BEHIND THE VEIL OF LEGAL UNCERTAINTY

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I
INTRODUCTION

In legal scholarship, it is almost self-evident that "certainty" is an advantage for regulation.[1] "Uncertainty," on the other hand, is usually viewed as an inevitable by-product of vague legal standards that may be justified by the prohibitive cost of creating bright-line rules or by the inability of the legislature to account ex ante for the complexity of a particular situation.[2] This article

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1. *See* Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L.J. 823, 841–42 (1972) ("Since the law should strive to balance certainty and reliability against flexibility, it is, on the whole, wise legal policy to use rules as much as possible for regulating human behavior as they are more certain than principles and lend themselves more easily to uniform and predictable application."); *see also* Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 298–99 (1986) (analyzing two undesirable social effects that stem from uncertain regulation: (1) over-deterrence and (2) inefficient risk-taking); Kenneth W. Gideon, *Assessing the Income Tax: Transparency, Simplicity, Fairness*, 25 OHIO N.U. L. REV. 101, 104–06 (1999) (arguing against the use of broad standards in tax law because of the harm of uncertainty); Antonin Scalia, *The Rule of Law as a Law of Rules*, *56* U. CHI. L. REV. 1175, 1178–83 (1989) (arguing that courts should decide cases in such a way that provides guidance to lower courts, future legislators, and citizens); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV 22, 62–64 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 957 (1995) (describing the conventional view that clarity of rules is a target of law). For a review of some of the main drawbacks of uncertainty in antitrust law, see Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 99 (2007).

2. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562–63 (1992) (observing that while rules are less costly than standards to interpret and apply, they are more costly to create). In the context of contract law, similar claims regarding the cost of contractual vagueness have been put forth. *See* Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1587–88 (2005); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006); Steven Shavell, *On the Writing and Interpretation of Contracts*, 22 J.L. ECON. & ORG. 289 (2006). *But see* Albert Choi & George

challenges the conventional view and proclaims the advantages of legal uncertainty.[3]

This article combines jurisprudential argument with behavioral analysis and experimental demonstration. The jurisprudential argument exposes the distorting effect of the law, which leads people to neglect their genuine preferences and moral perceptions and behave in a manipulative–strategic way. It further identifies contexts and circumstances in which creating a "veil of ignorance," which partially masks people's awareness and knowledge of the ex post legal consequences of their acts, may be desirable.

The jurisprudential discussion begins with the merits of creating a partial veil of ignorance for the ex post consequences of the law. Such a veil may promote values such as autonomy, efficiency, distributive justice, and personal well-being. Furthermore, such a veil of ignorance may encourage people to act in a natural and non-strategic way, namely, in a way that is not driven by legal incentives. Nonetheless, we also recognize the obvious problems associated with creating a veil that masks the ex post implications of the law. Indeed, ignorance of the law seems to be at odds with the main purpose of legal regimes, such as torts and criminal law, which aim to guide people's behavior.[4] Furthermore, the argument seems to run into a logical paradox: If following the law may create more harm than good, should not such a law be abandoned altogether? And if the law is just and efficient, why should it be hidden? Recognizing these challenges, we developed an innovative taxonomy comprised of three types of legal areas where masking the legal consequences of an act ex ante will benefit both individuals and society at large.

The first type occurs when people who find themselves in a certain situation ex post are offered a solution, but policy makers wish to prevent a case where they choose to be in that situation ex ante.

Such tension between one's ex post legal status and ex ante knowledge of the law was recognized by Meir Dan-Cohen's canonical argument on acoustic separation in criminal law. According to Dan-Cohen, the law speaks with two

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Triantis, *Completing Contracts in the Shadow of Costly Verification*, 37 J. LEGAL STUD. 503, 503–04 (2008) (arguing that ambiguity signals an unwillingness to sue).

3. Contrary to the conventional view, support for uncertainty was developed recently by Alon Harel & Uzi Segal, *Criminal Law and Behavioral Law and Economics: Observations on the Neglected Role of Uncertainty in Deterring Crime*, 1 AM. L. & ECON. REV. 276, 277 (1999). In the context of tax law, see generally David A. Weisbach, *Ten Truths About Tax Shelters,* 55 TAX L. REV. 215 (2002); Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law Is Uncertain*, 27 VA. TAX REV. 241 (2007). According to those views, in the context of tax law, uncertainty may enhance the deterrence effect of regulation due to risk aversion. This article, however, highlights the opposing side, arguing that uncertainty decreases legal influence on behavior in a way that strengthens "authentic behaviors." *See also* Craswell & Calfee, *supra* note 1 (identifying similar effects in torts law).

4. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207–09 (1968) (discussing the use of law to deter crime). At least in the context of criminal law, ambiguity may lead to invalidation of the law. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

voices. To the individual, the law issues rules that instruct the individual how to behave. To the authorities (for example, courts and administrative agencies), the law uses "decision rules" to assist in determining the legal ramifications of an individual's actions.[5]

While Dan-Cohen's focus is on the institutional aspect of the distinction between conduct and decision rules within the context of criminal law, this article's framework differs in a few ways. First, it focuses on ways in which "legal ignorance" may be desirable in the law in general, not only with regard to certain defenses within criminal law. Second, it provides a larger framework to distinguish between rules that attempt to direct the individual how to behave and rules that respond to the specific situation of the individual.[6]

The second type of situation in which the veil may be beneficial is that in which a certain course of action is desirable only when undertaken with genuine, nonstrategic motives. For example, in the tax context, policy makers may allow a certain transaction to take place, but not purely for purposes of tax avoidance.

The third type focuses on the identity-related value that may emerge when one is unaware of potential legal benefits for engaging in socially desirable activities. Although in the second type, policy makers are neutral to one's choice of action as long as one's motivation is genuine, in the third type, there is a desired course of action. If one's motivation is not driven by legal benefits, the value to both self and society from one's behavior will increase. Classic examples are organ donation and surrogacy, where society sees such action as desirable but fears the inadvertent harm of incentives for donors. Such harm may occur due to psychological processes such as crowding-out motivation or sociological processes such as commodification.

Following this taxonomy, we rely on behavioral methodologies and theories to demonstrate how uncertainty may become an effective veil for the ex post ramifications of the law. We begin with an examination of possible behavioral theories that support the proposition that when the law is uncertain, people are likely to diminish their reliance on legal benefits during the decision-making process.

Using an experimental survey approach, we compare the reported future behavior of respondents taken from a representative panel of the Israeli population toward employment practices under different legal regimes. The experimental manipulation focuses on the certainty of granting benefits associated with getting a "non-employer" status. Findings suggest that under conditions of uncertainty (for example, ambiguity and partial uncertainty where probabilities were provided), participants were less affected by benefits granted under the law. In contrast, when participants were asked to evaluate the

5. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–31 (1984).

6. We focus here on explaining the difference between our first type and Dan-Cohen's argument; our second and third types are too different to enable a meaningful comparison.

behavior of others, uncertain benefits did have an effect on their behavior. The study also demonstrates an interaction, where uncertainty is more influential for individuals with low and intermediate levels of preference than for those with strong preferences.

We then recognize some of the drawbacks of uncertainty, even in those areas where masking the law is desirable. First, there is the fear of excessive litigation. Second, there are distributive problems that might arise given an inequality in the effect of uncertainty on different parties. Those concerns are taken into account in part V of this paper, which discusses policy implications.

To clarify our arguments, we wish to define and provide context to some of the main concepts that are used in this article. First, the concepts of uncertainty and ambiguity, which are treated as two different concepts in the Judgment and Decision Making (JDM) literature,[7] are used interchangeably throughout this paper, as the differences between the two meanings are less relevant for our purposes than for JDM scholars. Second, throughout this article, we use the terms "genuineness" and "authenticity" especially with regard to the distinction between one's initial preference and one's attempt to gain instrumental legal benefits. In the philosophical literature, the association of authenticity with the notion of staying true to oneself when facing external values is constantly challenged, as philosophers and psychologists recognize that in the real world, where social forces play a dominant role, achieving full authenticity is neither possible nor desirable.[8] Indeed, we recognize the contribution of social and legal institutions to the formation of one's preference. Nonetheless, clearly, the law also has direct instrumental calculative legal effects, and our focus on the potential positive role of masking the law through uncertainty is mainly aimed at this function.

II

LEGAL IGNORANCE AS BLISS

A. Theoretical Framework

Law is one of society's most important tools for directing behavior. Every legal system contains incentives for certain kinds of activities and penalties for others.[9] Law also has important roles in designing social institutions[10] and

7. These two concepts are the most heavily studied in the JDM literature. For an example that attempts to study the relationship between these two concepts in the decision-making process, see generally Hillel J. Einhorn & Robin M. Hogarth, *Ambiguity and Uncertainty in Probabilistic Inference*, 92 PSYCHOL. REV. 433 (1985).

8. For a discussion of the complex concept of "authenticity," see generally Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM 25 (Amy Gutman ed., 1994) and LIONEL TRILLING, SINCERITY AND AUTHENTICITY (1972).

9. *See* Becker, *supra* note 4.

expressing societal values.[11] Taking into account these important legal functions, the conventional view is that policy makers should aspire to increase the likelihood that people will take the existence of the law into account when making decisions.

While in certain contexts it is desirable to increase awareness of the ex post legal results of activity, the conventional view does not take into account the distorting effect of the law on the ability of an individual to act in a way that would represent his or her genuine preferences, moral perception, and true economic interests. When the law becomes too dominant in the decision-making process, it results in manipulative behavior and excessive reliance on strategic reasoning. This eventually undermines efficiency, autonomy, distributive justice, and psychological welfare.

Finding the right balance between the positive role of the law to guide behavior and its negative distorting effect is a challenging task. While we do not espouse a complete solution to this problem, we explore three types of situations where the distorting effect of the law has negative results. In such circumstances, decreasing the saliency of the law during decision-making enhances autonomy, efficiency, distributive justice, and personal well-being, while at the same time narrows undesirable effects, such as commodification[12] and crowding-out.[13] This demonstrates why lawmakers should take seriously the distorting effect of the law, as well as the potential harm caused by partial masking through legal ambiguity and over-reliance on the law.

B. Moral Hazards and the Ex Post Versus Ex Ante Functions of the Law

The first type of situation in which the veil of uncertainty is beneficial is when policy makers desire to provide legal relief ex post without changing ex ante decision-making. Separation between ex post and ex ante perceptions can help distinguish between the two functions of law—guidance and responsiveness—and ensure that the second function will not undermine the first.[14] Ex ante, the law's main function is to guide behavior, while ex post, its main function is to respond to situations that people may face. In its guiding role, the law should motivate people to engage in behaviors that will be good

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10. *See* Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1591–92 (2009) (emphasizing the law's ability to shape social institutions, such as cohabitation).

11. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022–24 (1996).

12. For a discussion of the concept of commodification, see Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 81–83 (1990) and Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1930–33 (1987).

13. For an account of the psychological process of crowding-out motivation, see *infra* note 20 and accompanying text.

14. *See* P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, 65 IOWA L. REV. 1249, 1251 (1979–1980) (discussing the decreased willingness of judges and legislatures to adhere to harsh principles in order to promote desirable behavior and deter undesirable behavior).

for society as a whole. In its responsive function, however, the law helps people who are in dire situations with little regard to their ex ante intentions.

