normative theory. . . . The parties’ respective arguments demonstrate that the question whether a breach of contract is immoral is more sophisticated than simply asking if someone reneged on a promise.” Meredith R. Miller, *Strategic Default: The Popularization of a Debate Among Contract Scholars*, 9 CORNELL REAL EST. REV. 32, 42 (2011).

65. Shavell, *supra* note 64, at 439–40 (quoting RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (1981) (internal quotation marks omitted); *see also* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 40 (1981) (arguing that contracts are “grounded in the primitive moral institution of promising”); Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1428 (2009) (“It is therefore tempting to reach the conclusion that liability in contract for nonperformance is strict, and is based on policy reasons rather than moral reasons. . . . In the

indistinguishable from, promises made in every day life,” and those “promises are statements that most people think they have a moral obligation to honor.”⁶⁶ Despite these moral proclamations, contract law typically permits breach, in the sense that promises made are not generally required to be specifically performed.⁶⁷ Instead, contract law typically allows a person to breach a contract and pay monetary damages arising from that breach rather than being required to specifically perform the contractual promises.⁶⁸ Put in terms of a

area of nonperformance, law and morality, although not identical, tend to converge rather than diverge.”). Eisenberg argues that “[t]he efficiency of [the contracting] system rests on a tripod whose legs are legal remedies, reputational effects, and the internalization of social norms—in particular, the moral norm of promise keeping. These three legs are mutually supportive.” *Id.* at 1430. *But see* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 153 (5th ed. 1998) (arguing that contract law should not generally be used “to enforce moral (insofar as they may be distinct from economic) principles”).

66. Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1579 (2009). Shavell suggests that “[w]e are taught from childhood that our promises ought to be kept, and this view is reinforced throughout our lives,” and, accordingly, “it is natural for us to identify contracts with the promises that we have learned to treat as having moral valence.” *Id.*

67. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (“The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach.”); Wilkinson-Ryan & Baron, *supra* note 11, at 406 (noting that “[t]he penalty for breach of contract is limited, with some exceptions, to money damages in the amount necessary to put the nonbreaching party in as good a position as he or she would have been in had the contract been performed” (citing RESTATEMENT (SECOND) OF CONTRACTS § 347)); *see also* Shavell, *supra* note 64, at 440 (noting that “it is manifest that contracts are often disobeyed and that the law permits this without the imposition of rigorous sanctions”); Shavell, *supra* note 66, at 1579 (noting that individuals “do not pause to consider that contracts are in fact different from promises made in social intercourse, and that breaking contracts, unlike breaking promises, results in the payment of damages”). Moreover, the “moral” nature of contractual promises is often invoked only when talking about individuals as opposed to corporate or other entity behavior. *See* White, *supra* note 64, at 163 (asking “[w]hy also speak of morality and social responsibility only when talking about strategic default by homeowners and not by financial institutions or large corporations”). White suggests that, “if anything, the difference between commercial and residential mortgage contracts cuts in the other direction—and we should be more forgiving of less sophisticated residential borrowers.” *Id.* at 164.

68. *See* Shavell, *supra* note 64, at 440 (noting how “[t]he Restatement and commentators seem to be of the opinion that breach and payment of damages generally are tolerable, and sometimes even desirable, for practical, economic reasons”); White, *supra* note 64, at 157 (arguing that “a mortgage contract, like all other contracts, is purely a legal document, not a sacred promise”); Wilkinson-Ryan & Baron, *supra* note 11, at 406 (noting that “the law does not explicitly recognize the moral context of breach of contract. . . . This means that there are no legal distinctions between cases that elicit very different moral intuitions; morally salient factors like the motives and intentions of the breacher are legally irrelevant”). Indeed, Shavell notes that some commentators, such as Holmes, “seemed almost to celebrate the option to commit breach despite its negative moral aspect.” Shavell, *supra* note 64, at 440

mortgage contract, “the lender has contemplated in advance that the mortgagor might be unable or unwilling to continue making payments on his mortgage at some point—and has decided in advance what fair compensation would be” and “wrote that compensation into the contract.”⁶⁹ Indeed, in an economic sense, a breach may be a preferred course of action under certain circumstances.⁷⁰ If the breaching party would be benefited more by the breach than the other party will be harmed, then it would be “efficient” for the breach to occur.⁷¹

Regardless, people in the U.S. generally view breach as an immoral act.⁷² Indeed, “most individuals react to breach . . . as having an ethically

(noting Holmes’ idea that “[t]he duty to keep a contract . . . means a prediction that you must pay damages if you do not keep it,—and nothing else But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can” (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897))); see also Wilkinson-Ryan & Baron, *supra* note 11, at 406 (noting that “[n]ot only does our legal system appear indifferent to the moral harm of promise breaking, it permits breachers to profit from a moral violation”). Shavell, though, believes that Holmes was not ascribing an “ethically neutral” status to a breach, but rather was trying to describe the treatment of breach under the law. Shavell, *supra* note 64, at 457. Shavell believes that Holmes would have believed such an act to be immoral, or at least that “we have no reason to think that he would not consider it so.” *Id.* But see Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1349 (2009) (describing Holmes’ theory of contract as being a “no fault” theory, which suggests that a “‘breach’ is therefore not a wrongful act”). Posner suggests that “[t]he law uses moral language mainly because it supplies a familiar vocabulary in which to discuss duties and entitlements and thus provides continuity between legal language and the language of everyday life. To take it literally is a common source of mistakes in legal thinking.” *Id.* at 1357.

69. White, *supra* 64, at 158. White articulates that “it’s simplistic to suggest that it’s always immoral to break a promise. A more accurate description of the social norm is that one should keep one’s promises unless one has a compelling enough reason not to do so.” *Id.* at 159. As argued in this Article, though, contract prepares are incentivized to reinforce the “simplistic” view of the social norm as all contractual promises are sacrosanct.

70. RESTATEMENT (SECOND) OF CONTRACTS ch. 16, intro. note (“In general, therefore, a party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss.”).

71. Shavell, *supra* note 64, at 457 (“Writers on efficient breach have observed that breach will tend to be efficient under the expectation measure (since a party contemplating breach will commit it if and only if his benefit would exceed the value of performance to the other side).”).

72. *Id.* at 455 (citing survey evidence that individuals “found the simple, unqualified fact of breach to be unethical on average”); Wilkinson-Ryan & Baron, *supra* note 11, at 408 (describing the “traditional moral view [that] holds that a contract is a promise, and that breaking a promise is immoral” (citing FRIED, *supra* note 65, at 9–17)); see also Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 63 (1963) (describing contract and contract law as “often thought unnecessary” in sophisticated business transactions because of compelling social norms, including that “[c]ommitments are to be honored in almost all situations”).

incorrect aspect.”⁷³ Shavell demonstrates, though, that observers’ beliefs about the morality of a breach can be affected by information regarding whether the parties did bargain or would have bargained for specific performance upon the occurrence of a particular contingency.⁷⁴ From an attribution standpoint, this makes sense. One is likely to make negative attributions about someone (or herself) who fails to perform a promise under certain circumstances that, if discussed, the parties would have agreed was to be specifically performed.⁷⁵ If the parties did not contemplate the circumstances, or perhaps if it is unclear whether the parties would have required specific performance under such circumstances, then one might not ascribe as much control or negativity towards the breaching party.⁷⁶ The knowledge of what the contract preparer desired, and the control that the other party has over the breach, pushes the other party (as well as the adjudicator) to construct a particular attribution of responsibility.⁷⁷

Thus, framing a contractual promise in moral terms may serve to increase contractual compliance by the other party.⁷⁸ For example, the

73. Shavell, *supra* note 66, at 1579.

74. See Shavell, *supra* note 64, at 452–55; see also Wilkinson-Ryan & Baron, *supra* note 11, at 406. Shavell describes how, if the parties had not discussed whether specific performance was required (or had agreed that specific performance would not be required) under a particular set of circumstances, then observers would believe a breach to be more ethically neutral, while if the parties had discussed the specific circumstances and determined that performance would be required (or would have so determined if they had discussed it), then observers judged the breach to be more unethical. Shavell, *supra* note 64, at 455.

75. See Shavell, *supra* note 64 at 455 (describing a survey in which the participating individuals found a breach to be “ethically neutral” when no duty to perform on the contract arose but “quite unethical” when the breach was one of specific performance).

76. See *id.*

77. See Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers’ Propensity to Sue*, 15 BEHAV. SCI. & L. 83, 93 (1997) (concluding that the results from the study conducted “suggest that consumers’ contract schemas may include a general belief that all contract terms are enforceable”); Wilkinson-Ryan & Baron, *supra* note 11, at 410 (“Parties’ beliefs about the contract were informed by the terms of the contract itself as well as their intuitions or beliefs about contracts in general, namely, that they are enforceable as written.”).

78. Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67, 88 (2012) (conducting an empirical study that suggests “a moral framing of contract performance as living up to one’s promise—as compared to a legal threat, an instrumental reminder, or social pressure to conform—induced the greatest likelihood of compliance and the greatest relative quantity of compliance”). In Eigen’s study, the “moral prompt” for contract compliance reminded participants “that they had made a promise to do something and that they should therefore live up to their word and do it.” *Id.*

contract preparer also may be motivated to prepare the contract in such a way as to depict the idea that, in as many circumstances as possible, the specific promise made by the other contracting party is sought.⁷⁹ This may explain the regular inclusion of provisions requiring specific performance in written contracts, even though courts may be reluctant to grant specific performance.⁸⁰ A specific performance clause could convince an individual to believe that the expectation from the other party is that the promise has to be performed under all circumstances or else specific performance will be sought, even if it would make sense for the individual to walk away (if permitted) and compensate the non-breaching party economically. Second, a specific performance clause could convince an individual it is the expectation of the state that the promise has to be performed under all circumstances or else specific performance will be granted by the state, again regardless of the advantage that could be achieved if only monetary damages were awarded. If individuals do not know the frequency with which specific performance is awarded (as would be expected), the inclusion of such a clause could be impactful. Similarly, clauses that, in duplicative or repetitive fashion, emphasize the promises being made by the other party could be impactful. If people believe that their promises are specifically being sought and can be specifically enforced, then they may feel different about the immorality of a potential breach.⁸¹

Similarly, recitals in a written contract could also reinforce the importance of the promises being given in a particular contract. Recitals are often used in a preliminary section to a contract in order to give a brief overview of the contract's purpose and term.⁸² These recitals can indicate to the other party how "fair" the contract preparer has been or emphasize the benefits under the contract, and how the contract preparer is seeking particular promises in return from the other contract

79. As an example, one credit card agreement provides, in duplicative fashion, "YOUR PROMISE TO US. You agree to the terms of this Agreement. You promise to do everything this Agreement requires of you. . . . You specifically promise to pay all amounts owed because of transactions made on your Account" *Credit Card Agreement*, CREDIT FIRST NATIONAL ASSOCIATION (June 1, 2013), <https://www.cfna.com/wps/wcm/connect/migration/www.cfna.com/common/credit+application/credit+card+agreement>.

80. Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 271 (1979).

81. Wilkinson-Ryan & Baron, *supra* note 11, at 422 (suggesting that "[p]eople's moral intuitions about contract law may make breach less frequent than is economically efficient").

82. BLACK'S LAW DICTIONARY 1385 (9th ed. 2009) (defining recital as "[a] preliminary statement in a contract or deed explaining the reasons for entering into it or the background of the transaction, or showing the existence of particular facts").

party.⁸³ For example, an employment agreement's recitals may indicate the employer's "desire" to compensate an employee assuming that the employee fulfills his contractual promises.

A contract could also emphasize the importance of a particular clause and position of the respective parties, specifically that the contracting party is "relying" on the promises made by the other contracting party and would not have entered into the contract "but for" such promises being made.⁸⁴ As with recitals, if an individual believes that the other party was entering into an agreement with a good faith belief that the promise would be fulfilled, then the individual may be more reluctant to breach the agreement.

D. Shame, Contract, and Social Norms

One of the predicates to the shame experience is the predilection of individuals to conform to social standards.⁸⁵ In order to belong to a particular community or group, an individual must conform to some extent with the standards of that community or group.⁸⁶ By being able to feel shame, an individual can be deterred from deviating from the group's standards, and such conformity can strengthen the bonds of the group and an individual's place within the group.⁸⁷ Shame can thus

83. Zacks, *supra* note 9, at 187–88, 201.

84. *See id.* at 197, 201, 203 (suggesting that recitals and "reliance" language can be utilized to depict a particular story in order to induce the adjudicator to believe that one party is more culpable than another with respect to particular contractual outcomes).

85. Greenwald & Harder, *supra* note 29, at 230 ("Human beings demonstrate strong tendencies to conform to group standards." (citing Solomon E. Asch, *Opinions and Social Pressure*, in READINGS ABOUT THE SOCIAL ANIMAL 13 (Elliot Aronson ed., 5th ed. 1988))); Scheff, *supra* note 23, at 402 (describing studies of conformity as illustrating "the way in which emotions may lead to social control" (citing Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED, no. 9, 1956, at 1)); Tetlock, *supra* note 44, at 469 (describing how "people are not only expected to act in accord with prevailing norms, they are also expected to censure those who violate norms").

86. BAUMEISTER, *supra* note 20, at 149 ("Culture must find a way to make people want to respect those rules and do what is right. . . . The first stage relies on the need to belong and related motives of the concern people have for one another in stable, long-term relationships. These are mediated by shame and guilt . . ."); Greenwald & Harder, *supra* note 29, at 230; Scheff, *supra* note 23, at 403 (describing conformity studies that demonstrated "subjects will find group standards compelling, even though they are exterior and contradictory to their own individual standards" (emphasis omitted)).

87. Greenwald & Harder, *supra* note 29, at 231 (noting that a group "member who anticipates feeling shame upon the violation of group norms will take precautions to avoid such behavior. The capacity for shame experience, then, and its avoidance through conformity, can prevent the social rejection or ostracism" arising from not complying with the

function as a punishment for not conforming one's behavior to the proper standard.⁸⁸ It is not, then, merely being placed in the inferior position that causes the shame, but also the belief that one is being placed in the inferior position and does not want to be associated with that position (i.e., suffering that association is the punishment).⁸⁹

Presumably, the conformity pressures as to contract compliance relate to an individual's beliefs about the social norms of the group to which the individual belongs or wants to belong.⁹⁰ For individuals, this could be an ethnic group, religious group, social group, or even a belief about what it means to be an "American." Because "these standards may change with time and with culture," contract preparers have a vested interest in perpetuating a culture (or the public perceptions of the culture) that reinforces their ability to enjoy the benefits of contracts made.⁹¹ The issue here is that individuals rely on others to communicate to them whether shame would be experienced based on particular behavior.⁹² Other people, in other words, indicate to each individual whether he or she is worthy of inclusion or exclusion from the group, which may include "potent threat signals such as signals of being ignored, rejected, disliked, criticized, excluded, and so forth."⁹³ Similarly, if the (perceived) social standard within the culture is one of

group norm (citing Scheff, *supra* note 23, at 397)); Scheff, *supra* note 23, at 396 (arguing that "the degree and type of *deference* and the attendant *emotions* of pride and shame make up a subtle and pervasive system of social sanctions" that result in conformity).

88. Robinson et al., *supra* note 43, at 1653 ("Once the intuitions of justice exist, it is disadvantageous to reject publicly the principles of that system or to behave in ways that conflict with others' intuitions.").

89. Gilbert, *supra* note 22, at 18 ("Shame cannot, therefore, consist of inferiority alone but, first, must include some notion of a place or position that one does not want to be in or an image one does not wish to create and, second, this place or image must be associated with negative aversive attributes from which one struggles to escape."). Thus, shame (together with other self-conscious emotions) may provide "an emotional moral barometer, providing immediate and salient feedback on our social and moral acceptability." Tangney et al., *supra* note 25, at 22.

90. See Greenwald & Harder, *supra* note 29, at 230.

91. Lewis, *supra* note 26, at 127; see also Goetz & Keltner, *supra* note 44, at 166 (assessing that we should expect more variation in self-conscious emotions across cultures "in 'complex' dimensions like attribution of agency or responsibility, fairness or legitimacy, and norm compatibility or morality").

92. Gilbert & McGuire, *supra* note 38, at 101 (noting that "[s]ocial strategies are complex because it is other conspecifics who provide the salient signals about which strategy to use and whether a strategy is working or not").

93. *Id.* at 115.

contract compliance, then one's behavior in particular situations can be encouraged or discouraged.⁹⁴

From a contract standpoint, then, individuals may rely on others to inform them whether shame is the appropriate response to different contracting behavior. If others indicate that shame is associated with particular acts (a breach) and that group acceptance is predicated on refraining from such acts, then individuals may be influenced accordingly.⁹⁵ With respect to contracts, individuals may accept their losses, uneconomical promises, and illegal contractual provisions because they do not want to feel the shame associated with challenging the social norms.⁹⁶ Similarly, individuals that have breached and are being sued (or have been provided notice that they breached) may be reluctant to challenge a one-sided or unenforceable contract because they feel shame, either actual or anticipatory, associated with being an outlier in that situation. Individuals can make the problem go away by submitting (paying the damages or complying with the contract), which often may include simply doing nothing (accepting the contract as it is without challenge).

One way in which consumer contracts might reinforce a social norm of contract compliance is through the inclusion of an arbitration provision in all such contracts (not just a few individuals' contracts). Mandatory arbitration already is criticized because of a "lack of public scrutiny," meaning that the arbitration proceedings are conducted privately and usually without a written public record.⁹⁷ Home lenders, for example, could reinforce the social norm of contract compliance (and not defaulting on one's mortgage) by keeping such lending practices a secret and addressing disputes concerning those lending practices confidentially.⁹⁸ Thus, by shielding contractual disputes from

94. See Lewis, *supra* note 26, at 127.

95. Gilbert & McGuire, *supra* note 38, at 115 ("Social signals, therefore, cue affective arousal and indicate a need for reparative, defensive, or retaliatory action.").

96. *Id.* at 118 (describing "[s]hame [as] a signal that one is misattuned" to her social role). Shame can influence even those who do not acknowledge the influence of shame. In other words, shame can induce particular conforming behavior in individuals even though such individuals do not "experience" shame. Scheff, *supra* note 23, at 404 (describing "bypassed shame as a causal element in compelling conformity").

97. Sternlight, *supra* note 16, at 1635, 1647.

98. In 2004, Fannie Mae and Freddie Mac, large mortgage buyers, announced they would no longer purchase mortgages with such clauses, which deterred the use of arbitration clauses. Press Release, Fannie Mae, *Announcement 04-06*, 4 (Sept. 28, 2004), available at <https://www.fanniemae.com/content/announcement/04-06.pdf>; see also *Freddie Mac Promotes*

public scrutiny, lenders may have benefited from contracts that would have been contested had more homeowners known generally about the number of similarly situated or similarly acting (defaulting or litigating) individuals.⁹⁹ Such clauses thus obfuscated and distorted what the social norm actually was with respect to mortgage default or mortgage litigation and permitted lenders to engage in predatory lending practices without penalty.¹⁰⁰ Many homeowners may have felt anticipatory shame upon consideration of strategically defaulting on their mortgage or actual shame upon doing so because the confidential nature of mortgage litigation precluded them from determining what actual social practice was. If one perceives social practice inaccurately, then one may feel anticipatory or actual shame in improper situations and act inappropriately. The preparation of mortgage contracts may provide a clear example of such behavior. With respect to home mortgages, the disputes may eventually become public (when a foreclosure judgment is enforced and the house is sold), but many contractual disputes would not involve such a highly visible enforcement mechanism (e.g., a simple monetary judgment).¹⁰¹

Similar to the historical use of arbitration clauses in home mortgages, companies in other industries are using arbitration at an increased rate in their contracts, including in contracts where the imposition of the clause is not negotiated or appreciated by the other contracting party at the time of contract formation.¹⁰² Similarly situated

Consumer Choice with New Subprime Mortgage Arbitration Policy, FREDDIE MAC NEWS ARCHIVE (Dec. 4, 2003), https://web.archive.org/web/20040220070507/http://www.freddiemac.com/news/archives/afford_housing/2003/consumer_120403.html (accessed by searching for URL in the Internet Archive) (announcing that “effective August 1, 2004, it would no longer invest in subprime mortgages . . . that contain[ed] mandatory arbitration clauses”).

99. See *supra* note 15 and accompanying text.

100. See Press Release, Fannie Mae, *supra* note 98; see also *Freddie Mac Promotes Consumer Choice with New Subprime Mortgage Arbitration Policy*, *supra* note 98.

101. Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 236 (2008) (noting how arbitration is conducted privately and that the awards “may or may not contain reasons and may or may not be published or be otherwise generally available”).

102. *Id.* (noting that “[a]rbitration has become the standard fare in law firms at all levels and in most fields”); Sternlight, *supra* note 16, at 1631 (describing how “U.S. companies are increasingly using form contracts, envelope stuffers, and Web sites to require their consumers, patients, students, and employees to resolve future disputes through binding arbitration, rather than in court”). Sternlight notes how arbitration “began to be mandated by a broad range of industries, including financial institutions (as to personal accounts, house and car loans, payday loans, and credit cards), service providers (termite exterminators, gymnasiums,

individuals may be unable to ascertain the social practice (breaching, challenging, or defending) of others with respect to such contracts and whether such social practices are successful.¹⁰³ Through the silence of arbitration (emanating from others' contractual situations), individuals may be left with the likely conclusions that few others breach, challenge, or defend such contracts or are able to do so successfully.¹⁰⁴ Obviously, from a conformity standpoint, if contracting parties cannot perceive the actual practices (people are breaching or challenging these contracts) or the substantive rights (certain contracts may be rightly challenged) of similarly-situated parties, then this lack of transparency potentially distorts the market for one-sided or unenforceable contracts. Either through voluntary settlement or arbitration proceedings, contract preparers would engage in the practice most likely to keep any

telephone companies, and tax preparers), and sellers of goods (mobile homes, computers, and eBay)." *Id.* at 1638 (footnotes omitted).