This separation between the two functions of the law is obviously difficult. There is a fear that the law's responsive role will undermine its guiding one. This problem was addressed by Meir Dan-Cohen's acoustic separation argument in criminal law. According to Dan-Cohen, conveying one message to the general public and another to the enforcing authorities may ensure that the relief given to people who fall under an excuse defense, ex post, does not affect their ex ante behavior.[15] Our first type dealing with the distorting effect of law is based on a related concept. We view the problem addressed by Dan-Cohen in the context of criminal law as a more general one: people who are aware of the legal reaction to their ex post status might be in a morally hazardous situation where they will be guided by the responsive function of the law. Masking the law may prevent inefficient moves by individuals who would rely ex ante on ex post solutions. Beyond the moral-hazard rationale, masking the law is desirable because it ensures that the ex post relief is given only to those who did not choose to be in that status strategically, ex ante. Because part of the justification for the ex post relief is that people find themselves in a situation unwillingly, the mechanism of masking the law will ensure that relief is given only to people who find themselves in dire situations despite good-faith attempts to avoid such predicaments.

Bankruptcy law exemplifies a legal scenario where the ex ante–ex post tensions justify masking the law. Ex ante, the debtor assumes full responsibility over the debt when making the economic decision of whether to take a loan and how to invest it. However, if the debtor is unable to pay back the loan, the law provides relief through various legal arrangements. If the debtor knew ex ante the exact nature of the ex post legal relief, there is a potential for morally hazardous behavior by the debtor.[16] Furthermore, according to our second justification for masking the law, when people are unaware of their ex post legal status, ex ante, there is greater moral justification for protecting them.[17]

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15. Dan-Cohen, *supra* note 5, at 633.

16. *See* Kenneth Ayotte & David A. Skeel, Jr., *Bankruptcy or Bailouts?*, 35 J. CORP. L. 469, 485–86 (addressing the role of moral hazards in bankruptcy law).

17. In Part V, which focuses on legal implications, we shall return to these examples with greater focus on the legal design. We will also demonstrate a second scenario in family law with regard to the distinction between the economic relationship between married partners and that of cohabitants. Ex ante, the distinction between marriage and cohabitation commitments is justified because it provides a "screening mechanism" for spouses to express their different preferences. According to this view, the distinction between marriage and cohabitation does not reflect the superiority of marriage, but rather the advantage of diversity of spousal institutions. Ex post, however, cohabitation law should impose on cohabitants the responsive components of marriage law that aims to prevent exploitation and protect weaker parties in the relationship. Masking the ex post responsive effect of the law may help to preserve the ex ante effect of the screening mechanism.

C. Ensuring Genuine Choice

The case for masking the law extends beyond separation of ex post and ex ante and applies even when one has to choose ex ante between two legitimate courses of action. This second type deals with a situation where the desirability of a certain course of action taken by an individual may be achieved only when it is done for non-strategic reasons. Thus, we argue that when law has too big of a role in one's motivations, it may jeopardize the purpose of the law itself. In these scenarios, the policy maker is indifferent to the course of action taken by the individual as long as it is not chosen as a way to circumvent the law.

Tax law is a good example of the benefits that may arise from masking the law. While the conventional view emphasizes the advantages of certainty and clarity in tax law,[18] recent innovative lines of literature suggest that strategic tax planning may lead to inefficient results.[19] Converging this line of scholarship with our second type suggests that the legal policy maker should differentiate between a transaction that takes place for genuine economic reasons and another transaction done purely for tax-avoidance purposes. A mechanism that masks the ex post tax status of a given transaction will increase the chance that people will behave authentically in accordance with their true economic preferences.

Another classic example is in employment law, where the legal policy maker is willing to recognize that not all long-term hiring relationships between people are employment relationships. People may be legitimately hired as either employees or as independent contractors if the choice is driven by genuine economic and organizational rationales, but not when it is driven primarily for the purpose of gaining legal benefits. Given that employing an individual as a contractor might relieve the employer of the responsibility for providing employment benefits, it is sometimes tempting for employers to define their employees as service providers for that reason alone. When getting these legal benefits is the dominant factor in the choice of how to define the relationship, the law might distort one's behavior. Furthermore, in the context of employment law, there is a concern that the asymmetric bargaining power might allow employers to behave strategically and manipulate the law to their advantage at the expense of employees' rights. In sum, when the motivation for an action is crucial for its desirability, using legal techniques that hide the ex post legal consequences of those actions is justified.

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18. *See* United States v. Correll, 389 U.S. 299, 307 (1967) (choosing to retain a bright-line rule instead of a case-by-case approach, thereby avoiding uncertainty and excessive litigation).

19. *See* David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215, 224 (2002) ("Anytime anyone alters his behavior because of taxes we have the same problem—the changed behavior imposed cost on others that the person does not take into account."). *But see* Leo Katz, *In Defense of Tax Shelters*, 26 VA. TAX REV. 799, 800–01 (2007) (responding to Weisbach's arguments).

D. Shielding Altruistic Motivation

The third type is related to the context of pro-social behaviors where the action taken may be generally desirable, but when taken to achieve legal or economic benefits, may cause harm to the individual or to society at large. The harm might occur due to psychological processes such as crowding-out motivation or sociological processes such as commodification.

Crowding-out literature suggests that when people base their behavior on external rewards, they discount moral incentives for their behavior, thereby lowering the effect of intrinsic motivation. As applied to the regulation of pro-social behavior, this theory would predict that saliency of the law in decision-making would undermine intrinsic motivations.[20] For instance, paying people in return for their blood may lead donors to view the event as a transaction rather than as a charitable act, thereby reducing altruistic blood donations.[21] Edward Deci, Richard Koestner, and Richard Ryan have argued that "tangible rewards tend to have a substantially negative effect on intrinsic motivation."[22] They warn that attempts to externally control behavior may yield long-term counterproductive results. An interesting twist in the crowding-out motivation approach comes from research conducted on image motivation in the context of incentives. According to a study conducted by Dan Ariely and his colleagues, the effect of extrinsic motivation on intrinsic motivation is highly related to the way in which one perceives that he or she is viewed by society. In their study, the negative effect of incentives was evident only when the behavior was conducted in public—when others were watching—not when the behavior was done in a private setting.[23] This modification of the theory suggests that the uncertainty effect is needed not only for the individual, but also for the individual's view of how he or she is perceived by others, given that the individual engages in pro-social behaviors due to extrinsic motivation.

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20. *See* Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46 EUR. ECON. REV. 687, 713–19 (2002) (discussing the psychological process of crowding-out and its relevance to economics); Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 NATURE 137, 140 (2003) (presenting research that "suggests that economic incentives cause mainly negative effects on altruistic cooperation if they come in the form of sanctions and if they are associated with greedy or selfish intentions"); Ernst Fehr & Simon Gachter, *Do Incentive Contracts Undermine Voluntary Cooperation?* 1 (Univ. of Zurich Inst. for Empirical Research in Econ., Working Paper No. 34, 2002) (presenting research indicating that incentive contracts undermine voluntary cooperation to such a degree that these contracts are less efficient than fixed-price contracts).

21. RICHARD M. TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY 314 (Ann Oakley & John Ashton eds., 1997) (arguing that payments to blood donors could diminish the quality and quantity of donations).

22. Edward L. Deci, Richard Koestner & Richard M. Ryan, *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivation*, 125 PSYCHOL. BULL. 627, 658–59 (1999).

23. Dan Ariely, Anat Bracha & Stephan Meier, *Doing Good or Doing Well? Image Motivation and Monetary Incentives in Behaving Prosocially* 17 (Fed. Reserve Bank of Bos., Working Paper No. 07-9, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =1010620.

Table 1: Taxonomy of Types Masking the Law

Type	The Ex Ante Position of the Law	The Ex Post Position of the Law	The Merits of Masking the Law	Examples
Moral Hazard and the Ex Post Versus Ex Ante Functions of the Law	Prefers option A over option B	Benefits option B despite ex ante undesirability	Acoustic separation effect * Ensuring that ex post considerations will not undermine the directive ex ante function of the law * Preventing moral hazard * Ensuring that ex post benefits will be provided only to those who are morally deserving	Bankruptcy law
Ensuring Genuine Choices	Neutral to options A and B	Benefits options A or B as long as the selection reflects genuine choice	Ensuring genuine choice: * Efficiency—preventing the distorting effect of the law * Distributive Justice—preventing manipulative avoidance of legal duties	Tax law, Employment law
Shielding Altruistic Motivation	Prefers option A over B	Benefits option A regardless of the motivation	Encouraging the experience of non-instrumental factors as dominant, initiating pro-social behavior; preventing crowding-out and commodification	Surrogacy law; organ and blood donation

III

LEGAL UNCERTAINTY AS A VEIL OF IGNORANCE

Part II presented a taxonomy of three types of situations where masking the law ex ante is desired. The nature of this legal masking was not developed, however. This part offers legal uncertainty as a possible solution. To make this argument, we rely on theories and methodologies of the behavioral analysis of law. First, this part looks for support in behavioral-research literature, which argues that when the meaning of the law is uncertain, people will likely diminish their reliance on legal benefits during the deliberation process. Following that stage, it presents an experimental survey that empirically tests these propositions.

A. Behavioral Consequences of Legal Uncertainty

Classical expected-utility paradigms suggest that under conditions of uncertainty, people should multiply the likelihood of an event with their utility from the payout associated with that event. Further research has taken into account the notion of risk perception, adding another dimension to our understanding of one's preference for value that derives from probabilistic events. Psychological research has documented the factors that moderate one's attitude toward risk; famous among them is the prospect theory, which differentiates between attitudes toward risk with regard to gains and with

regard to losses.[26] Furthermore, in contexts where the probability of an event occurring is unknown, cognitive psychologists have developed different concepts to account for the way people react to ambiguous information.[27] In that regard, it is generally accepted that people have an aversion toward events with an ambiguous probability of occurring.[28]

Amos Tversky and Eldar Shafir have termed the concept "disjunction effect" to account for people's reluctance to think through different possibilities that may arise from events whose likelihood of occurring is unknown to them.[29] Following this line of research, Eric Van Dijk and Marcel Zeelenberg have shown that when people are faced with ambiguous information, they give possible outcomes much less weight in the decision-making process.[30] Furthermore, in some cases, ambiguous information could have the same effect as no information.[31] Uri Gneezy and his colleagues developed the concept of the "uncertainty effect" to account for the fact that people are not willing to pay for a gift card whose benefits are uncertain, even when the expected value is much greater than the cost of the card. Using various techniques, they demonstrated that people preferred a fixed amount of money over a gamble between two options, even when both options were higher than the sum of money offered in the fixed option.[32] Thus, even when the least desired outcome was greater than the fixed option, it was less likely to be preferred in both gambling settings and incentive settings. This effect, combined with the disjunction effect discussed above, suggests that by making legal benefits ambiguous, we may cause people to downplay their importance rather than engage in probabilistic calculation of outcomes, an option which is obviously less desirable for the argument we wish to develop in this paper.

In contrast to the wealth and variety of research conducted in psychology, research on decision-making under uncertainty in law has focused only on limited aspects of uncertainty. Many of the papers on uncertainty in law are focused on criticizing Gary Becker's view on deterrence.[33] Many have criticized

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26. *See generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979).

27. *See* Deborah Frisch & Jonathan Baron, *Ambiguity and Rationality*, 1 J. BEHAV. DECISION MAKING 149, 152 (1988) (discussing the definition of ambiguity).

28. Gideon Keren & Léonie E.M. Gerritsen, *On the Robustness and Possible Accounts of Ambiguity Aversion*, 103 ACTA PSYCHOL. 149, 169–71 (1999) (recognizing the phenomenon of ambiguity avoidance and discussing possible explanations).

29. Amos Tversky & Eldar Shafir, *The Disjunction Effect in Choice Under Uncertainty*, 3 PSYCHOL. SCI. 305, 306 (1992). It should be admitted that the disjunction effect may be limited to ambiguity with regard to a specific event, which is narrower than the broader claim we wish to develop in our project.

30. *See* Eric Van Dijk & Marcel Zeelenberg, *The Discounting of Ambiguous Information in Economic Decision Making*, 16 J. BEHAV. DECISION MAKING 341, 350–51 (2003).

31. *See id.* at 342.

32. Uri Gneezy et al., *The Uncertainty Effect: When a Risky Prospect Is Valued Less Than Its Worst Possible Outcome*, 121 Q.J. ECON. 1283, 1284 (2006).

33. *See* Becker, *supra* note 4, at 183–84 (presenting analysis of probability of conviction, length of punishment, and other variables as determinants of number of criminal offenses).

the Becker model for treating changes in the severity of a sanction and in the probability of detection as identical, arguing that potential criminals are more sensitive to changes in the probability of detection than to changes in the size of a sanction.[34]

In a series of two papers, Alon Harel and his colleagues employ insights from cognitive psychology to compare the way potential criminals treat uncertainty concerning sanction size and the probability of detection.[35] These studies focus mainly on how individuals evaluate the probability of detection in a criminal-law context. Additionally, there are some lines of research that focus on behavioral effects of legal ambiguity in the civil context.[36] In the contexts of tax law and information sharing, researchers have focused on how the law can help people overcome their ambiguity aversion when avoiding a behavior is inefficient.[37]

In the legal context, some research, while not using the terminology of disjunction, suggests that legal uncertainty decreases the influence of the law on people's decision-making beyond what would have been predicted under utility theory and risk-aversion research. Viewing legal uncertainty as different from uncertainty in decision-making, Yuval Feldman and Alon Harel have shown that when faced with legal ambiguity, people rely primarily on social norms to decide how to behave.[38] Their paper demonstrates that people are strategic in their choice of social reference group and that legal ambiguity is a key factor in moderating reliance on the behavior of others. Feldman and Doron Teichman have shown the difference between uncertainty in a law's meaning and uncertainty in enforcement. They have demonstrated empirically that the legal uncertainty affected not only the instrumental, deterrence-related effects of law, but also the expressive meaning of the law.[39] Their paper demonstrates how the type of law as well as its association with uncertainty moderates the effect of legal uncertainty on behavior.

Although these studies focus on how uncertainty leads people to understand the law differently, they do not directly address the disjunction effect, whereby uncertainty causes people to ignore the law in full or in part. In this paper, we

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34. *See, e.g.*, Harold G. Grasmick & George J. Bryjak, *The Deterrent Effect of Perceived Severity of Punishment*, 59 SOC. FORCES 471, 486 (1980–1981) (suggesting that perceived severity has significant deterrent effect at relatively high levels of perceived certainty).

35. Harel & Segal, *supra* note 3; Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 486–87 (2004).

36. *See, e.g.*, Lee Anne Fennell, *Death, Taxes and Cognition*, 81 N.C. L. REV. 567, 578–93 (2003) (discussing people's behavior with regard to estate-tax planning).

37. *See* Amitai Aviram & Avishalom Tor, *Overcoming Impediments to Information Sharing*, 55 ALA. L. REV. 231, 248–50 (2004); Terrance R. Chorvat, *Ambiguity and Income Taxation*, 23 CARDOZO L. REV. 617, 640–45 (2002) (advocating a low or zero tax rate for foreign investments to overcome investors' ambiguity-based preference for domestic funds).

38. Yuval Feldman & Alon Harel, *Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule vs. Standard Dilemma*, 4 REV. L. & ECON. 81, 98–99 (2008).

39. Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 985 (2009).

suggest a more dramatic change in the way people react to legal uncertainty than has been argued for in the disjunction effect suggested by Tversky and Shafir[40] or the uncertainty effect suggested by Gneezy and his colleagues.[41] More specifically, we argue that legal ambiguity might cause people to undermine their consideration for the law altogether and resort to alternative motivational causes—their true preferences. Thus, our focus is not on how people make decisions under conditions of uncertainty, but rather how people might avoid taking legality of their actions into account and choose alternative paths of behavior when the law cannot give them certainty. Furthermore, in contrast to the surveyed literature on uncertainty in law that focuses mainly on legal costs and the deterrent power of ambiguity, our focus is on legal benefits and, hence, transcends the deterrence-related discussion of ambiguity. We aim to demonstrate empirically that legal uncertainty can mask some of the distorting ex ante effects of the law. If indeed we succeed, our effort to provide a mechanism which could mask the law ex ante will likely receive some behavioral support.

B. Empirical Demonstration

Based on the review of literature on the disjunction effect, the following empirical demonstration explores, in a legal context, the gap between the impact of certain probabilistic and ambiguous legal benefits on one's legal preferences. To achieve this goal, we randomly divided our sample into four groups. Each group was presented with an identical employment-law dilemma that differed only in the likelihood of getting a legal benefit associated with choosing a certain type of legal regime. The goal was to compare between the influence of certain, probabilistic, and ambiguous legal benefits relative to a situation where no legal benefit was offered.[42]

1. Sample and Design

The data collection method was web-based, using the survey firm, Panels. The firm holds a panel of volunteers who earn online rewards in return for filling out a survey. The sample of the survey was drawn from a diverse, representative panel of 438 Israeli adults. All participants were presented with the following identical scenario, which is based on a typical employment-law dilemma:

> Assume that you are looking for an accountant for a firm that you own. You wonder whether it makes more sense to employ him as your employee or as a contractor. If you choose the first route, then you gain greater ability to supervise his working hours and greater control over the way the work is being done. In contrast, if you choose the second option, then the payment will be based on output, but you will not have any control over the working hours or the way the work will be done.

40. *See* Tversky & Shafir, *supra* note 29.
41. *See* Gneezy et al., *supra* note 32.
42. When referring to legal benefits, we include also saving future legal costs.

Following this description, which was the same for all subgroups of the sample, an experimental manipulation took place. In this manipulation, the legal ramifications of choosing to take the second route were phrased in four different ways, each given to one of the four randomly selected subgroups of the sample:

1. No external rewards mentioned. In this group, no reference to legal benefits was made, and participants were expected to make their decision based on organizational differences between the two types of employment.

2. Legal reward under the condition of ambiguity. In this group, participants were told the following:

> Assume that, according to the law that regulates employment relations in Israel, if you choose to employ the accountant as a contractor rather than as an employee, you could save 5,000 NIS per month because of various legal benefits you will not need to pay (e.g. employer's tax, severance pay, and other social benefits). Nonetheless, there is a possibility that the court will intervene and would declare that the accountant is your employee and then you will save nothing on legal grounds.

3. Legal reward under the condition of uncertainty, with probabilities provided. In this group, participants were told the following:

> Assume that, according to the law that regulates employment relations in Israel, if you choose to employ the accountant as a contractor rather than as an employee, you could save 5,000 NIS per month because of various legal benefits you will not need to pay (e.g. employer's tax, severance pay, and other social benefits). Nonetheless, there is an 80%[43] chance that the court will intervene and would declare that the accountant is your employee and then you will save nothing on legal grounds.

4. Certain external rewards. In this group, participants were told the following:

> Assume that, according to the law that regulates employment relations in Israel, if you choose to employ the accountant as a contractor rather than as an employee, you would certainly save 1,000 NIS per month because of various legal benefits you will not need to pay (e.g. employer's tax, severance pay, and other social benefits).

43. We recognize that using low probabilities limits the ability of our findings to generalize in terms of other situations with higher probabilities.

For each factual scenario and legal mechanism, we measured the following variables:[44]

1. Intention[45] of self and others to choose a certain employment pattern
2. Whether the legal arrangement taken is profitable and fair from the employee perspective
3. What the most suitable legal arrangement for the described setting would be
4. Risk attitudes
5. Demographics

2. Findings

a. Effect of Certainty on Self Versus Others

We start our analysis by examining whether the different ways of framing the certainty of legal benefits affected (1) what participants themselves would choose and (2) what participants expected that others would choose. Using an "Analysis of Variance"[46] controlling for demographics and attitudes toward risk (MANCOVA[47]),[48] we find that the legal instrument subgroups did indeed differ significantly with regard to the measures of the employment preference.[49] Univariate tests revealed that the effect was significant for both measures of the preferred form of employment,[50] with a higher preference for employing a salaried employee found within the *No External Reward* scenario (*No External*

44. In addition, we have also measured an elaborate demographic profile to account for risk preferences. This last factor was used as the control in all of the presented analyses.

45. We rely on the concept of intention developed by Icek Ajzen. *See* Icek Ajzen, *The Theory of Planned Behavior*, 50 ORG. BEHAV. & HUM. DECISION PROCESSES 179, 181 (1991) ("Intentions are assumed to capture the motivational factors that influence a behavior; they are indications of how hard people are willing to try, of how much of an effort they are planning to exert, in order to perform the behavior.").

46. ANOVA, a univariate analysis of variance, aims to identify the sources of variance among participants. In contrast to MANOVA, ANOVA involves only one dependent variable.

47. MANCOVA and ANCOVA are similar procedures to MANOVA and ANOVA, respectively. The major difference is that MANCOVA and ANCOVA control for the influence of a supplementary independent variable (a covariate) such as demographics and attitudes toward risk.

48. While the one-way analysis of variance (ANOVA) revealed that the legal instrument subgroups did not differ significantly on the risk-attitudes measure, the measure, which was expected to be associated with the outcome factors, was included as a covariate in the analyses to be reported. A similar pattern of results emerged without covariating for the risk attitudes and, therefore, the possible effect of the measure as a competing explanation for the participants' outcomes was substantially reduced. Covariating for the three background variables revealed similar patterns of results unless reported otherwise.

49. Multivariate $F(6, 864)=7.45$, $p<.001$, $\eta^2=.05$.

50. Self as an Employer: $F(3, 433)=6.79$, $p<.001$, $\eta^2=.04$; The Majority as an Employer: $F(3, 433)=12.20$, $p<.001$, $\eta^2=.08$.

Reward), followed by the *Legal Reward Under the Condition of Ambiguity* scenario (*Ambiguous Reward*), the *External Reward—Probabilistic Reasoning* scenario (*Probabilistic Reward*), and the *Certain External Reward* scenario (*Certain Reward*).

In accordance with the hypothesis,[51] we found that for the measure of self-decision, the scenarios of *No External Reward* and *Probabilistic Reward* generated a significantly higher preference for the salaried employee than did the *Certain Reward* (all $p's < .05$). We found that for the measure of the decision participants expected others to make, however, the *No External Reward* scenario generated a significantly higher preference for occupying a salaried employee than did the scenarios of *Ambiguous Reward*, *Probabilistic Reward*, and *Certain Reward* (all $p's < .05$). This gap in the ambiguity effect might be related to the fact that part of the reason for ambiguity aversion is related to a self-defense mechanism. Thus, when asked to evaluate the behavior of others, the discount associated with an ambiguity aversion is smaller.[52]

Table 2 presents the adjusted mean scores (M) and standard deviations (SD) of the measures of the preferred form of employment as a function of the legal instrument. Figure 1 presents the ranking of the legal instruments with regard to these measures.