103. Carbonneau, *supra* note 101, at 266 (concluding that law "suffers because legal norms are no longer elaborated on a public record"). For example, confidentiality provisions routinely contained in settlement agreements concerning civil litigation (concerning torts committed by corporate actors) also serve to prevent similarly situated (wronged) individuals from becoming aware of their remedies. Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information about Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 676 n.51 (2001) (finding that confidentiality provisions are routinely included in settlement agreements because "[d]efendants fear that disclosure of settlement information will create a sense of entitlement among potential plaintiffs and therefore encourage lawsuits by people who otherwise would not feel they had suffered a harm, or would not expect money from the defendant for their harm"); Alison Lothes, Comment, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 474-75 (2005) (suggesting that confidentiality provisions are routinely included because "quantitative publication of settlement amounts encourages frivolous lawsuits, imposing costs on the public and defendants and primarily benefiting fraudulent plaintiffs"). Conversely, class actions litigated in public may permit similarly situated individuals to become aware that they have been wronged or otherwise have valid claims or defenses. See Joshua D. Blank & Eric A. Zacks, *Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation*, 110 PENN ST. L. REV. 1, 10-14 (2005) (discussing generally the benefits to the poor of class action litigation).

104. See Sternlight, *supra* note 16, at 1674 (noting that arbitration's "secret proceedings inherently threaten a society's ability to enforce its norms"); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 115 (2004) ("The problem of pluralistic ignorance and the motive for group coherence distorts many social norms and would seem to have significant implications for policy and law. . . . It is also behind the pervasive, dysfunctional classroom dynamic in which students do not ask questions because they assume that others' silence suggests they are themselves alone in their ignorance, thus contributing to the silence that encourages others to do the same."). In this Article, I am not seeking to describe how norms should be enforced but instead to describe how norms can be portrayed falsely to the benefit of one party.

challenges or unfavorable decisions confidential from others who might be able to utilize such information to realize their own rights.

The resulting conforming behavior is related to the possibility of stigma, which is the “public mark” or distinction suggesting that a person is not socially acceptable.¹⁰⁵ If the community characterizes individuals that breach their contract as “deadbeats,” perhaps others will be accordingly deterred from acting in such a way to avoid the shame associated with such a label.¹⁰⁶ Thus, individuals anticipate the “punishment” of shame (arising from possible future conduct) based on prior experiences with similar actions or events where shame was experienced.¹⁰⁷

Arbitration provisions also may encourage individuals to anticipate being stigmatized, particularly where such individuals are unable to perceive the actions of similarly situated individuals. Similarly, in the mortgage context, “[t]he stigma against default apparently remains robust,” which deters strategic default.¹⁰⁸ The deterrent effect of shame and contractual features that reinforce a social norm of contract compliance may, in fact, explain why few individuals breach contracts where the financial advantages of doing so outweigh the financial disadvantages.¹⁰⁹ Thus, people generally strategically default on their mortgages only when their shame is “overwhelmed” by their economic

105. Lewis, *supra* note 26, at 126. Lewis notes that “[f]rom the point of view of standards, it is quite clear that the stigma that an individual possesses represents a deviation from the accepted standards of the society; this deviation may be in appearance, in behavior, or in conduct.” *Id.* at 127.

106. See Tetlock, *supra* note 44, at 458 (“The cognitive research program tells us that people use few items of information in making up their minds; the social contingency model tells us that subjective estimates of the reactions of those to whom they are accountable will be prominent among those few items of information considered.”).

107. Tangney et al., *supra* note 25, at 21–22. Lewis notes that “[s]tigma reflects the idea of difference and how difference shames us and those we know” and feeling stigmatized arises “through one’s interactions with other people or through one’s anticipation of interactions with other people.” Lewis, *supra* note 26, at 129, 131.

108. White, *supra* note 53, at 1288. White describes how “homeowners who strategically default sometimes report being shunned by others.” *Id.* Similarly, defaulters typically are reluctant to share information regarding their defaults to anyone other than close associates or neighbors in a similar situation. *Id.* at 1290.

109. See White, *supra* note 8, at 971–72 (describing “underwater” homeowners who continue to make their mortgage payments despite having no prospect of regaining their losses).

or other circumstances.¹¹⁰ Even though individual homeowners often would be better off by “walking away” from their home mortgages, individuals are induced in part by a feeling of shame (or anticipatory feeling of shame) to continue paying their mortgage or risk being labeled a “deadbeat.”¹¹¹ As long as the contract (in addition to other social communication) continues to suggest “personal responsibility” and moral promises, then individuals may feel anticipatory shame upon contemplating a breach of or contesting the contract.¹¹² This suggests that, notwithstanding the contractual ability to breach one’s mortgage, contract preparers and others have been able to maintain or at least reinforce moral norms about the sanctity of promise.¹¹³

By contrast, if the “stigma” is removed from a particular type of behavior, one could expect an increase in that behavior.¹¹⁴ For example, homeowners were found to act “strategically” in response to a lender’s announcement of a new loan modification program.¹¹⁵ Following the lender’s announcement, there was a significant increase in the number of defaults by individuals who did not need to default for financial distress reasons and who otherwise would not have been expected to default.¹¹⁶ One explanation for this behavior could be that the lender removed the stigma associated with defaulting on one’s home loan. By acknowledging its willingness to accommodate those stuck in

110. White, *supra* note 53, at 1289 (describing how homeowners may strategically default “not because [they are] shameless but because circumstances overwhelm their shame, driving them to make decisions that they would not have made otherwise”).

111. White, *supra* note 8, at 971–72, 999 (suggesting that “most underwater homeowners choose not to default as a result of two emotional forces: (1) desire to avoid the shame or guilt associated with foreclosure; and (2) fear over the perceived consequences of foreclosure”).

112. *Id.* at 1007.

113. This is not to say that the contract preparation is the exclusive mode of reinforcing such norms. Lenders, government actors, and others all have undertaken numerous actions, at all stages of the contractual relationship, to communicate and reinforce the notion that one should pay one’s mortgage no matter what the circumstances. *Id.* at 997 (“[T]he predominant message of political, social, and economic institutions in the United States has functioned to cultivate fear, shame, and guilt in those who might contemplate foreclosure.”).

114. See Lewis, *supra* note 26, at 127 (discussing how stigma “represents a deviation from the accepted standards of the society; this deviation may be in appearance, in behavior, or in conduct”). Lewis also suggests that individuals “judge whether or not their behavior meets or does not meet these standards.” *Id.*

115. Christopher Mayer et al., *Mortgage Modification and Strategic Behavior: Evidence from a Legal Settlement with Countrywide* 12, 31 (Columbia Univ. Ctr. for Law & Econ. Studies, Working Paper No. 404, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1836451.

116. *Id.* at 31, 34.

uneconomical loans (and presumably acknowledging, if implicitly, the lender's blame, in part, for the borrower's situation), the lender may have signaled to borrowers that it was no longer shameful to default upon one's mortgage.

Consequently, aggressive individuals can be pacified and silenced (through settlement, waivers of contractual rights, or the confidentiality of arbitration proceedings), and passive individuals can be encouraged to defer to the status quo of silence and contractual deference.¹¹⁷ For example, with respect to consumer transactions, sellers may renegotiate a contract after the fact in order to avoid adverse publicity associated with unhappy consumers or a one-sided contract.¹¹⁸ It has been suggested that assertive consumers will be rewarded (either by a waiver of the contract's terms or otherwise), while "aggrieved consumers who do not display persistence and assertiveness will bear losses."¹¹⁹ In other words, sellers are incentivized to induce passivity on the part of consumers with respect to "negative" contract actions.¹²⁰ Thus, at the point of *ex post* contracting behavior (and the contemplation of a breach), the other contracting party likely is faced with a written

117. Becher & Unger-Aviram, *supra* note 7, at 207 (describing how, in such instances, "all consumers will be offered biased, unfair terms, and only assertive marginal consumers will get their way, after negotiating their [standard form contracts]"). Accordingly, "whereas it is basically true that contracting parties do not negotiate [standard form contracts] *ex ante*, actual contracting around the [standard form contract's] content is more likely to take place at the *ex post* stage." *Id.* at 208. Interestingly, contract preparers may be unable to induce other contract parties not to read their contract and simply defer to the existing relationship. At least in the standard form contract context, the legal jargon and visual features (such as font size) of a written contract were not important factors in determining whether a consumer would read the contract after the fact. *Id.* at 225. That is not to say, however, that the presentation and features of the written contract would not affect the actual contracting behavior of the parties after they read the contract. *Id.* at 226.

118. *Id.* at 207 (noting that "sellers fear undermining their own reputations by insisting on the language of one-sided contracts").

119. *Id.* This practice is called "ex post discrimination." *Id.*

120. Wilkinson-Ryan & Baron, *supra* note 11, at 422 ("If parties think that a contract is a promise to perform, and not simply to confer a benefit as valuable as performance, they may be less likely to breach at all."). Indeed, only certain types of individuals may be inclined to challenge a contract. Becher and Unger-Aviram note the argument that "people, and especially women, fear the negotiation procedure" associated with challenging an existing contract. Becher & Unger-Aviram, *supra* note 7, at 225 n.59. If so, then such individuals may forego reading the contract and attempting to renegotiate, even if such activities would be beneficial. *Id.*; see also *id.* at 206 (describing the two main reasons that consumers may read contracts after formation as to develop familiarity with rights and obligations generally (so as to be able conform conduct accordingly), as well as to develop a strategy to modify the contract after it has been executed).

contract that contains unfavorable substantive terms in the event of a breach, and such terms are likely presented in a manner designed to deter breach.

From the contract preparer's standpoint, then, the actual results in arbitration may be less important than the social messaging and deterrence that occurs from the silence of all such proceedings.¹²¹ One's inability to perceive that contracts are being challenged and could and should be challenged suggests that contract preparers can overreach. Contract preparers are also then permitted to deal with similarly situated individuals differently in order to maintain this silence.

III. COGNITIVE LIMITATIONS AND CONTRACT DESIGN

In addition to triggering particular negative emotions such as shame, contract preparers may prepare contracts designed to exploit particular cognitive biases and judgment heuristics of the other contract party with respect to post-formation behavior. After identifying particular biases and heuristics, this Part will examine particular contract provisions that may anticipate and manipulate such biases and heuristics.

Individual contracting parties' contracting behavior at the time of contract formation often does not fit within the standard rational-actor model, which may be attributed to the "limits of cognition," including "limits based on bounded rationality and rational ignorance, limits based on disposition, and limits based on defective capability."¹²² Previous critiques of the rational-actor model with respect to individual contracting behavior generally focus on the period during which the contract is executed or negotiated.¹²³ This Article examines these same cognitive limitations in the context of individual contracting behavior *after* the contract has been executed, particularly with respect to decisions concerning whether to breach or challenge a contract.

121. See Sternlight, *supra* note 16, at 1672 (concluding that "[p]rivate proceedings and private awards offer no opportunity for non-disputants to learn from what happened").

122. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213 (1995); see also Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998) (describing limits on individual cognitive abilities and the coping mechanisms individuals use that may cause behavior to "differ[] in systematic ways from that predicted by the standard economic model of unbounded rationality").