Table 2: The Adjusted Mean Scores and Standard Deviations of the Measures of the Preferred Employment Format as a Function of the Legal Instrument

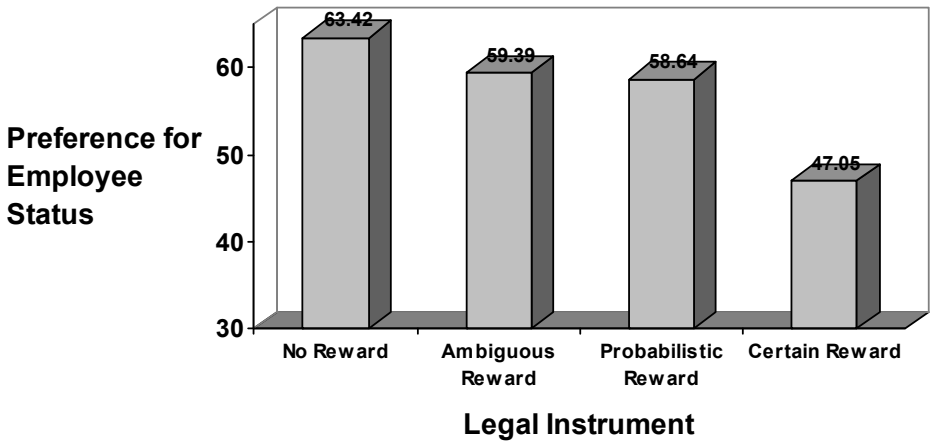
	The Legal Instrument							
	No Reward		**Ambiguous Reward**		**Probabilistic Reward**		**Certain Reward**	
Measures of the Preferred Occupational Arrangement	M	SD	M	SD	M	SD	M	SD
Self (Intention)	63.42	27.47	59.39	27.12	58.64	27.49	47.05	31.14
Most Others	62.00	24.30	49.02	27.76	46.23	27.05	40.84	29.00

Comment: Controlling for the level of tendency for taking risks.

51. This hypothesis is based on the Bonferroni post-hoc test, which helps to address the problem of multiple comparisons.

52. For a discussion of the sources of the "self-other gap," see Nicholas Epley & David Dunning, *Feeling "Holier Than Thou": Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOL. 861, 861–62 (2000) (discussing why people tend to hold more charitable views of themselves than of others). For a discussion of the gap in the legal context, see Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1153–54 (2010) (examining the effect of various regulatory mechanisms on social enforcement patterns).

Figure 1: Preferred Legal Arrangement (Self)



Therefore, as one can see from the analysis and from the graph, our hypothesis was confirmed: when legal benefits are provided through uncertain rules, their effect on the reported intention of individuals will be diminished. Not only did certain legal benefits have a stronger effect on participants' decisions than uncertain legal benefits, but the effects of both probabilistic and ambiguous legal benefits were no stronger than the effect of no legal benefit. While the weak effect of the *Ambiguous Reward* was expected according to the behavioral literature, the theoretical basis for the limited effect of the *Probabilistic Reward* was weaker. This effect could be explained by the uniqueness of legal uncertainty, which was shown above to have different effects than typical ambiguous information.[53]

53. *See* Feldman & Teichman, *supra* note 39, at 1009–11 (finding that because of law's expressive nature, clear law significantly affects behavior even if enforcement is uncertain or unlikely).

b. Who Is More Likely To Be Affected by Certainty?

By examining whether the arrangement was desirable to employers, we can identify how much people care about employees in their choice of employment format. Examining the interaction between this factor and the manipulated level of certainty of legal benefits, using a two-way MANCOVA, reveals the following interesting interaction: the effect of the certainty of the law on the measures of the preference of the form of employment changed according to the level of the perceived desirability of the arrangement from the employee's perspective.

We divided our sample based on their evaluation of the desirability of their chosen legal arrangement from the perspective of the employee.[54] Only among participants with a low or an intermediate positive perception of the arrangement did the legal instrument have a significant effect on their choice.[55] Among participants with a low positive perception of the arrangement (that is, those who did not care at all about the employee), the *No External Reward* scenario generated a significantly higher "self" preference of employing a salaried employee than did the scenario of *Certain Reward*.[56] An even stronger effect of certainty was found with regard to those with an intermediate positive perception of the arrangement (that is, those who had a moderate regard for the interest of their employee). All three legal rules (*No External Reward*, *Ambiguous Reward*, and *Probabilistic Reward*) generated a significantly higher "self" preference for the salaried employee than did the scenario of *Certain Reward*.[57] Among participants with a high positive perception of the arrangement from the employee perspective, however, the certainty did not have a significant effect on the measure ($p > .05$).

Figures 2–4 present the interaction effect between the certainty of the law and the perceived desirability of the arrangement from the employee's perspective on the measures of the preference of the employment format ($n=438$).

54. Participants were divided into three subgroups according to the thirty-third and sixty-sixth percentiles of the measure of the perception of the arrangement from the employee's perspective. Two items were used to build this factor: q 4 (whether the chosen arrangement is profitable for the employee) and q 8 (whether the chosen arrangement is fair for the employee).

55. These tests are based on the linearly independent pairwise comparisons among the estimated marginal means.

56. $F(3, 425)=2.86, p<.05, \eta^2=.02$.

57. $F(3, 425)=3.24, p<.05, \eta^2=.02$.

Figure 2: Preference for the Contractor Arrangement Within the *Low* Perceived Desirability Subgroup

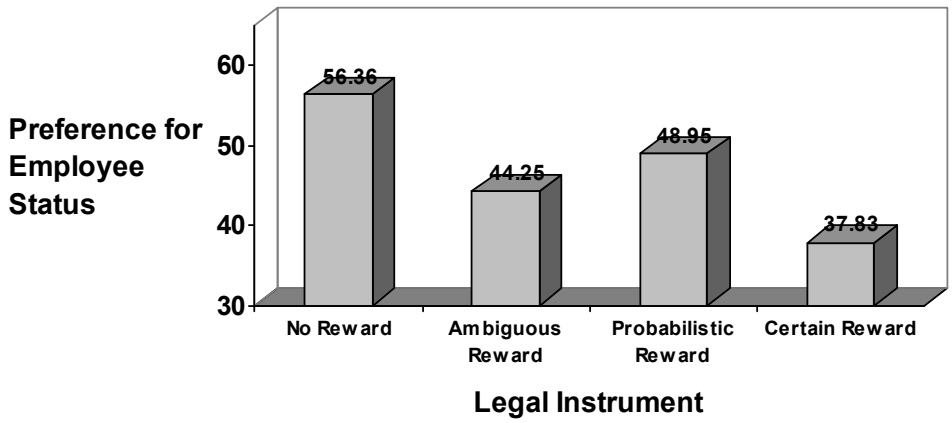


Figure 3: Preference for the Contractor Arrangement Within the *Intermediate* Perceived Desirability Subgroup

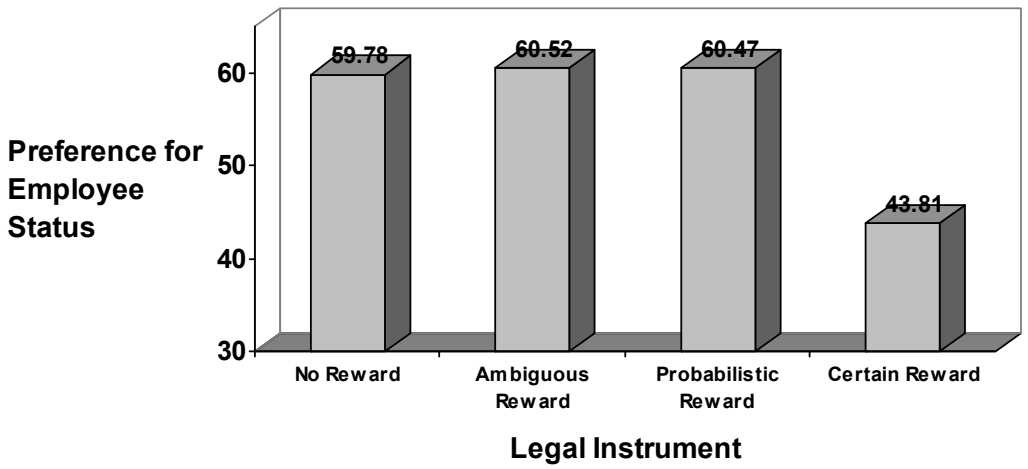
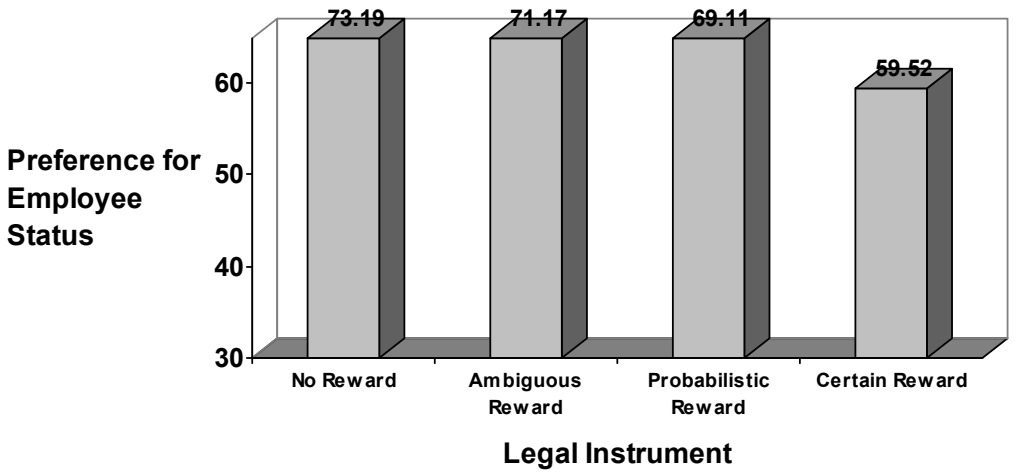


Figure 4: Preference for the Contractor Arrangement Within the *High* Perceived Desirability Subgroup



For participants who are internally motivated and who have high regard for the employee, neither the law nor its certainty affected their choice. In our terminology, such people's "original experience" will not be affected even by a certain law; thus, creating a veil of ignorance by legislating uncertain law is not needed. This is not the case with regard to people who have no regard for their employee or, especially, moderate (or intermediate) regard for their employee. For those two categories, we see that only legal certainty can shift their choice. For such people, uncertainty was shown to be an effective tool in masking the ability of ex post legal benefits to alter behavior.

A similar finding emerged when an interaction was examined with the factor of "level of saving needed" (in terms of salary) for choosing the employee–contractor option. This factor aimed at identifying the strength of participants' preferences for either one of the employment formats offered to them.

The two-way MANCOVA revealed that the effect of the legal instrument on the measures of the preference of the employment format changed according to the level of the estimated reduction in the employee's wage.[58] Only among participants with a low estimated reduction in the employee's wage did the legal instrument have a significant effect on their choice of legal

58. Participants were divided into three subgroups according to the thirty-third and sixty-sixth percentiles of the measure of the perceived reduction in the employee's wage.

arrangement,[59] with the conditions of *No External Reward*, *Ambiguous Reward*, and *Probabilistic Reward* generating a significantly higher preference for the salaried employee than the *Certain Reward*.[60] Among participants with an intermediate or a high estimated reduction in the employee's wage, the variation in the certainty of the law did not have a significant effect on the measure ($p's > .05$).

Thus, we see a similar interaction between level of certainty and strength of preferences, as in the previous analysis. When participants require moderate to high changes in costs to change their preferences, it is more difficult for either law or certainty to alter their preferences.[61] These two interactions, while enriching our understanding of the mechanism through which certainty operates, limit our ability to generalize in our argument, as they suggest that the main effect of certainty discussed in the beginning of the findings section could be attributed to certain types of people.

c. Subjective Experience of Uncertainty

Finally, we move on to explore the effect of certainty on one's experience through a "within subject" design rather than a "between subject" design. In this part of the study, we asked participants to consciously ignore the benefits that they had just read. MANCOVA analysis shows that the legal instrument subgroups[62] differed significantly with regard to the measure of the preference of the employment format under the absence of economic considerations.[63] In accordance with the hypothesis, we found that the *Certain Reward* scenario generated a significantly higher preference for employing a salaried employee than did the two conditions of uncertainty.

This finding is consistent with our argument that uncertain rules are less likely to interfere with one's experience. Participants who were exposed to a certain legal benefit that emerged from the law were unable to ignore this benefit when requested to do so. Those participants who were asked to ignore an uncertain benefit and even a probabilistic one, however, were more likely to succeed in doing so.

Next, we reexamined the subjective experience of participants through the "within subject" design. Here, participants' success in ignoring the effect of the law was compared with their original choice across four experimental conditions.

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59. These tests are based on the linearly independent pairwise comparisons among the estimated marginal means.

60. $F(3, 425)=4.55, p<.01, \eta^2=.03$.

61. Note that with regard to the second interaction, certainty could not have had an effect when neither type of law differed significantly from the control group for the moderate- to high-level intensity of preferences.

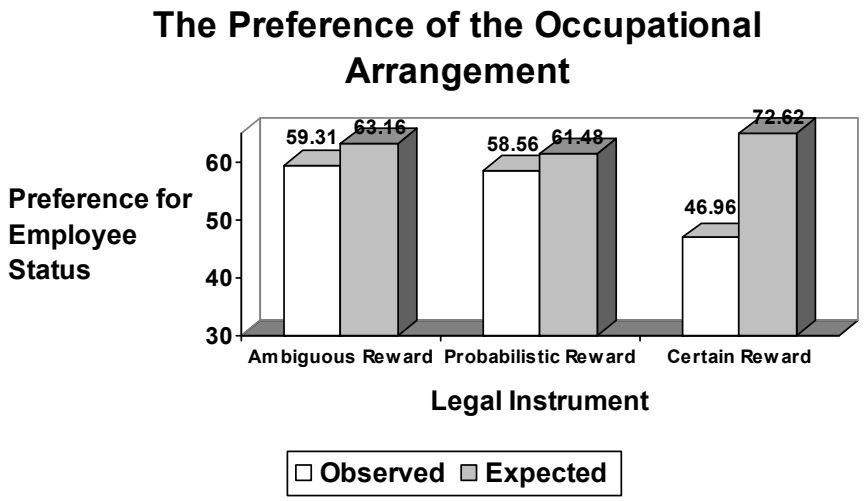
62. Three subgroups were compared: High External Reward under Uncertainty, High External Reward–Probabilistic Reasoning, and External Reward with Certain Probability.

63. $F(2, 324)=5.52, p<.01, \eta^2=.03$.

To examine this fact, we looked at the participants' responses when asked to ignore the legal benefits associated with their choice and compared it to their actual choice, which was done in response to the different framings of the law. In the vignettes that participants were asked to read, a two-way MANCOVA with repeated measures for the type of the preference of the employment format with and without reference to the legal benefits was mentioned, indicating a significant gap between the two measures.[64]

More importantly, a significant interactive effect was found between the preference of the employment format and the legal instrument.[65] Within the *Certain Reward* condition, the effect of the type of the preference of the employment format was found to be significant.[66] With regard to the other two uncertainty conditions, however, there was no change when participants were asked to note the preferences without taking into account the legal benefit. Figure 5 presents the adjusted mean scores of the two measures as a function of the legal instrument.

Figure 5: The Adjusted Mean Scores for the Measures of the Preference of the Employment Format as a Function of the Observed or Expected Preference and of the Legal Instrument (*n=438*).



64. *F(1, 324)=19.10, p<.001, η^2=.06*; *Expected Preference*: *M=72.62*, *SD=22.68*; *Observed Preference: M=46.96*, *SD=31.14*.

65. *F(2, 324)=15.63, p<.001, η^2=.09.*

66. *F(1, 324)=62.02, p<.001, η^2=.16.*

When participants were asked to ignore the effect of a certain legal benefit, there was a big shift in their behavior, which was even stronger than the experimental effect of legal benefits. In contrast, under both conditions of uncertainty, when participants were asked to ignore the effect of the law, they did not make any significant change in their choices. This suggests not only that uncertainty can mask the ex ante effect of law, but also, even in their own subjective experience, the participants did not feel the need to adjust their true preferences when they were asked to ignore an uncertain benefit.

C. Intermediate Summary: The Role of Uncertainty Within the Law

The empirical demonstration has led to three main findings regarding the ways in which legal uncertainty causes people to behave according to their true preferences. First, we have seen that getting legal benefits under conditions of uncertainty, whether probabilities were provided or not, did not have a significant effect on participants' preferences for an employment arrangement. Participants' behavior was less affected by the benefits of law when those benefits were uncertain. While the lack of effect of ambiguous legal benefits was expected according to theories of ambiguity aversion, disjunction effect, and uncertainty effect, it was less expected with regard to probabilistic benefits.[67] Because attitudes for risk were controlled for, it is unlikely that risk aversion could explain this effect. It is possible that this effect replicates some of the findings of Feldman and Teichman with regard to the uniqueness of legal uncertainty and the diminishing expressive power that law has in such contexts, even when probabilities are given.[68] It is also possible that even when probabilities are given, especially when they are low (for example, twenty percent), the legal benefit is not seen by people as worth considering in their own decision-making. Such effect is especially anticipated when people have other indicators on how to decide. In contrast to the classic decision-under-uncertainty studies, where the individual is required to give a dollar value to a probabilistic value, here, people have an option to avoid this tedious process by following their true desires.

Another caveat is that the effect of certainty works differently with regard to self-decision and with regard to what participants thought others would do. Here, probabilistic benefits and, to a lesser extent, ambiguous benefits, did have an effect on participants' evaluations of what type of arrangements people might choose.

This caveat is important for several reasons. First, it demonstrates that the manipulation was working well, for only in the uncertain groups was there a difference between what people wanted to do and what people thought others would do. Second, it suggests the motivational nature of ambiguity avoidance is

67. This second type of uncertain benefit was slightly stronger than the first type, but still no significant effect was present.

68. *See* Feldman & Teichman, *supra* note 39, at 1010–11.

weaker with regard to a decision not taken by the individual himself or herself. Therefore, in those areas where we are not interested in affecting the individual but rather social norms, ambiguity is expected to be less effective in masking the law.

Our second finding is related to the interaction between the effect of uncertainty and the strength of an individual's preference for one of the employment arrangements. We have shown that for participants who are internally motivated and have high regard for the employee, neither the law nor its certainty affected their choice. For such people, their "authentic experience" was not affected by certainty in the law. This is not so for people who have little regard for employees or have moderate regard for employee interests. For those two categories of participants, we see the benefits of uncertainty as a mask on the law. Certain legal benefits shifted their choice, while uncertain law, either ambiguous or probabilistic, did not have a significant effect on the choice of occupational arrangement. Therefore, for people with weak to moderate regard for employees, uncertainty was an effective tool in masking the ability of the law to alter behavior. A similar effect was found when the analysis was conducted with regard to the level of reduction in salary costs needed for employers to choose the employee's status.

Third, when participants were asked to ignore the effect of certain legal benefits, there was a substantial shift in their behavior, which was even stronger than the original experimental effect of legal benefits. This effect might be related to the "endowment effect," where maintaining a legal right one already possesses is valued more highly than obtaining a new legal right that one was never entitled to before. In contrast, under both conditions of uncertainty, when participants were asked to ignore the effect of the law, they did not make any significant change in their choices. This suggests that even in their own subjective experience, they did not feel the need to adjust their true preferences when they were asked to ignore an uncertain legal benefit. This last finding completes our understanding of the importance of uncertainty in weakening law's influence on people's experience and behavior.

Uncertainty was shown to be, at least in an artificial replication of real-life decision-making, significantly different than certain legal benefits. This fact demonstrates the potential for using uncertainty to mask the ex ante effect of law in the legal areas discussed above. Obviously, there are important limitations that we need to consider when attempting to use data taken from web-based experimental surveys, which basically only measure attitudes about real-life legal settings. In our experimental design, people did not risk anything in their responses and were faced with a somewhat unrealistic dichotomous dilemma. Nonetheless, as an empirical demonstration for the difference in treatment of uncertain and ambiguous legal benefits, we do believe that our study contributes to the theoretical argument of this paper.

IV

THE INADVERTENT CONSEQUENCES OF LEGAL UNCERTAINTY

Part III demonstrated that uncertainty might serve as a tool to mask the parts of the law which are shown to be disruptive. However, masking the law is not always a desirable goal. Furthermore, even in those situations where masking the law is socially desirable, uncertainty still carries some inadvertent effects which may limit its usage. Part IV presents these inadvertent effects and balances them with the advantages of uncertainty.

A. Excessive Litigation

According to conventional wisdom, uncertainty is one of the causes for excessive and inefficient litigation.[69] Recent research reveals, however, a more complex picture of the relationship between uncertainty and litigation. In some circumstances, due to risk and ambiguity aversion, uncertainty may encourage compromise. Furthermore, in ongoing relationships, uncertainty may lead litigants to neglect their legal rights and to focus instead on their future needs and preferences.[70] Given the complex and rich effects of uncertainty, the fear from excessive litigation should not prevent the policy maker from exploring the benefits of uncertainty.

B. Distributive Concerns

The effect of uncertainty may vary among people of different educational and socioeconomic statuses. Variation may occur ex ante, ex post, or during the period in between. This may have a significant distributive justice effect that lawmakers should be taking into account.

1. The Ex Ante Distributive Effect on Uncertainty

According to our analysis, legal uncertainty provides the mechanism for masking the legal consequences of an action and, therefore, enhances authenticity. Uncertainty, however, never achieves the pure effect of masking the law, as people gather some information about courts' ex post decisions regarding the uncertain rules. This ex post information is not equally accessed and understood by everyone. "Repeat players" are naturally more exposed to such information and are usually more motivated to gather and analyze the ex

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69. *See, e.g.*, Michael S. Wilk & Rik H. Zafar, *Mediation of a Bankruptcy Case*, 22 AM. BANKR. INST. J. 12, 60 (2003) ("[M]ediation gives the parties the control of determining the outcome of the dispute and avoids the uncertainty inherent in all litigation."). In the context of contract law, see Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 836–37 (2006) (discussing the trade-offs between precise terms, which are more costly to negotiate, and vague terms, which may lead to inefficient litigation).

70. *See, e.g.*, Claire A. Hill, *Bargaining in the Shadow of the Lawsuit: A Social Norms Theory of Incomplete Contracts*, 34 DEL. J. CORP. L. 191, 218 (2009) (arguing that parties strengthen their relationships by jointly accepting vulnerability "to costly and uncertain enforcement" through ambiguous contract terms).

post information. Thus, uncertain rules may increase the power gap between repeat players and "first-timers."[71]

Although asymmetric information has a clear distributive effect that should be taken into account, uncertainty does not necessarily work against economically weaker parties. First, the premise that both first-timers and repeat players are familiar with the legal implications of certain rules is not always true. In some cases, first-timers or economically weaker parties are wholly ignorant about the content of the law. In those cases, uncertainty reduces the knowledge advantage rather than increase it.