123. See, e.g., Bar-Gill, *supra* note 9, at 1107-08 (discussing homeowner contracting behavior at the time of home mortgage contract execution); Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 374 (discussing investor contracting behavior at the time of investment contract execution).

Moreover, if such behavior suggests that individuals are not acting completely rationally at such times, then one should expect contract preparers to anticipate such irrational behavior and coordinate their contracts to encourage particular decisions.

A. Information Gathering Strategies

Individuals often do not act completely rational due to the unavailability of information or incomplete information processing.¹²⁴ This is because individuals are concerned with finding merely “satisfactory” rather than “optimal” decisions.¹²⁵ Accordingly, individuals may engage in limited information searches (perhaps based on the relative perceived costs and benefits of such a search) or utilize limited decision-making processes (perhaps relying on “rule-of-thumb heuristics”).¹²⁶ For example, the amount of information gathering required in order to evaluate or negotiate a liquidated damages provision and navigate the “complexity of determining the application of a liquidated damages provision to every possible breach scenario is often likely to exceed actors’ calculating capabilities.”¹²⁷

With respect to the decision to breach a contract after the contract has been executed, one may similarly expect individuals to do a limited or no search with respect to similarly situated individuals (e.g., “What have others done in my situation?” or “Have others ‘gotten away’ with a breach?”). This may result in a perception that few other individuals in a similar situation have chosen to breach or have “gotten away” with a breach, thus indicating that the appropriate course of action is to comply with the contract.

124. Eisenberg, *supra* note 122, at 214 (“Accordingly, human rationality is normally bounded by limited information and limited information processing.”); *see also* Cass R. Sunstein, *Moral Heuristics* 2–3 (U. Chi. John M. Olin L. & Econ. Working Paper Series, No. 180, 2003), available at http://www.law.uchicago.edu/files/files/180.crs_moral.pdf (arguing “that moral heuristics play a pervasive role in moral, political, and legal judgments, and that they produce serious mistakes. . . . And if good heuristics misfire in the factual domain, they will inevitably do so in the domains of morality and law as well”).

125. Eisenberg, *supra* note 122, at 214.

126. *Id.* at 215 (describing “rule-of-thumb heuristics (decision rules)” such as following or imitating a neighbor’s practice); Chris Guthrie, *Principles of Influence in Negotiation*, 87 *MARQ. L. REV.* 829, 830 (2004) (discussing “Cialdini’s principles of influence [as operating] like these heuristics and biases (though they are ‘motivational’ rather than ‘cognitive’ in origin). When deciding whether to comply with a request, individuals generally look for simple cues. . . .” (citing ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* (4th ed. 2001))).

127. Eisenberg, *supra* note 122, at 227.

This Article suggests that contract preparers anticipate such “bounded rationality” with respect to *ex post* decision-making and prepare contracts to exploit individual limits on information gathering and processing.¹²⁸ Thus, the confidentiality of arbitration proceedings (compelled by the arbitration provision in the contract) may result in less information about similarly situated individuals being available when a contracting party is determining whether to breach or challenge a contract.¹²⁹ By obfuscating the existence of contract disputes, contract preparers may encourage incorrect perceptions by the other contract party that her “neighbors” do not breach or challenge contracts, even if in fact they do (but are “hidden” from view because of arbitration’s confidentiality).¹³⁰ Thus, if an unenforceable contract provision is included in a contract but is never challenged in public, an individual contracting party is unable (even if desired) to engage in “optimal” substantive decision-making, and given the proclivity for merely “satisfactory” substantive decision-making, the contracting party may incorrectly determine that the “satisfactory” decision is not to challenge the provision in question.¹³¹ For example, people often believe that “the parties [are] morally bound by the specific language of the contract, even when contract law says that the exculpatory clause is unenforceable or that the promisor can pay rather than perform.”¹³² This belief may be influenced by the lack of knowledge regarding whether such provisions can be or are challenged.¹³³ Thus, contract preparers may purposefully conceal or fail to disclose information to

128. Hanson & Kysar, *supra* note 3, at 635, 691 (arguing that “the presence of unyielding cognitive biases makes individual decisionmakers susceptible to manipulation by those able to influence the context in which decisions are made. . . . [W]e believe that market outcomes frequently will be heavily influenced, if not determined, by the ability of one actor to control the format of information, the presentation of choices, and, in general, the setting within which market transactions occur”).

129. See Zacks, *supra* note 15, at 1497.

130. See *id.* at 1497–98.

131. Eisenberg, *supra* note 122, at 214 (describing the difference between “optimal substantive decisions” and “satisfactory substantive decisions” (emphasis omitted)).

132. Wilkinson-Ryan & Baron, *supra* note 11, at 423.

133. See *id.* at 422 (“[I]ndividuals who are not familiar with the rule of expectation damages . . . believe that they are legally (and morally) obligated to perform. Researchers have found that people believe that exculpatory clauses in contracts mean that they cannot seek compensation.” (citing Stolle & Slain, *supra* note 77, at 91)).

exploit an individual's already limited information gathering and processing.¹³⁴

B. Framing

Individuals also utilize judgment heuristics that deviate from a model of rationality and “yield systematic errors.”¹³⁵ For example, individuals' choices may also be influenced by the framing of the outcomes arising from each choice.¹³⁶ If an option is framed in terms of possible gains, individuals prefer the “sure gain” of a lower value to the “chance” with a higher value, while if an option is framed in terms of possible losses, individuals prefer the “chance of loss” with a higher value rather than the “sure loss” of a lower value.¹³⁷ In other words, “most people are risk-averse when contemplating gains, but risk-preferring when contemplating losses.”¹³⁸ Individuals also suffer more regret from a loss suffered than the happiness (or utility) enjoyed from an equivalent benefit.¹³⁹ Consequently, the “anticipation of regret over actions that yield disappointing results is usually stronger than the anticipation of rejoicing over actions that yield desirable results.”¹⁴⁰

Such judgment heuristics (utilized by non-drafting parties) may explain why many “fee-shifting” provisions are drafted as they are. Fee-shifting provisions typically provide that in the event of a dispute regarding the contract, the losing party will be obligated to pay the winning party's costs and fees associated with litigating the dispute.¹⁴¹ A contract preparer, in order to frame the contract in the most

134. Hanson & Kysar, *supra* note 3, at 635 (“Once one accepts that individuals systematically behave in nonrational ways, it follows from an economic perspective that others will exploit those tendencies for gain.”).

135. Eisenberg, *supra* note 122, at 218.

136. *Id.* at 218–19 (describing the failure of “invariance,” which suggested that “a decisionmaker's preference between two options should not depend on how a choice is characterized and presented”).

137. *Id.* at 219.

138. *Id.*

139. Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1620 (1998) (“Loss aversion theory posits that the utility consequences to individuals of suffering a ‘loss’ from a reference point will be greater than an equivalent ‘gain’ from the same reference point. If losses loom larger than gains, it follows logically that anticipated regret would loom larger than anticipated rejoicing.” (footnote omitted)).

140. *Id.* at 1619.

141. Nicholas N. Nierengarten, *Fee-Shifting: The Recovery of In-House Legal Fees*, 39 WM. MITCHELL L. REV. 227, 227–28 (2012).

advantageous manner, could include a provision that does not indicate the “possibility” of the other party winning but instead include a declarative statement to the effect that: “If you breach this contract, you will be responsible for all of the costs and fees we incur in connection with enforcing this contract.”

By framing the possibility of paying for the other party’s costs and fees as a guaranteed loss rather than a chance of loss, contract preparers may be able to deter more breaches.¹⁴² If the fees were portrayed as being conditional, then perhaps a party would choose the “riskier” option of a breach that possibly would result in damages (the lost amount due under the contract), plus possible fees and costs. Additionally, an arbitration provision that maintains the confidentiality of the actual results of any similar disputes and the frequency of such disputes may distort the perception of whether such fees will be and are collected.

If, on the other hand, the provision provided that: “If there is a contract dispute, the losing party will be required to pay the winning party’s costs and fees incurred in connection with the dispute,” then the other contracting party may consider the possible payment of the other party’s fees and costs as a contingency. The provision does not include or describe a guarantee that such fees and costs would be paid, but instead provides for such payment only if the other contract party was the losing party in litigation. If, when deciding whether to breach a contract, one will be deciding between a sure loss (complying with the contract) and a possible future loss (possibly being forced to pay for breaching the contract, including the other party’s costs and fees), then the contracting party may choose to breach (as risk-preferring when dealing with potential losses).¹⁴³ If the latter is characterized in the contract not as a possibility but instead as a certainty, then the fee-shifting (and indemnity) provisions may deter an individual from

142. Hanson & Kysar, *supra* note 3, at 685 (“Whether something is coded as a loss, thus raising the possibility of loss aversion, depends on how it is *framed*. In this respect, one may usefully conceive of framing effects as a mechanism for eliciting other cognitive biases—in other words, a mechanism for manipulating individual perceptions and decisions.”).

143. See Eisenberg, *supra* note 122, at 219.

breaching.¹⁴⁴ The framing of the contract, then, may have implications beyond representing the bargain at the time of formation.¹⁴⁵

Contracts framed in terms of a loss (as opposed to a gain) can also lead to increased efforts on the part of the other party.¹⁴⁶ For example, an employment contract that characterizes compensation as a wage plus a contingent bonus (if certain thresholds are met) may induce less effort than an employment contract that describes compensation as a wage less a deduction (if certain thresholds are not met), even though the compensation is the same under each contract.¹⁴⁷ It may be, then, “the loss frame communicates a stronger sense of the default expectation of the party offering the contract.”¹⁴⁸ Thus, framing contingent amounts as a loss appears to “threaten a ‘punishment,’” suggesting to the individual that “expectations to meet the threshold are higher under the loss frame than under the gain frame.”¹⁴⁹

This may explain why contract preparers may include late fees or termination fees rather than bonuses (presumably as a reduction to the required payment or credited towards the next payment) for paying on time or not terminating before a certain date. In each case, the total amount to be paid under a contract is the same, but contract preparers can expect “better” performance from the other party if all “extra” amounts under the contract are characterized as penalties or losses.¹⁵⁰ The expectation, then, under the loss-framing contract, is paying “less” (and avoiding the late fees).¹⁵¹ This is a different scenario, of course,

144. *See id.*

145. *Id.* at 220 (describing how “failure of invariance is both pervasive and robust” (quoting Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341, 343 (1984))).

146. Richard R. W. Brooks et al., *Framing Contracts: Why Loss Framing Increases Effort*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 62, 63 (2012).

147. *Id.* The fixed wage under the second contract would be higher by the amount of the possible deduction and the deduction would be equal to the possible bonus under the first contract.

148. *Id.* at 74. Brooks et al. conclude that the loss frame sets an expectation “that cognitively induces subjects to invest more effort.” *Id.* at 81.

149. *Id.* at 65. Brooks et al. suggest that this makes sense given that “a reward is often viewed as a kind of recognition for voluntary overperformance, while a punishment is more akin to a sanction for not meeting the client’s expectation.” *Id.*

150. *See id.* at 81 (citing evidence suggesting that “framing contracts in a manner that makes ‘losses’ more salient than ‘gains’ leads to greater effort” (citing Tanjim Hossain & John A. List, *The Behavioralist Visits the Factory: Increasing Productivity Using Simple Framing Manipulations*, 58 MGMT. SCI. 2151 (2012))).