Second, making it harder for people to gather full knowledge of the law ex ante will primarily harm the more affluent members of society. After all, the employers or rich taxpayers are among the first of those who usually attempt to behave strategically with regard to the law.[72] This should work in the favor of first-timers, such as economically weaker parties.

Finally and most importantly, even if repeat players get legal advice ex ante, which could transform an ambiguous situation into a probabilistic one, our findings demonstrate that in the legal context, the discount for ambiguous legal information works even when the legal reward is probabilistic. This means that even if repeat players do indeed have more information ex ante about the possible results of litigation than do first-timers, the disjunction effect still undermines the practical results of these differences. Furthermore, our findings reveal that the disjunction effect does not interact with participants' risk attitude. This might narrow the distributive effect, which could be attributed to the gap in attitudes toward risk-taking among participants.

2. Bargaining in the Shadow of Uncertainty

We have argued that ex ante ambiguity will not result in a systematic distributive effect in favor of the economically superior parties even in cases of asymmetric information and differences in risk-taking. Yet, the ex ante advantage of uncertainty may carry inadvertent normative and behavioral effects with regard to ex post litigation decisions. From a normative perspective, in the ex post stage, the need to maintain ex ante genuine choice is no longer present, and the focus moves to ensuring that weaker parties will be able to protect their legal rights.[73] On the behavioral front, when an individual decides whether to engage in ex post litigation, the legal ambiguity may be substituted for non-legal considerations. That is why in this stage, there is a need to refine our argument for masking the law, keeping in mind legal rights.

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71. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97–104 (1974–1975) (contrasting the characteristics of and strategies used by "repeat players" and "one-shotters").

72. *See* Craswell & Calfee, *supra* note 1 (explaining the effects of uncertainty in terms of deterrence); Harel & Segal, *supra* note 3 (arguing that uncertainty enhances deterrence).

73. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC'Y REV. 631, 636–37 (1980–1981).

For example, in the labor-law context, the uncertainty regarding the legal status of an employee may deter him from suing to protect his legal rights ex post. Furthermore, in the ex post situation, when the focus of both sides of an employment relationship is on protecting their own legal rights, there is no room, either behaviorally or normatively, for masking or decreasing legal considerations.[74] Thus, legal ambiguity may undermine the optimal functioning of the law without giving rise to an alternative mode of decision-making.

An additional danger arises when one's uncertainty regarding legal rights may intensify the power gap among parties. For example, under the regime we advocate, an employee in the context of labor law or a couple in the context of spousal relationships[75] may face uncertainty with regard to their legal rights. To be sure, when the legal rights associated with the exit options of the individual are uncertain, the power relations within the relationship become more problematic.[76] Those employees or couples may find themselves in an inferior position as a result of the uncertainty in the law.

In sum, despite our general support of uncertainty, we believe that its benefits should be balanced against its negative distributive-justice consequences. Although we do not offer a complete solution to this situation, the following part will demonstrate a possible balance between uncertainty and its potential negative distributive-justice implications in various legal fields, including labor law, tax law, family law, and health law.

V

POLICY IMPLICATIONS: THE ROLE OF UNCERTAINTY WITHIN THE LAW

A. Rules Versus Standards

In law and economics literature, much attention has been paid to the difference between "standards" and "rules."[77] Standards and rules can be depicted as two extremes in a one-dimensional space representing the degree of specificity of legal norms. Both standards and rules are legal norms that adjudicators use to direct actions. Standards are open-ended legal norms, allowing the adjudicator to make fact-specific determinations, such as whether a driver used "reasonable care" in a given situation. A rule, conversely, imposes stricter limits on the discretion of the adjudicator.

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74. There is an additional concern that should be taken into account regarding the influence of cognitive biases like the disjunction effect on decision-making in large organizations. *See* Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1568 (1992) (demonstrating that where the law is uncertain, large organizations tend to create structural and cultural environments that discourage employees from exercising their rights).

75. For more details, see *infra* Part V.B.1 (discussing the certainty in cohabitation law).

76. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970) (discussing and comparing exit options of various actors in various settings).

77. *See generally* Kaplow, *supra* note 2; Sunstein, *supra* note 1.

The use of rules and standards involves different costs. In the view of law and economics theorists, the choice between them should be determined by these costs.[78] The cost of producing standards is typically lower than rules, but the former has higher enforcement and compliance costs. Promulgating the standard "to take reasonable care in all matters" is extremely easy and does not generate much cost. Applying this standard in practice, however, may generate significant costs for judges, for example, who have to determine whether a plaintiff or defendant complied with a standard, and for defendants, who have to determine which level of precaution is necessary to escape liability. In the case of specific legal norms (that is, rules), the relative size of costs is exactly the opposite. The legislature incurs larger costs in creating a rule than in creating a standard, as it has to specify more precisely the scope of the rule and the consequences of its violation. On the other hand, rules are typically easier to apply than standards. In addition, the costs of legal advice are lower, and it is easier for citizens to predict their effects and act accordingly.[79]

While the efficiency consideration is straightforward, the choice between using standards and rules is difficult in the real world. The existing literature on the rule–standard distinction identifies the choice between rules and standards as founded on the frequency of the regulated activities. Rules are preferable when the regulated activity is frequent, whereas standards do best when behavior varies so greatly that any particular scenario is rare. Designing a rule for a rare scenario is too costly and the use of standards is, therefore, preferred. Since rules are more expensive to create, the costs are worthwhile only when the regulated activity occurs frequently.[80]

Recently, Feldman and Harel offered a behavioral case for use of legal rules. Because the effect of social norms on compliance is far greater with regard to standards than to rules, they suggest that the existence and the nature of prevailing social norms should be taken into account when determining the desirable degree of specificity in legal norms. Specifically, they argue that when social norms of noncompliance serve individuals' self-interest, legal rules are preferable to legal standards as a tool to achieve compliance.[81]

In this article, we use similar logic but approach it from the opposite direction. When social norms align with the law, we prefer legal standards over rules so that non-legal factors will be dominant in the decision-making process. Naturally, giving judges greater flexibility in adjudicating the law is likely to increase ex ante ambiguity, which is desirable in those situations. Furthermore, with regard to the third type and according to our model, when uncertainty is

78. *See* Kaplow, *supra* note 2, at 619–20.

79. Of course there could be relevant non-economic considerations. The rule of law is often considered a virtue of a legal system irrespective of its economic ramifications. *Cf.* Baker, Harel & Kugler, *supra* note 35, at 472 (non-economic considerations are often provided to justify the use of standards on the grounds that rules are too rigid and therefore unjust).

80. Kaplow, *supra* note 2, at 563.

81. Feldman & Harel, *supra* note 38, at 112.

geared toward preventing crowding-out, using standards may have an additional justification. Standards may be the optimal solution when the aim is encouraging state policies of certain pro-social activities, such as organ donations, without undermining the social capital which underlies such activities.

B. Moral Hazard and the Ex Ante Versus Ex Post Distinction

In order to demonstrate the use of uncertainty in type-one scenarios, where uncertainty may prevent moral hazards, we have chosen examples from family law and bankruptcy law for discussion.

1. The Marriage–Cohabitation Distinction

For over two hundred years, civil marriage has been a recognized legal institution in Western culture. During this period, it has been almost undisputed that the law should distinguish between married spouses and unmarried cohabitants,[82] both in terms of their mutual duties ("the internal dimension"), as well as in terms of their rights and privileges against the state and other entities external to their relationships ("the external dimension"). In recent decades, most Western legal systems have started to provide certain legal rights to unmarried cohabitants. Yet in most legal systems, the legal preference for married couples is still deeply rooted.[83]

Traditionally, the preference for marriage has been based mainly on moral–religious foundations. In recent years, however, a set of secular arguments have developed to justify the promotion of marriage.[84] At the heart of those arguments is the understanding that marriage is a signal for high-level commitment.[85]

The first set of arguments focuses on the interests of the couple. In recent years, research has demonstrated that from psychological and economic perspectives, involvement in an intimate relationship with a long-term commitment has significant value for the emotional and financial well-being of the individual, for the individual's self-image, and for the individual's ability to

82. Maxine Eichner, *Marriage and the Elephant: the Liberal Democratic State's Regulation of Intimate Relationships Between Adults*, 30 HARV. J.L. & GENDER 25, 26 (2007) (claiming that until recently, the legitimacy of the state's involvement in and support for marriage went largely undisputed).

83. For a survey of the many tangible legal benefits of marriage, see generally David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996) and Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291 (2001).

84. *See* Shahar Lifshitz, *Spousal Rights and Spousal Duties: The Liberal Case for Privileging Marriage*, *in* THE JURISPRUDENCE OF MARRIAGE AND OTHER INTIMATE RELATIONSHIPS 165, 165–69 (Scott FitzGibbon et al. eds., 2010) (surveying the public arguments in favor of marriage).

85. Michal J. Trebilcock, *Marriage as Signal*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 245, 249–50 (F.H. Buckley ed., 1999); Russell D. Murphy, Jr., *A Good Man Is Hard To Find: Marriage as an Institution*, 47 J. ECON. BEHAV. & ORG., 27, 27–28 (2002).

function as a good citizen.[86] Marriage constitutes a classic example of a social institution embodying a profound and long-term intimate commitment.[87] Accordingly, there exists a public interest in supporting the social institution of marriage.[88]

Another type of argument focuses on the well-being of children. Extensive research demonstrates the importance of a stable relationship for the physical and mental well-being of children. This research has exposed the difficult reality encountered by children and mothers who live in unconventional family patterns—particularly in single-parent families[89] but even in cohabiting families[90]—and the long-term ramifications of these difficulties. Since the well-being of children is an outstanding public interest, this interest also supports the institution of marriage.

A third type of argument relates to the benefit to society that is inherent in the institution of marriage. First, the financial responsibility imposed on the couple within the framework of marriage frees the public from the need to cover the costs of caring for weaker family members. In addition, theoretical and empirical studies illustrate that marriage has a moderating effect on individuals' behavior and promotes positive social behavior in general.[91]

Taking into account the public interest in promoting long-term commitment between spouses, it seems reasonable that the law should distinguish between marriage and cohabitation in order to encourage couples who are willing to take on a long-term commitment to get married. Yet while the law should distinguish marriage from cohabitation ex ante, various considerations justify the award of certain marital benefits to cohabitants. The law has a role in the protection of weaker parties within society—the responsive aspect of the law. Consequently, even if it is deemed appropriate to encourage couples to marry,

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86. For an overview of the psychological advantages of marriage, see Linda J. Waite & Maggie Gallagher, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 65–77 (2000). For an overview of the economic advantages of marriage, see *id.* at 97–123.

87. *See* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1908–10 (2000).

88. For a similar argument, see Carl E. Schneider, *The Channeling Function in Family Law,* 20 HOFSTRA L. REV. 495, 500–01 (1992).

89. *See* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT 19–63 (1994).

90. *See* Wendy D. Manning & Daniel T. Lichter, *Parental Cohabitation and Children's Economic Well-Being*, 58 J. MARRIAGE & FAM. 998, 1009 (1996) (finding that children in cohabitating households have an economic advantage over children in single-parent households but are at an economic disadvantage compared to children in married households).

91. For an economic analysis of the moderating aspects of marriage and the social benefit thereof, see William Bishop, *Is He Married? Marriage as Information*, 34 U. TORONTO L.J. 245, 259 (1984) (noting that marriage is a signal of desirable qualities, such as stability); David D. Haddock & Daniel D. Polsby, *Family as a Rational Classification*, 74 WASH. U. L.Q. 15, 33, 42–43 (1996) (noting that members of traditional families generally regulate their behavior to uphold the household's reputation; noting that domestic partnership can be feigned for temporary social benefits and does not implicate the same level of mutual responsibility).

it may not be appropriate to leave unmarried couples or their children to their own fate. Accordingly, this approach responds to the existing reality by establishing legal principles that recognize the institution of cohabitation and confer rights upon couples who have chosen that lifestyle.

Different legal systems have sought the proper balance between the directive aspect of the law, which leads to distinguishing marriage and cohabitation, and the responsive aspect, which supports granting marital rights to cohabitants. The "veil of uncertainty" should have a positive role in this context. Regarding marriage, the channeling–directive function of the law should have a prominent role. The law should be clear and certain both in terms of who is married and of which rights apply to marriage, in order to provide an incentive for couples to get married. In the context of cohabitation, the directive and responsive aspects of law must be balanced to provide a guiding principle regarding which components of marital law should apply to cohabiting couples.[92]

The components of marital law in which the principal function is to encourage participation in long-term relationships should not generally be applied to cohabiting couples. In contrast, in the case of "responsive" provisions, which focus on the protection of weaker family members[93] (such as various forms of bereavement pensions) and corrective justice (such as the provision in torts law granting the partner of a person killed in an accident the right to sue the tortfeasor), our argument for distinguishing marriage and cohabitation is diminished. In such scenarios, the protective and responsive functions of the law should receive greater weight. Yet, as we have already explained, the responsive aspect of the law might harm its guiding aspect, as wide imposition of marital laws on cohabitants may blur the distinction between the institutions and decrease the incentive to get married. Here, legal uncertainty and ambiguity may serve a positive role.

In contrast to the certainty that should characterize laws regarding marriage, laws relevant to cohabitants should include broad legal standards that provide courts with discretion to determine who should be considered a cohabitant under the law and which marital rights should apply. In such a legal structure, the ex post relief to cohabitants will not undermine the ex ante incentive for couples to get married. In contrast to the conventional criticism on the current ambiguity of laws for cohabitants, this ambiguity may actually benefit society.

Before concluding our discussion on the marriage–cohabitation distinction, we would like to add three caveats. First, our analysis regarding the promotion of long-term commitments is implicitly premised on couples that could choose between marriage and cohabitation. In many Western countries, same-sex couples are excluded from marriage. From a liberal perspective, it is implausible

92. *See* Lifshitz, *supra* note 10.

93. *See* Braschi v. Stahl Assoc. Co., 543 N.E.2d 49, 53–54 (N.Y. 1989) (protecting housing rights of cohabitants).

to prevent them from getting married and to deny them marital rights. Accordingly, we believe that the privileges derived from marriage as a tool to encourage long-term commitment should also support the ability of same-sex couples to undertake these same commitments, either by marriage or, alternatively, by civil union that entails all the legal benefits of marriage.

Regarding families with children, the responsive aspect of the law, particularly its protective function, should outweigh the directive aspect. Accordingly, those components of family law in which the overt or covert intent is to support children should be applied to all family models.

Finally, this part focuses on the external rights of cohabitants, as opposed to their mutual duties (or internal rights). As we explain in the "limitation section" of this article,[94] in the context of the mutual relationship between couples, absolute uncertainties regarding legal rights may intensify the power gap between parties during the course of their relationship. In this context, we believe that the law should provide a minimum level of certainty in order to put the weaker party on notice that he or she will be entitled to legal remedies should the couple separate.[95]

2. Bankruptcy Law

In the context of bankruptcy law, the effect of uncertainty on the behavior of legal actors has been recognized and criticized.[96] Much of the discussion of uncertainty has been with regard to the prioritization of different debts and debtors. Uncertainty is seen as a factor which should be reduced, rather than as a factor that may reduce the likelihood of an individual behaving strategically ex ante when considering whether to take a loan. Indeed, moral hazard is a major theme in a long list of laws where helping people deal with consequences of certain behaviors may lead to situations where those behaviors could be the product of manipulative intentions.[97]

Legal ambiguity may curb the problem of moral hazard in bankruptcy law[98] by downplaying, ex ante, the exact reliefs defaulting debtors can receive. An additional illustration of the potential role of uncertainty is related to the increasing number of alternatives to the classic bankruptcy process. Much of the

94. *See supra* Part IV.

95. *See* Lifshitz, *supra* note 10, at 1601–02 (suggesting pluralistic regulation of spousal relationships which objects to full equality of marriage and cohabitation but at the same time suggests imposing selective components of marital law on cohabitants).

96. Baird and Bernstein have argued that uncertainty in the evaluation of the reorganized corporation is part of the reason for the lack of coherency in absolute-priority criteria. *See* Douglas G. Baird & Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 YALE L.J. 1930, 1935 (2006).

97. For a critical review and analytical discussion, see generally Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

98. The relationship between bankruptcy laws and morally hazardous behavior is relatively straightforward and has been widely recognized in the literature. *See, e.g.*, Joseph E. Stigliz, *Bankruptcy Laws: Basic Economic Principles*, *in* RESOLUTION OF FINANCIAL DISTRESS (Stijn Claessens, Simeon Djankov & Ashoka Mody eds., 2001) (discussing lending behaviors without due diligence).

concern of academics who work within this literature is centered on the strategic behavior by the various actors involved in creditor agreements. Furthermore, the recent economic crisis has created many situations where government bailout is an additional option for companies in dire circumstances.[99] When examining the pros and cons of who should be allowed to take advantage of this option and under what circumstances, the problem of moral hazard is mentioned as one of the main policy concerns, as executives may evaluate their decisions based on the likelihood of getting legal relief rather than on fixing the company. Keeping executives in the dark with regard to types of legal relief available, as well as which parts of their debts could be excused, could limit their focus on a law aimed at helping a company when no other option is available.[100]

C. Ensuring Genuine Choices

1. Employment Law

The area of employment relations is one of the typical legal contexts where we see the dilemmas from the second type. As explained in part II, this type of legal ambiguity focuses on ensuring that the law does not dominate one's decisions, even when the choice to do so is legitimate. Employers should not engage in a behavior in which the main purpose is to pay employees less than what the law requires, either by conferring a contractor title rather than that of a full-fledged employee or by arguing that the individual in question should not be seen as the company's own employee. In various contexts, courts have been very clear in their holdings against organizations structured purely to evade the law.

We demonstrate the potential effect of ambiguity in this context with regard to the core definition of the status of employees and employers as well as intellectual property created in the workplace. In the context of employment relations, the discussion can be divided into two basic questions: Who is an employee, and who is an employer? The first question discusses the same dilemma that we explored in our experimental sample—the distinction between an employee and a contractor. In many cases, both employers and employees prefer a situation where their relationship is flexible. The law permits service providers to be defined as contractors or freelancers when this is an accurate representation of their status. Judges and the legislature fear a situation in which the main or only purpose is to create a fictitious representation of the

99. Ayotte & Skeel, *supra* note 16, at 469–70.

100. We are aware of the cost of legal ambiguity in this context. For example, ambiguity may cause debtors to wait too long before asking for legal relief. The challenge of bankruptcy lawmakers, therefore, is to find the equilibrium between morally hazardous risks and over-deterrence. A possible option is to continue with the general broad standards ex ante but to add to the existing ambiguous system a semi-individualized pre-ruling mechanism ex post that provides executives who run into financial distress the ability to estimate the legal result of bankruptcy versus alternative debt arrangements.

employee as a contractor in order to evade the legal responsibilities employers have toward their employees. In such a situation, due to the asymmetry between employers and employees, such employees will not enjoy the benefits contractors enjoy (for example, higher salary, flexibility, intellectual-property rights) nor will contractors enjoy the benefits of employees (for example, greater job security and equal protection rights).[101] In this context, a common criticism is related to the complex definition of the word "employee."

In many legal systems, the definition of "employee" may change from one statute to the next. In addition, courts have employed various tests to define "employee" that take into account various factors that can sometimes be determined only ex post (for example, the "true nature" of the relationship and how parties perceive themselves).[102] The complexity of those tests and factors are often criticized.

Despite the problems associated with ambiguity in this context, there is at least some value in the fact that employers facing ambiguity may be less motivated by legal concerns in forming the relationships they maintain in the workplace. Our simple experimental manipulation has shown this exact phenomenon: Preference for employing an individual as a contractor was reduced when legal status was ambiguous. The other primary way that employers evade responsibility is with regard to their status as employers, something which is especially problematic in "triangular" relationships, where the user enterprise tries to escape its responsibilities as an employer.[103]

In the context of who is an employee, one may point to the relatively dominant involvement of courts in determining how the tests should be applied. We see the reverse trend when the legislature has attempted to suggest clear ex ante rules to determine when the user enterprise should be seen as the employer.[104]

In a recent example from Israeli law, there has been an attempt to replace with legislation the discretion traditionally given to the courts regarding employment status. Under the legislation, the user enterprise would act as the employer after nine to fifteen months of tenure. Under this approach, employers know in advance the length of time they can safely employ people

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101. For a comparative discussion of many of the tests used by the United States, Canada, and the United Kingdom, see generally Guy Davidov, *Who Is a Worker?*, 34 INDUS. L.J. 57 (2005).

102. Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV 351, 417–20 (2002).

103. *See* Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153, 162–63 (2003).

104. For a discussion of this issue in Germany, see Anke Freckmann, *Temporary Employment Business in Germany*, 15 INT'L CO. & COM. L. REV. 7, 8 (2004). Similar laws can be seen in France and Belgium that have strict ex ante limitations both on the length of time and on the reasons that justify using contractors. Furthermore, in these countries, there is an equal-pay requirement for contractors. *See generally* Sabine Smith-Vidal, *France*, *in* TEMPORARY AGENCY WORK AND THE INFORMATION SOCIETY 115 (Roger Blanpain & Ronnie Graham eds., 2004); Othmar Vanachter, *Labour Law and the Division of Power Between the Federal Level, the Communities and the Regions in Belgium*, *in* FEDERALISM AND LABOUR LAW 21 (Othmar Vanachter & Martin Vranken eds., 2004).

without any fear of legal intervention.[105] In the context of contingent employees—employees who are formally employed through one entity but provide their services to a second entity—defining who is the employer is especially important. This is primarily because many of the "formal employers" are unable to take care of their employees' basic needs. Legal ambiguity regarding the permissible length of time of contingent work may make user enterprises less likely to consider hiring people for fourteen months as a way to evade the law.

We understand the limitations of our approach, especially when it comes to relatively weak employees who lack ex ante knowledge. Without ex ante knowledge of the law, for example, employees may wait too long before claiming that an employer has engaged in fictitious transactions in defining them as temporary employees. Therefore, the argument for the advantages of ex ante legal ambiguity is stronger in situations where the decision to clarify one's legal status is not based solely on risk perception of weaker parties. In situations where the weaker party is expected to act first, the cost of legal ambiguity may exceed the benefit.

The second context we would like to discuss is the area of intellectual property in the workplace. In this context, the role of ambiguity in preventing strategic behavior by both employees and employers is complicated. Employees are obligated not to divulge trade secrets and proprietary knowledge to entities outside the corporation, and employers are obligated to respect the intellectual property in employees' inventions.