151. *See id.*

than a contract in which a concrete “bonus” is possible, but one would expect the same effect to be present.¹⁵² Contract preparers invite the conclusion that performance is expected, that timely performance is expected, and that failure to meet these expectations will be sanctioned. Characterized as such in the contracts, one would expect higher compliance rates than if the contracts required higher payments but promised a “reward” or “bonus” for performing as and when required under the contract.

C. Regret Theory

Individuals’ behavior often is influenced by the desire to avoid regret, which can lead to an individual maintaining current behavior or avoiding any act that could lead to regret.¹⁵³ Individuals typically feel more regret from a loss arising from engaging in a new activity than from a loss arising from being passive.¹⁵⁴ Contracting parties accordingly may rather suffer a loss from complying with an unfavorable contract than suffer an equivalent loss by challenging or breaching the contract. Thus, individuals may be inclined to continue performing under unfavorable contracts for fear of the consequences, however unlikely, that may arise if the individual breached or challenged the contract. This tendency also can be exploited by contract preparer, who can emphasize the losses and costs (e.g., late fees, litigation costs, and

152. *Id.* at 65–66 (describing the possible endowment effect associated with the description of a contingent “bonus”).

153. Tetlock, *supra* note 44, at 472 (describing how “people tend to avoid decisions in which they could appear after the fact to have made the wrong choice, even if in advance the decision appeared correct given the information available at the time”); *see also* Zacks, *supra* note 9, at 176 (“The status quo bias describes the tendency of individuals to prefer the status quo (the contract as presented) even if the status quo does not efficiently allocate rights . . .”).

154. Tetlock, *supra* note 44, at 472 (“[P]eople feel greater regret for bad outcomes that are the result of new actions than for similar outcomes resulting from inaction.”); Korobkin, *supra* note 139, at 1613 (“Substantial experimental evidence suggests that individuals predict that greater regret will follow an action that leads to an undesirable result than a failure to act that leads to the same undesirable result.”); *see also* Chris Guthrie, *Better Settle than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 72 (positing “that litigants seek to make litigation decisions that minimize the likelihood they will experience postlitigation regret”); Zacks, *supra* note 15, at 1476 (arguing that “[t]he tendency to experience more regret from negative situations resulting from actions an individual takes rather than inaction also may explain [credit card holders’] reluctance to negotiate credit card agreements”); Zeelenberg, *supra* note 29, at 329 (explaining how “we may avoid deciding as a consequence of anticipated regret . . . simply in order to avoid making the wrong decision”).

foreclosure) associated with not choosing the “default” of complying with the contract.¹⁵⁵

If people are reluctant to breach or challenge a contract because of a preference for ending up in an equally bad situation from inaction (complying with the contract) rather than action (breaching or challenging the contract), then contract preparers should be incentivized to exploit this tendency.¹⁵⁶ For example, under many home mortgage contracts, a defaulting homeowner will be responsible for any deficiency between the amount for which the home sells in foreclosure and the loan amount, plus fees and costs.¹⁵⁷ Most lenders, however, do not seek to recover such deficiency amounts, presumably because of the cost or unlikelihood (due to the debtor’s inability to pay) of collection.¹⁵⁸ The contractual right to collect this deficiency nevertheless may serve as a deterrent to those contemplating a breach because people anticipate the regret that would be experienced if such deficiency were enforced.¹⁵⁹

In other words, the prospect of suffering the losses arising from a breach (the deficiency judgment, plus costs and fees) may deter someone from breaching, even if the likelihood of such losses being

155. Korobkin, *supra* note 139, at 1616 (“The link between norm theory and the tendency of individuals to favor choices correlated with inaction over action is the prediction that actions are more mutable [more abnormal or exceptional] than failures [to] act” and thus more “likely to be perceived as the cause of the negative event.”). Korobkin also describes how people associate additional personal control with action as compared with inaction, and “[t]he thought that something bad happened when something good could have happened instead is likely to be more distressing when the actor also thinks he could have done something to avoid the negative outcome.” *Id.* at 1617. This may also explain the high costs of arbitration, which can act as an additional deterrent to defying the contract. *See, e.g., Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 371 (N.C. 2008) (discussing the costs associated with arbitration that are not incurred in regular litigation proceedings).

156. *See* Korobkin, *supra* note 139, at 1617.

157. Jay Adkisson, *Foreclosure, Deficiency Judgments and the Perils of Anti-Deficiency Statutes*, FORBES.COM (June 24, 2012, 12:49 AM), <http://www.forbes.com/sites/jayadkisson/2012/06/24/foreclosure-deficiency-judgments-and-the-perils-of-anti-deficient-statutes/>; *see also* Bar-Gill, *supra* note 9, at 1105 (noting that foreclosure fees and dispute resolution fees can be significant).

158. Luigi Guiso et al., *Moral and Social Constraints to Strategic Default on Mortgages 3* (Nat’l Bureau of Econ. Res., Working Paper No. 15145, 2009), *available at* <http://www.nber.org/papers/w15145> (noting that “the cost of legal procedures is sufficiently high that most lenders are unwilling to sue a defaulted borrower unless he has significant wealth besides the home”); Bar-Gill, *supra* note 9, at 1135–37 (noting the tremendous losses arising for lenders in the event of a foreclosure).

159. Tetlock, *supra* note 44, at 470–71 (“Accountable decision-makers are more likely to anticipate how difficult it would be to justify choosing an option that led to a worst-case outcome. One would stand accused of recklessness.”).

realized is small.¹⁶⁰ The severity of a contractual outcome arising from breach, rather than its probability, may prove vital to a contract preparer's ability to maintain contract compliance.¹⁶¹ The prospect of a severely negative outcome may consequently impact the experience of a contracting party's anticipatory regret and influence her contracting behavior.¹⁶²

D. Social Proof

Individuals tend to rely on social proof when encountering a new or uncertain situation and when there are perceived similarities between themselves and others who have encountered the same situation.¹⁶³ Most individuals presumably do not (consciously) breach many of their contracts, and material contract breaches are perhaps even more rare (such as deciding whether to default on a home mortgage), so individual contracting parties may be expected to rely on social proof when faced with such a novel situation.

Similarly, many individuals would likely perceive similarities between themselves and other individual contracting parties with respect to most consumer transactions. If one's neighbors do not default on a home mortgage, this may be fairly convincing. In order to take advantage of social proof, the contract preparer must reinforce the social norms regarding compliance with a contract's terms as written (and not contesting an unfavorable contract).¹⁶⁴ Social conformity can be reinforced through the silence of litigation disputes (through the confidentiality of arbitration) or negotiations and confidential settlements with the few individuals who do challenge a contract.¹⁶⁵ If these social norms are not perceived by the other contracting party, or

160. *But see* Bar-Gill, *supra* note 9, at 1127 (suggesting that lenders should want to hide fees in order to induce an "imperfectly rational borrower . . . to underestimate the total cost of the loan").

161. *See* Prentice, *supra* note 123, at 362–63; *see also, e.g.*, White, *supra* note 8, at 972.

162. *See, e.g.*, White, *supra* note 8, at 972.

163. Guthrie, *supra* note 126, at 831–32; *see also supra* text accompanying note 17.

164. ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 116 (rev. ed. 2007) (describing how our perception of the behavior of others in a particular situation influences our belief about what the proper behavior is); HERBERT W. SIMONS & JEAN G. JONES, *PERSUASION IN SOCIETY* 215 (2d ed. 2011) (defining as pluralistic ignorance "[t]he assumption that individuals make that 'because nobody is concerned, nothing is wrong'"); Scheff, *supra* note 23, at 396 (describing how "[o]ur thoughts and perceptions of social expectations only set the stage for social control"). For more information, see *supra* Parts II.B and C for a discussion of social standards and their relationship to inducing shame.

165. *See supra* Part II.D.

are weakened through other individuals who do not abide by them, then the contract preparer risks additional losses on his contracts through strategic defaults and other litigation disputes.

Empirical evidence with respect to strategic defaults of home mortgages supports the above description. For example, “homeowners who are personally acquainted with someone who has strategically defaulted are much more likely to default than those who are not.”¹⁶⁶ This suggests that lenders should be motivated to keep the occurrence of strategic default and related foreclosure proceedings as confidential as possible. Similarly, homeowners that did not share the moral belief that default is immoral were more likely to default strategically.¹⁶⁷ As discussed above, until 2004, most lenders included arbitration provisions in their subprime mortgages, which could have had the muting effect with respect to the occurrence of breach.¹⁶⁸ Of course, the confidentiality of arbitration does not preclude the communication of strategic default by one individual to another, but it could dampen the general public’s awareness of such acts. In fact, most Americans believe that defaulting on one’s mortgage is immoral.¹⁶⁹

It may be easier to keep the incidence of breaches and strategic defaults (or other contractual challenges) “quiet” with respect to contracts that do not include property as significant and visible as a house. With respect to breaching one’s home mortgage, eventually the breach will come to light once the house is sold after foreclosure proceedings commence. With respect to other contracts, it may be impossible for others to detect that one breached her contract and was forced to pay (or not forced to pay) damages as a result.

166. White, *supra* note 53, at 1285; Luigi Zingales, *The Menace of Strategic Default*, 20 CITY J. 47, 50 (2010) (“Perceived social norms also seem to affect the propensity to walk away [from one’s mortgage]: knowing somebody who defaulted strategically, or living in an area where many people have done so, makes a person much more likely to declare his willingness to follow suit.”); Guiso et al., *supra* note 158, at 21 (“The most important barriers to strategic default seem to be moral and social.”).

167. White, *supra* note 53, at 1285.

168. See *supra* note 98 and accompanying text.

169. White, *supra* note 53, at 1287–88 (noting a 2009 study that “eighty-one percent of Americans believed that it was morally wrong to default on one’s mortgage” (citing Guiso et al., *supra* note 158, at 10, 21)). White cites a similar study finding that “eighty-five percent of Americans believed it was morally wrong even if one faced financial difficulties . . . that made it difficult to pay one’s mortgage.” *Id.* at 1288 (citing News Release, Fannie Mae, New Nationwide Survey Provides Comprehensive Look at Sentiment Toward Housing (Apr. 6, 2010), available at <http://www.fanniemae.com/portal/about-us/media/corporate-news/2010/4989.html>).

E. Authority

Contract preparers can also utilize the influence of authority or the appearance of authority to induce the other contract parties to comply with the contract.¹⁷⁰ Contracts can appear authoritative through their official and legal appearance.¹⁷¹ For example, the mere inclusion of exculpatory clauses, even if unenforceable, “may deter consumers from pursuing their rights and seeking compensation.”¹⁷² Similarly, the contract preparer may perhaps appear as an authority or powerful figure in the contract through the use of a defined term (“Bank,” “Employer,” or “Company”), while the other party is diminished similarly through a particular label (“Borrower,” “Employee,” the party’s last name, or “Customer”).¹⁷³ The labels inform as to the relative authority of the two parties: the “Bank” is more of an authority than the “Borrower.”¹⁷⁴ The “Borrower” may not, then, be inclined to challenge the “Bank’s” authority to charge particular fees or to consider breaching the contract. Similarly, the use of all capital letters or boldface type with respect to particular contractual disclaimers or waivers may induce the other contracting party to believe that she is in a subordinate position and is, to some extent, being yelled at or scolded.¹⁷⁵

Cognitive biases, reinforced by anticipatory regret, lead individuals “to imbue the form contract that they are presented by form givers with a presumption of legitimacy and fairness that they are hesitant to challenge.”¹⁷⁶ This Article extends this argument to post-formation

170. SIMONS & JONES, *supra* note 164, at 138–40 (describing examples in which apparent authority figures were able to induce deference or particular behavior).

171. Prentice, *supra* note 123, at 372.

172. Becher & Unger-Aviram, *supra* 7, at 207. Becher and Unger-Aviram rely on the study performed by Stolle and Slain, where “the presence of exculpatory language in form contracts does appear to have some deterrent effect on consumers’ propensity to seek compensation.” Stolle & Slain, *supra* note 77, at 92; Becher & Unger-Aviram, *supra* 7, at 207 & n.27.

173. See Prentice, *supra* note 123, at 372 (asserting that contracting parties will be unlikely to question the terms of a form contract because a “dense form contract has an ‘authoritative legality’ about it that induces deference”).

174. See *id.*

175. See Laura Schocker, *Why Do Capital Letters So Annoy Us?*, BBC NEWS MAG., Sept. 3, 2009, <http://news.bbc.co.uk/2/hi/8234637.stm> (explaining that language written in capital letters is commonly thought to connote screaming or yelling).

176. See Prentice, *supra* note 123, at 374. Prentice suggests, “[T]o the extent that a preprinted form contract appears to represent the normal condition (the contract that everyone else is signing), people will anticipate that they would suffer greater regret from adverse consequences stemming from an abnormal situation (forcing a rewriting of the

contract behavior: to the extent that compliance with the contract (as indicated by the contract, the behavior of others, social norms, and otherwise) appears to represent the normal condition, people will anticipate that they would suffer greater regret from adverse consequences stemming from an abnormal situation (breaching or challenging the contract) than those arising from a normal situation (simply complying with the contract as written).

F. Attribution Theory

The above descriptions of human decision-making processes, biases, and heuristics neatly tie with the idea of attribution-based theories, which posit that individuals determine blame for a particular outcome or behavior based on whether the perceived cause of the outcome or behavior was external or internal.¹⁷⁷ If a person believes that she caused a particular outcome (or that it is something about her or related to her that caused the event), then she will feel a higher degree of shame.¹⁷⁸ One's perception of causation is based on the outcome controllability.¹⁷⁹

If one believes that she could control whether a particular outcome occurred or not, then she will believe that she is responsible for the outcome (and feel shame under certain social circumstances).¹⁸⁰ Perceptions about responsibility thus trigger conclusions, both

contract) than those arising from a normal situation (simply accepting the form presented)." *Id.* at 377.

177. Daniel T. Gilbert & Patrick S. Malone, *The Correspondence Bias*, 117 PSYCHOL. BULL. 21, 21–22 (1995) (noting that attribution theories are all "grounded in a common metaphor that construes the human skin as a special boundary that separates one set of 'causal forces' from another"); see also MARK R. LEARY, *THE CURSE OF THE SELF: SELF-AWARENESS, EGOTISM, AND THE QUALITY OF HUMAN LIFE* 96 (2004) (describing how "[f]ollowing a failure, trauma, or other undesirable event, people may engage in *behavioral self-blame*, in which they attribute the event to a behavioral mistake or miscalculation on their part, they may engage in *characterological self-blame* in which they attribute the event to some relatively unchangeable aspect of themselves, or they may blame external factors such as other people or society at large"); Tracy & Robins, *supra* note 22, at 12 (describing how "self-conscious emotions occur when individuals attribute the eliciting event to internal causes").

178. Lewis, *supra* note 26, at 127; Tracy & Robins, *supra* note 22, at 12 (differentiating between "the narrow sense of attribution theory (e.g., 'Did I cause the event?')" with the "more general sense of 'Is something about me or related to me the cause of the event?'").

179. Lewis, *supra* note 26, at 128.

180. See *id.* at 127 (describing how people blame themselves or are blamed by others for various health conditions based on perceptions about whether the condition could have been avoided); Hanson & Kysar, *supra* note 3, at 736 (describing that consumer responses to product malfunctions depend on whether the manufacturer or consumer is the perceived cause of the failure and whether such cause was perceived to be controllable).

individual and social, about whether one should be shamed or stigmatized for a particular condition or outcome.¹⁸¹ These perceptions, in turn, can be affected by “cultural variation in causal attribution.”¹⁸²

The goal of the contract preparer, then, is to convince the non-drafting party that she is the cause of the “problem” herself rather than the contract preparer and to reinforce a cultural norm of individual responsibility for one’s actions.¹⁸³ Contract preparers accordingly are incentivized to prepare the contracts to convey, to the other contracting party and adjudicators (as well as the community at large), the voluntariness, objectivity, and fairness of the consent given by the other contracting party to the contract.¹⁸⁴ If an individual either perceives that others will feel a particular way about her or actually believes that she herself is to blame for being in a particular contracting situation, then she will be deterred from acting in a manner likely to lead to an experience of shame.¹⁸⁵

For example, the inclusion of multiple signature blocks or disclaimers in all capital letters may suggest to the contracting party that the adjudicative party will be more likely to blame and shame her if she breaches than the contract preparer.¹⁸⁶ Such features also could convince the other party to feel “silly” for not knowing what terms are

181. Lewis, *supra* note 26, at 127 (concluding that “[t]he degree to which stigmatized persons can blame themselves or are blamed by others for their condition reflects their degree of shame”); Tracy & Robins, *supra* note 22, at 12 (noting that “studies have shown that internal attributions for failure tend to produce guilt and shame”).

182. Goetz & Keltner, *supra* note 44, at 166.

183. *Id.* (noting how “[j]udgments of agency and responsibility are central to moral judgment, as well as the occurrence of self-conscious emotions” (internal citation omitted)). Goetz and Keltner describe how “[j]udgments of agency and responsibility also vary dramatically across different cultures,” again reinforcing the premise that contract preparers have a vested interest in how the agency and responsibility of the other contracting parties are perceived by both the other contracting parties and other contracting parties themselves. *Id.*; see also Zacks, *supra* note 9, at 199 (discussing the incentives for contract preparers to depict within the contract the voluntariness and other indicators of agency and responsibility so that adjudicators will blame or otherwise feel negatively towards the other contracting party).

184. Lewis, *supra* note 26, at 128 (noting how “social rules involve not only standards and rules but also societal beliefs about controllability”). Lewis importantly notes how “[r]esponsibility can change as a function of new knowledge and information or a change in social values.” *Id.* Accordingly, this Article argues that contract preparers have a vested interest in maintaining the status quo with respect to contracting culture.

185. *Id.* at 127 (concluding that “[f]or a person to fear stigma from such a [public] violation, it must be transparent, such as in physical appearance or action”).

186. See Zacks, *supra* note 9, at 171, 210 (arguing that multiple signature blocks and boldface language can induce adjudicators to make conclusions about which party to blame for a particular contractual outcome); Schocker, *supra* note 175.

contained in written contract, thus evoking feelings of shame.¹⁸⁷ The use of capital letters themselves may indicate that the terms should have been more clear to the other contract party and also warn the other contract party from acting in an undesirable manner.¹⁸⁸ Individuals do not want to be an outlier in a social situation, so they usually conform to the social norms, or risk shame if they do not.¹⁸⁹

In addition, blaming one's self (which can also trigger feelings of shame) could be understood as a self-preservation technique to avoid feeling vulnerable in a situation over which an individual exercised very little control.¹⁹⁰ This allows individuals to operate within a risky world and believe that they are not continuously vulnerable to such situations.¹⁹¹ People may then have a subconscious desire to be blamed for their contractual outcomes (particularly those in which they

187. Tamara J. Ferguson et al., *Shame and Guilt as Morally Warranted Experiences*, in *THE SELF-CONSCIOUS EMOTIONS: THEORY AND RESEARCH*, *supra* note 19, at 330, 341 (“Overestimates of an outcome’s controllability might support intense feelings of guilt (for producing avoidable harm) and shame (for being the type of person who produces avoidable harm).”); *see also* Tetlock, *supra* note 44, at 468 (“One way of pressuring other people to behave is by indicating to them that one has a low tolerance for justifications or excuses and that one will treat their behavior as automatically diagnostic of underlying intentions.”). It also has been demonstrated that the more time an individual spends reading a contract (*ex ante*), the more likely the individual is to comply with the terms of the contract. Zev J. Eigen, *Experimental Evidence of the Relationship Between Reading the Fine Print and Performance of Form-Contract Terms*, 168 *J. INSTITUTIONAL & THEORETICAL ECON.* 124, 139 (2012) (“[T]his research presents evidence that suggests that the more time individuals spend reading contracts into which they are entering, the more likely they are to perform as contractually obligated.”). Thus, contract preparers may include multiple signature blocks to induce the other party to read (not just to induce counterfactual analysis), which also could lead to a higher compliance rate.

188. Schocker, *supra* note 175 (noting that one’s use of all capital letters in electronic mail correspondence is commonly understood to connote screaming, while traditionally the use of all capital letters was reserved to express formality as well as emphasis). It is possible that contracting parties are consequently affected by the use of all capital letters when examining such warnings or disclaimers when deciding upon a particular course of contracting behavior.

189. Tetlock, *supra* note 44, at 455 (describing “[a]ccountability [as the] critical rule and norm enforcement mechanism—the social psychological link between individual decision-makers and the social systems to which they belong”).

190. Prentice, *supra* note 123, at 406 (“[The] desire to make themselves feel comfortable in their environment, coupled with the illusion of control . . . , the desire to feel free from potential victimhood, and to believe that they live in a just world . . . make it easy for jurors and others to tend to blame investors These factors are so strong that not only do others tend to blame victims, victims tend to blame themselves for things that clearly are not their fault.”).

191. *See* Bernice Andrews, *Shame and Childhood Abuse*, in *SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE*, *supra* note 21, at 176, 178.

exercised very little power with respect to the negotiation of the contract). By blaming themselves, people may feel comforted by the illusion that they can avoid the situation in the future if they acted differently, even though in all reality they likely will or would not.

Contract preparers should again then reinforce the voluntariness of the contract's negotiations and execution in order to present a scenario where the other contracting party is compelled towards self-blame or is comforted by such a depiction.¹⁹² These features can encourage particular counterfactual analysis, meaning that the individual will attempt to determine what changes in the facts or variables involved in an outcome would have resulted in a different outcome.¹⁹³ Contractual provisions that indicate that the contracting party had multiple opportunities to walk away, such as by the inclusion of multiple signature blocks or a boldfaced caption before the signature page indicating that the contracting party had consulted counsel prior to executing the contract, could lead one to blame one's self were one to consider breaching or challenging the contract.¹⁹⁴

The negative emotions discussed earlier in this Article are also associated with, and may even trigger, such counterfactual analysis on the part of the individual.¹⁹⁵ Again, in the contract context, contracts may trigger particular emotional responses (e.g., shame) that may be associated with particular counterfactual thinking (e.g., "If only I did not sign the contract, I would not be in this mess"). Or, contracts may

192. Zacks, *supra* note 9, at 210.

193. Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 345 (1992) ("Counterfactual considerations intrude at many stages in legal factfinding and decisionmaking. Sometimes we acknowledge their presence, but other times we remain unaware of them. Sometimes counterfactuals help focus our inquiry, but other times they lead us astray. Nevertheless, whether express or implicit, helpful or misleading, they are there.").

194. Zacks, *supra* note 9, at 210 (arguing that such provisions can induce adjudicators to make similar conclusions about which party is to "blame" for a particular contractual outcome or situation).

195. BAUMEISTER, *supra* note 20, at 268 ("[T]here is some evidence that emotions stimulate *counterfactual thinking*, defined as imagining events or outcomes that differ from reality."); Giorgio Coricelli & Aldo Rustichini, *Counterfactual Thinking and Emotions: Regret and Envy Learning*, 365 PHIL. TRANSACTIONS ROYAL SOC'Y. B 241, 246 (2010) (suggesting "an adaptive role of emotions, like regret and envy, which . . . proceed from a counterfactual consideration of outcomes"). For example, it has been demonstrated that signing a document on the front page (as opposed to the end page) can increase a party's honesty. Lisa L. Shu et al., *Signing at the Beginning Makes Ethics Salient and Decreases Dishonest Self-Reports in Comparison to Signing at the End*, 109 PROC. NAT'L ACAD. SCI. 15197, 15198 (2012).

trigger the anticipation of shame that would be associated with prospective counterfactual thinking (e.g., “If I challenge this contract, I will be shamed”).

As discussed in this Part, the stakes are high for the contract preparer: the *ex ante* contract features, while profitable at the front end, can “increase delinquency and foreclosure rates,” which are costly at the back end.¹⁹⁶ The balance for contract preparers is to create a contract that takes advantage of cognitive biases and other decision-making processes of contracting parties both at the time of contract formation as well as during the term of the contract.¹⁹⁷ The contract needs to induce deference as written both for execution’s sake and for the sake of compliance and performance.¹⁹⁸ As seen in the example of subprime mortgages, lenders may have succeeded in creating a contract that induced the *ex ante* contracting behavior desired while also being able to realize a lower level of strategic default than might otherwise be expected.¹⁹⁹

IV. CONSEQUENCES OF SHAME AND REGRET

The anticipation and experience of shame and regret ultimately may be about the resolution of conflict.²⁰⁰ At a fundamental level, the social strategies individuals employ are based on an understanding that other individuals are also pursuing the same goals (whether making gains or social alliances).²⁰¹ Based on “[t]he inhibitory dimensions of shame . . . as a defensive strategy which can be triggered in the presence of an interpersonal threat,” one can better understand the strategic use of social signals inducing shame.²⁰² In other words, subordinate

196. Bar-Gill, *supra* note 9, at 1133–35.

197. *See supra* Part III.E.

198. *See supra* Part II.D.

199. *See* Bar-Gill, *supra* note 9, at 1127 (arguing that the complex and multidimensional design of subprime mortgage contracts is purposefully exploitative of borrowers’ imperfect rationality); White, *supra* note 8, at 971–72 (describing the lower than expected level of default among underwater homeowners).

200. Gilbert & McGuire, *supra* note 38, at 101 (“In a straightforward contest, where there is likely to be a winner and a loser, the animal who loses requires a strategy that will inhibit (turn off) its challenging behavior. . . . [T]he non-verbal communicative patterns of shame appear to be related to de-escalation in potential and actual conflict situations.”).

201. *Id.*

202. *Id.* (citing Paul Gilbert, *The Evolution of Social Attractiveness and Its Role in Shame, Humiliation, Guilt and Therapy*, 70 BRIT. J. MED. PSYCHOL. 113 (1997)); *see also* Scheff, *supra* note 23, at 405 (concluding that “social control involves a biosocial system that

individuals do not spontaneously experience shame or anticipatory feelings of shame in a vacuum. Rather, aggressive individuals attempt to induce others to submit.²⁰³ Without submission, the aggressive individuals would not “win” and achieve dominance.²⁰⁴ The signals the aggressive individuals send often can affect the physiological activity of the other, resulting in submissive behavior.²⁰⁵

Contracts similarly address the resolution of current and future conflicts.²⁰⁶ Contracts detail current and future obligations and give a roadmap of how disputes will be handled, both procedurally (e.g., arbitration) and substantively (e.g., damages).²⁰⁷ Accordingly, contract preparers only achieve their desired contractual outcome by inducing submission by the other party.²⁰⁸ If contract preparers can “take” and induce individuals to “give up” and not contest or breach a particular contract, then they have established their dominance within the relationship (and more importantly, they have achieved their desired economic end).²⁰⁹ Social rank (powerful corporate actor versus small individual) also might be relevant, as dominant players “have much more power to make subordinates attune to their self-interests than the

functions silently, continuously, and virtually invisibly, occurring *within* and *between* members of a society”).

203. Gilbert & McGuire, *supra* note 38, at 102 (“[I]t is not only aggression that determines dominance and rank structure but also the subordinate behaviors that are elicited.”).

204. *Id.* (“If, and only if, the subordinate recognizes the relationship, or ‘predicts’ the outcome of an agonistic encounter by immediately showing submission, can we assume that a dominance relationship exists.” (quoting Irwin S. Bernstein, *Dominance: A Theoretical Perspective for Ethologists*, in *DOMINANCE RELATIONS: AN ETHOLOGICAL VIEW OF HUMAN CONFLICT AND SOCIAL INTERACTION* 71, 80 (Donald R. Omark et al. eds., 1980))).

205. Gilbert & McGuire, *supra* note 38, at 106 (describing “[r]egulation-dysregulation theory (RDT)” as offering “insights into the ways that social signals, originating in the external world, impinge on and influence the biological state of the receiver(s),” which, in the case of social signals indicating that the individual is not acting properly, involve “atypical physiological and psychological states associated with symptoms (e.g., depression, anxiety, anger, boredom) and reduced capacities to concentrate and act efficiently” (citing Michael T. McGuire & Alfonso Troisi, *Unrealistic Wishes and Physiological Change*, 47 *PSYCHOTHERAPY & PSYCHOSOMATICS* 82 (1987))).

206. E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 1.3 (3d ed. 2004) (“The decision to recognize purely executory exchanges of promises also allowed the parties to engage in more sophisticated planning for the future.”); *id.* § 12.1 (“Our system of contract remedies . . . is aimed, instead, at *relief to promisees to redress breach.*”).

207. *Id.* § 1.3.

208. See Gilbert & McGuire, *supra* note 38, at 101.

209. See *id.* at 101–02.

other way around.”²¹⁰ If individuals believe they occupy a different rung on the social ladder than the contracting party (and there often is a disparity in bargaining and other power), then the contracting party may be in a better position to influence the other party’s behavior.²¹¹ This may be seen in the negotiation and execution stages of the contract, where the party not preparing the contract often defers to the written contract as written by the contract preparer.²¹²

As mentioned above, in addition to behaviors associated with the shame experience itself, another important part of shame behavior is shame avoidance.²¹³ Despite urges to act differently, the anticipation of shame may deter individuals from acting in accordance with those urges.²¹⁴ Similarly, one may withdraw from those situations where shame might be experienced, including situations involving asking for help.²¹⁵ Although one may feel angry or frustrated in such situations (to cover up one’s shame), one is more likely to act aggressively from such anger or frustration from a superior social position.²¹⁶ Thus, as between two contracting parties, the socially subordinate contracting party may be less likely to display anger upon feeling shame.²¹⁷ Similarly, one who is afraid of feeling shame is unlikely to reveal or publicize the actions that involve a failure to measure up to others’ behavior.²¹⁸ This is important because the goal of the contract preparer often will be

210. *Id.* at 104.

211. See Dov Cohen et al., *The Sacred and the Social Cultures of Honor and Violence, in SHAME: INTERPERSONAL BEHAVIOR, PSYCHOPATHOLOGY, AND CULTURE*, *supra* note 21, at 261, 274 (describing cultures of honor where “deference must be paid to a person higher on the social ladder”).

212. See Zacks, *supra* note 15, at 1474 (describing why parties sign contracts as presented, including the fact that many contracts are presented on a “take it or leave it” basis by an agent of the other party who does not appear to have the authority to negotiate or modify the terms).

213. Gilbert, *supra* note 22, at 23 (“At this level, shame avoidance is a safety behavior no different in kind from that associated with any threat”); Gilbert & McGuire, *supra* note 38, at 99 (describing shame as “an aversive experience . . . which people are highly motivated to avoid”).

214. Macdonald, *supra* note 29, at 148 (stating that “[s]hamelike or embarrassing predicaments are . . . strong motivators of socially avoidant behavior”).

215. Gilbert, *supra* note 22, at 23–24.

216. *Id.* at 23 (“[D]ominant individuals can hide their shame in anger far easier than can subordinates.”).

217. See *id.*

218. *Id.* at 20 (“Social comparison and the anticipation of how others will evaluate and respond to negative information about the self also plays a crucial role in acts of revelation.”).

deference and compliance on the part of the other party, which suggests incorporating a difference in status explicitly into the contract.²¹⁹

As discussed in Part II *supra*, contract preparers may be rigging social strategies if the written contracts can send inaccurate or biased signals about how individuals should respond in particular situations in order to maintain their status within the community.²²⁰ In this way, contracts may reinforce a particular social hierarchy, at least with respect to the particular positions of the contract preparer versus the other contract party.²²¹ Whether in the employer/employee context, the broker/client context, or the seller/consumer context, contracts may be more about reinforcing and even enlarging disparities in bargaining power as opposed to soliciting consensual agreements that are at worst neutral with respect to such issues.²²² This Article suggests that such

219. For more information, see *supra* Part II.B for a discussion regarding social status and the relevance of shame as well Part III.F for a discussion regarding the uses of authority. What is particularly interesting about shame responses in the contract situation is that the contract preparer and other contract party often are not face-to-face after the contract has been formed. Thus, much of the emotional displays associated with shame (such as looking down or covering one's face) are not available to the other contract party. Instead, the only submission possible is the acquiescence to the contractual result as demanded by the contract preparer. More importantly, the emotional displays associated with shame are only instructive with respect to the actual shame experience; as discussed below, it is likely that contract preparers rely on anticipatory feelings of shame with respect to inducing particular contractual behavior. See *infra* text accompanying notes 225, 228. In addition, individuals rely on others to provide indications or signals about what social strategies to use when negotiating acceptance within a group. See *infra* text accompanying notes 226–27.

220. See *supra* Part II.D.

221. See Zacks, *supra* note 9, at 201.

222. Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 66 (2011) (asserting that, under the “modern contract law system,” “[b]argaining power is increased via each contract the stronger party enters into, because the stronger party is able to reap more gains from each contract than it otherwise would with less bargaining power”). Even the solutions designed to address bargaining power inequalities may be more effective at conveying a sense of successful reform as opposed to actually achieving it. *Id.* at 68, 77 (concluding that “compliance with [reforms such as] disclosure statutes will give the appearance that the quality of the weaker party’s mutual assent has increased, when in fact it has not. . . . [Disclosure statutes] justify the [abuse] of power by the party with superior bargaining power both by masking the power imbalance embedded in the very structure of modern contract law and diverting critical attention and analysis away from that structure as a whole”); see also Zacks, *supra* note 9, at 223 (concluding that “reforms appear to be ineffective in modifying the actual contracting situation while reinforcing existing adjudicative biases. This, in turn, precludes a deeper and more accurate examination of the contracting context. If we are comfortable with reforms that make us feel better after the fact about the contracting context (regardless of effectiveness), then we are unlikely to search for evidence that the context was not as depicted by the contract’s content and presentation” (footnotes omitted)).

reinforcing behavior is elicited not at the contract negotiation or execution stage, but instead is at the post-formation stage, at which point much contracting behavior occurs.²²³ Moreover, these behaviors can be triggered, at least in part, by particular contract features.²²⁴

On the other hand, shame may be seen as “an essential motivator” for desirable social behavior.²²⁵ The fear of shame can not only prevent illegal acts but also can motivate “altruistic” acts that reinforce the image of an individual as a valuable member of the group.²²⁶ Although it is doubtful that any particular person benefits from complying with their contract, at least from the perspective of whether the group accords such a person any additional respect or admiration, it may be that contract compliance is a prosocial behavior that permits more parties to engage in contract-making and the exchange of goods.²²⁷ If people cannot rely on the promises made within the contract, the argument may proceed, then contract preparers (often the “sellers”) may engage in fewer transactions with a smaller number of buyers (those who are personally known to be trustworthy), which would be damaging to the entire group.²²⁸

Law, then, fills any void left by social pressure to ensure compliance with one’s contract.²²⁹ As long as the redress matched what the other

223. See Becher & Unger-Aviram, *supra* note 7, at 208.

224. See *supra* Part III.E.

225. Greenwald & Harder, *supra* note 29, at 232.

226. *Id.*

227. See *id.* (stating that when shame encourages compliance with group norms, this creates “[p]rosocial behavior” which “helps to maintain mutually supportive relationships”).

228. Robinson et al., *supra* note 43, at 1650–51 (“In the small groups in which humans have evolved, the marginal benefit of having each individual support punishment for wrongdoings might have reduced the number of transgressions in the group and, thus, protected an individual’s health, property, and ability to make contracts.”). Robinson and colleagues note that “[t]his last element, contracts, is worth special consideration.” *Id.* at 1651 n.62. They argue that “[b]ecause of humans’ abilities to represent abstract costs and benefits, the number of social exchanges that are possible is much, much larger than in other organisms As the range of possible exchanges increases, the advantage of the ability to enforce contracts increases.” *Id.*; see also FARNSWORTH, *supra* note 206, § 1.3 (noting that “purely executory exchanges of promises did not become important in practice until a relatively advanced level of economic development had been attained”).

229. BAUMEISTER, *supra* note 20, at 150 (“As cultures grow more elaborate and complex, social life consists of an increasing proportion of interactions with strangers. . . . [P]eople are less motivated to treat each other properly when they do not expect ever to see each other again.”). Baumeister describes how, accordingly, “to make people honor it the [financial] deal [between strangers] will usually be confirmed in some way that can be proven to be legally binding, such as a signed contract.” *Id.*

bargained for (e.g., expectation damages, in many cases), then the contract arguably would have served its purpose, regardless of how many individuals actually breach their contracts.²³⁰ As argued in this Article, however, contract preparers may utilize social pressures and the anticipation of shame or guilt to influence a party's compliance with the contract, particularly if the legal and economic incentives for the other party suggest non-compliance as a viable option. In other words, one's attributions about her own behavior help determine her emotional and behavioral responses to a situation.²³¹ The written contract may accomplish this through the inclusion of multiple signature blocks, a formal legal appearance, boldface type for disclaimers, reliance language, and other features discussed in this Article.²³²

V. CONCLUSION

By reinforcing the social norm of contract as sacred promise and anticipating the negative emotions, cognitive biases, and judgment heuristics of the other parties, contract preparers (often corporate actors) can enjoy the other party's contract compliance or deference (even if not mandated by the legal regime), while still relying on the flexibility of the legal regime to abandon contract compliance on their own behalf when economically beneficial.²³³

One possible benefit to the growing public awareness of human behavior and its manipulability is the additional caution individuals may exercise when making particular decisions. As individuals become more

230. See Wilkinson-Ryan & Baron, *supra* note 11, at 408.

231. LEARY, *supra* note 177, at 97 ("The same harmful event may produce different emotional reactions depending on how people talk to themselves about what they have done.").

232. See *supra* Part III.E.

233. See White, *supra* note 8, at 1023 ("Individuals should not be artificially discouraged on the basis of 'morality' from making financially prudent decisions, particularly when the party on the other side is amorally operating according to market norms and could have acted to protect itself by following prudent underwriting practices."); Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 29 (2012) (concluding that "[c]orporations do not have autonomy or emotionality. . . . They do not deserve blame because they lack the volitional capacities we associate with moral blameworthiness"); Kenneth R. Harney, *The Moral Dimensions of Ditching a Mortgage*, WASH. POST, Nov. 28, 2009, at E1 (quoting Fannie Mae spokesman Brian Faith, who indicated that "there's a moral dimension to this as homeowners who simply abandon their homes contribute to the destabilization of their neighborhood and community" (internal quotation marks omitted)). Because they lack these volitional capacities, corporations may act without regard to the possible shame associated with blameworthy actions such as breaching a contractual (and moral) promise.

aware of what contract preparers do in order to induce them to act in a particular manner after the contract has been formed, perhaps individuals will become more careful actors when considering a possible adverse course of action with respect to their contracts. If regret aversion can be diminished and knowledge of actual social practices and norms (versus perceived and artificially constructed social practices and norms) can be increased, then contract preparers will be less advantaged by undetected current contract-preparation methodology.²³⁴ For example, if the public was aware that contract preparers were aware of the biased portrayal of contractual breach, perhaps the decision regarding whether to breach or challenge the contract would not appear so fraught with peril. A more informed and perhaps more cynical contracting public may be better prepared to respond to such provisions when encountered in the future. Given the limited success, however, of “awareness campaigns” in addressing market-driven strategies by more powerful actors or otherwise changing behavior, it is nevertheless dubious to presume that a more informed public will be better equipped when making post-contract formation decisions, particularly given the unconscious or uncontrollable aspects of the shame experience.²³⁵

Because of the complicated and, in some cases, unpredictable, nature of the emotional and cognitive processes involved in human decision-making, this Article does not contemplate or describe a panacea for economically irrational actions or decisions in the *ex post* contracting context, such as regulatory oversight of the contract preparation for “troubling” provisions.²³⁶ Indeed, in the absence of empirical data demonstrating that the critique laid out in this Article is in fact accurate and predictable, it is not desirable to attempt to insert a “better” decision-maker for the contracting party. As has been noted elsewhere, it would be difficult to imagine a centralized approach, directed also by fallible individuals, that would enable decision-makers to “weigh all the economic, scientific, and psychological evidence objectively, to stand on nuanced distinctions, and to adopt policies that

234. See *supra* Part III.C (discussing how contract preparers can take advantage of the contract signer’s desire to avoid regret).

235. See Hanson & Kysar, *supra* note 3, at 669; see also, e.g., *id.* at 731.

236. Accordingly, “individuals [may] more or less ‘rationally’ choose to take these non-material, psychological consequences into account” to satisfy “certain needs, although these needs are non-material.” Zeelenberg, *supra* note 29, at 331.

carefully target just those people who need help most.”²³⁷ If others cannot “fix” or “optimize” individual decision-making tendencies, and the solution is not individual knowledge itself, then one is left to contemplate whether the existing system can be remedied at all. Perhaps one “should expect policies to be blunt instruments,” but that does not necessarily dictate comfort with such policies being utilized or manipulated only by one of the affected parties.²³⁸

Nevertheless, the limits and exploitation of human cognition with respect to *ex post* contract decision-making is important for understanding contract preparation and contemplating possible reforms.²³⁹ This in turn may undermine the perceived sanctity of a written contract as moral promise. From an economic standpoint, undermining such perceptions may be desirable if contracts contain provisions that, if not breached or challenged, threaten the economic well-being of the greater society. For example, if more homeowners had strategically defaulted on their subprime mortgages earlier, perhaps the mortgage crisis would not have been as prolonged or as damaging (because fewer mortgages would have been originated or at least would have been rated more accurately based upon their risk of default). One can imagine similar conclusions for the next unknown contracting-related crisis. If individuals feel constrained by social norm considerations (reinforced by the written contract) from breaching or contesting economically one-sided or illegal contracts, then such contracts and their associated transactions will presumably proliferate, with possibly severe consequences.

It may be, of course, that it is the very “moral” nature of the promises made in written contract that help deter undesirable breaches, regardless of contract law’s general disposition that monetary damages are appropriate to compensate for breaches.²⁴⁰ If monetary damages

237. Mario J. Rizzo & Douglas Glen Whitman, *Little Brother Is Watching You: New Paternalism on the Slippery Slopes*, 51 ARIZ. L. REV. 685, 737 (2009).

238. *Id.* at 737. Rizzo and Whitman are concerned about paternalism that does “not clearly distinguish private, voluntary efforts from public, mandatory ones,” which, as a bright-line test, would provide part of a “bulwark against the problems of vagueness, including the threat of slippery slopes.” *Id.* at 739.

239. Eisenberg, *supra* note 122, at 259 (concluding that, although “the limits of cognition are not a universal explanation of either contract law or the limits of contract,” the “[o]ther teachings of experience, as well as concepts of efficiency and morality . . . can be given appropriate weight only when we know the psychological framework within which actors operate when making choices”).

240. *See* Goetz & Keltner, *supra* note 44, at 166.

generally do not compensate an aggrieved party fully for a breach (whether because of the time involved in litigating a dispute or the inability of the legal system to ascertain the actual amount of loss suffered), then perhaps “our legal system works better . . . by relying on moral forces, such as they are, to fill the gap in inducing appropriate performance.”²⁴¹

Without accepting or denying this assertion as a general proposition, my response is that this Article is not addressing the role of morality with respect to written contracts generally. Instead, this Article examines whether contract preparers can anticipate and exploit individuals’ moral and emotional impulses regarding breach to their advantage. In other words, general moral sentiments regarding breach may be beneficial in the abstract to ensure that most people perform their promises, but this contention only has validity if all contracting parties are playing by the same sentimental rules. As seen in this Article, contract preparers depict a world in which contractual promises have a moral component, are specifically sought and enforced, and are rarely challenged or breached, while those same contract preparers make their own contracting decisions based on a more basic, if real, economic calculus.

241. Shavell, *supra* note 64, at 460; *see also* Wilkinson-Ryan & Baron, *supra* note 11, at 421 (noting that individuals’ responses to breaches can be influenced by the belief “that breaking a contractual promise is a moral violation, [so] it is reasonable to think that breachers should not be permitted to profit (above the expected benefit of the contract) from their intentional bad act”).