When deciding to what types of information the employee will be exposed, there is an inherent conflict of interest between the employee and the employer. With regard to the protection of confidential information, it is obvious that employees want to learn information that could also be used when they leave the company. In contrast, the employer's main interest is that its employees learn skills that will improve their productivity while they are working for the company. The employer has no interest (and perhaps has a negative incentive) in having employees learn information that could be used when they leave the company. Given the increasing rate at which employees move between companies in recent years, the effect of this conflict is substantial with regard to the types of information to which employees will be exposed.[106] A situation where both employers and employees will not have a clear ex ante view of what information is proprietary may ensure that employees have greater motivation to learn as well as more opportunities to do so.

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105. Indeed, very recently, the National Labor Court in Israel allowed a company to fire a temporary worker after nine months even though there was no other reason behind the layoff. *See* File No. 759-39-10 National Labor Court, Zohar Golan v. O.R.S (Dec. 9, 2010), Padaor (by subscription) (Isr.).

106. *See* Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 594 (2001).

This argument needs a few adjustments and adaptations to stand up to several possible criticisms. First, ex post when employees leave the company, some clarification will be needed to avoid over-deterrence situations. Second, even ex ante employees need clear rules as to which types of information may be disclosed while they are working for the company. For example, employees should be able to distinguish between topics they are free to discuss and those that are off limits.

The argument regarding the distributive effects of ambiguity is demonstrated nicely in the context of employment relations. The greater risk aversion of employees, as well as their greater fear of ambiguity, may suggest that without ex ante clarity, they may work in the company for more time than is efficient for them simply because they are not certain of their ex post status. Similarly, employers may have better tools for dealing with such ex ante uncertainty, such as organizational measures that would replace the incentives offered by the state. Employees would have limited ability to employ countermeasures. Distributive concerns may arise when employees who are unclear about the law refrain from discussing their rights when leaving the company or looking for another job.

Yet these concerns are only partly valid. Our analysis distinguishes between ex ante and ex post situations. The ex post status deals with a situation where an employee (especially when it comes to sophisticated high-tech employees) is planning to leave a company and seeks legal advice to sufficiently understand the relevant law. In the ex ante status, the disjunction-effect prediction and our own empirical demonstration suggest that both employers and employees are less likely to focus on the legal status of the information employees are exposed to during their tenure in the workplace. While recognizing the costs associated with such ambiguity, we argue that the effort to draw a clear distinction between proprietary and non-proprietary knowledge comes with a cost that also needs to be recognized.

2. Tax Law and Tax Shelters

As already mentioned, tax law provides an additional illustration of the potential role of uncertainty in law, under the second type.[107] A prominent example of this distorting effect is the tax shelter. Indeed, the term "tax shelter" refers to transactions "carefully designed to fit within the letter" of various provisions of the Internal Revenue Code and Regulations to derive benefits unintended by those sections.[108]

Legal systems have fought against tax shelters through a combination of dynamic legislation and ex post judicial intervention. Legislators attempt to stop transactions that involve tax shelters by denying taxpayers the benefits that made the transactions worthwhile in the first place. Yet, due to the complexity

107. *See* Weisbach, *supra* note 19.

108. Shannon Weeks McCormack, *Tax Shelters and Statutory Interpretation: A Much Needed Purposive Approach*, 2009 U. ILL. L. REV. 697, 699 (2009).

of tax systems, taxpayers enlist the services of the best consultants, and, therefore, even the best legislators fail to block all such possible shelters. In addition, statutory and regulatory amendments rarely operate retroactively in the tax arena, with few, if any, exceptions. Thus, the benefits of successful tax planning survive, even if the law is changed when the shelter is exposed.[109]

Courts often use the "economic substance doctrine" as a tool to limit tax shelters.[110] The economic-substance doctrine usually contains a combination of two inquiries. First, courts inquire objectively whether the transaction has a reasonable prospect of a pretax profit—that is, whether the taxpayer could have profited in the absence of the tax benefits gained—after taking into account transaction costs.[111] An additional test[112] focuses on the taxpayer's subjective intention, namely, whether in entering the transaction the taxpayer was motivated by a business purpose other than obtaining a tax benefit.[113]

While legislation that covers undesirable tax shelters and the economic-substance doctrine are important in the struggle against tax shelters, the veil of uncertainty may serve as a complementary tool in this struggle.

As we have seen, the goal of the struggle against tax shelters is to prevent taxpayers from engaging in legal actions with the sole purpose of avoiding taxes. Therefore, concealing the tax consequences of a certain action may result in the action being taken in accordance with pertinent economic considerations and not out of a desire to fit any specific mold.[114] The total concealment of tax consequences is not feasible. However, as the behavioral part of this article has shown, vague legal principles trigger the psychological process of disjunction, leading people to base behavior on considerations other than vague legal results. Accordingly, vague tax principles weaken the incentive to engage in tax planning, and, instead, encourage a focus on the substantive planning of a transaction. Furthermore, most tax planners and users of tax shelters are affluent, and the struggle against tax shelters may also have a positive distributive effect.[115]

At this juncture, we should add a significant caveat to the argument in favor of vague rules in tax law. In the introduction, we suggested that laying a smokescreen over the tax consequences of a certain action is worthwhile only to

109. *Id.* at 704–05.

110. *See* Davis P. Hariton, *Sorting Out the Tangle of Economic Substance*, 52 TAX LAW. 235, 237–40 (1999) (describing the types of challenges Commissioners may bring under the economic-substance doctrine).

111. ACM P'ship v. Comm'r, 157 F.3d 231, 248 (3d Cir. 1998).

112. For the purpose of this article, it is unnecessary to figure out the exact relationships between these two inquiries.

113. *See, e.g.*, Black & Decker Corp. v. United States, 436 F.3d 431, 441 (2006); Coltec Indus., Inc. v. United States, 454 F.3d 1340, 1355 (2006).

114. *See, e.g.*, Jacob Nussim, *Taxes, Prices, and Consumer Protection* 3 (Bar Ilan Univ. Pub. Law, Working Paper, 2009), *available at* http://ssrn.com/abstract=1397643 (justifying the common practice in the United States of listing prices excluding sales tax rather than listing prices with sales tax included, as such a practice prevents the distorting effect of tax on behavior).

115. Weisbach, *supra* note 19, at 223.

prevent a person from performing the action for tax purposes. In many instances, however, tax laws are meant to encourage people to diverge from their regular way of behaving, and to act in a certain manner encouraged by tax legislators.[116] In such cases, the concealment of the legal results of an action, or even the creation of uncertainty regarding its results, undermines the goals of tax legislators.

In the literature concerning the doctrine of artificiality, there was a recent call to distinguish between situations in which the artificial transaction undermines the legislator's goal and instances in which the goal is realized. In the former, the artificial nature of the transaction should be exposed. The latter, in contrast, deals with cases where the legislator gives a tax benefit to investors in certain locations who engage in certain activities or to taxpayers who employ a certain type of person—both of which should not be invalidated solely because they are intended to derive tax savings.[117] In such cases, where tax law aims to direct behavior, ambiguity is undesirable, as the rule is intended to be formulated in a clear and concise manner. In instances where it is important to encourage activity lacking a legal motivation, however, the veil of uncertainty is beneficial.

D. Shielding Altruistic Motivation

The last type of analysis is pro-social motivation, where the use of uncertainty is also desirable. We begin with a unique example from an Israeli context and continue on to a discussion of surrogacy laws.

1. Incentivizing Reserve Duty

A classic policy debate in Israeli society is related to incentives for those serving on reserve duty in the military. Although military service in Israel is mandatory, many Israelis use various medical and personal excuses to evade serving their reserve duty. In an attempt to provide incentives to more Israelis to serve reserve duty, there have been various legislative changes to increase the economic attractiveness of this service. In this context, the government faces a tricky dilemma. On the one hand, given the need to increase the value of incentives, there is a need to overplay their value. On the other hand, making money too much of a factor may crowd out patriotism as an intrinsic motivation, despite the risks faced by people who serve.

Here, we might have a different distributive effect than that described in other types discussed previously. For lower-income people, monetary benefits will be more valuable than to people from middle- and high-income families. Therefore, informing people about the monetary incentives associated with

116. *See* Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 975–76 (1986) (arguing that some tax incentives may be more efficient policy tools than direct-expenditure programs).

117. *See* McCormack, *supra* note 108, at 722 (arguing that courts should examine the purposes of a given law and "strip taxpayers of benefits that are discordant with those purposes").

reserve duty, may not only crowd out intrinsic motivation, but may also send different signals to different segments of society. Thus, the use of uncertainty in the type of rewards offered to soldiers may curb the negative effects of using incentives ex ante while still making sure that a reimbursement ex post will prevent people from feeling taken advantage of.

2. Surrogacy Contracts

An idiosyncratic use of vague principles is exemplified in the area of surrogate-motherhood contracts. Such an arrangement is one in which a woman agrees to bear a child for a commissioning couple. Surrogate-mother arrangements, like the baby-making market in general, were supported at first mainly by the outstanding proponents of the imposition of "commercial market" norms on numerous realms of behavior.[118] With time, however, surrogate-motherhood agreements[119] raised fears regarding the exploitation of economically disadvantaged women and opposition to the commodification of personal services.[120] These objections were raised in the famous *Baby M* decision, which expressed a position hostile to surrogacy contracts.[121] The *Baby M* decision was followed by several legislative acts that prohibited or greatly restricted surrogate-motherhood contracts.[122] Baby-making markets and surrogate-motherhood contracts have been widely discussed in scholarly literature as well. Scholars have made general commodification arguments about the damage caused to the concept of paternity by the trading of fertility and birthing services.[123]

Despite the fears of exploitation and commodification, there are distinct advantages to surrogate-motherhood contracts that should not be ignored. First, surrogate motherhood, like other modern procreation techniques conducted within a contractual relationship (for example, egg donations), constitutes a

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118. *See* Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2330–34 (1995) (concluding that the analogy of surrogacy to baby-selling "only strengthens the conclusion that surrogacy transactions should be legal"); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978) (advocating a market in babies).

119. *See, e.g.*, Carol Sanger, *Developing Markets in Baby-Making:* In the Matter of Baby M, 30 HARV. J.L. & GENDER 67 (2007).

120. Radin, *supra* note 12, at 1930–33.

121. *See In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988) (holding that a full surrogacy agreement is unenforceable).

122. Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 117–20 (Summer 2009). *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218 (1989) (prohibiting surrogacy contracts), *invalidated by* Soos v. Superior Court, 897 P.2d 1356 (Ariz. Ct. App. 1994); IND. CODE ANN. § 31-20-1-1 (West 2010) (prohibiting enforcement of most surrogacy agreements); LA. REV. STAT. ANN. § 9:2713 (2010) (declaring surrogacy contracts void); MICH. COMP. LAWS ANN. §§ 722.855–59 (West 2010) (declaring surrogacy contracts void and imposing criminal penalties on parties to such contracts); NEB. REV. STAT. § 25-21,200 (2010) (declaring surrogacy contracts void).

123. *See* Radin, *supra* note 12, at 1931–32 (suggesting that surrogacy furthers the misconception that a genetic connection between fathers and children is necessary to facilitate bonding); *see also* Anderson, *supra* note 12 (discussing commodification in surrogacy arrangements generally).

valuable contribution for childless women. As surrogacy is not a simple process for the surrogate mother, few women would consent to volunteer to become a surrogate without financial compensation. Instead of presenting the surrogate mother as either one who has been exploited, or as a shrewd businesswoman, a completely different narrative has developed, one that presents the surrogate mother as an autonomous woman in control of her body who chooses to use it to aid another woman. Consequently, a considerable number of contemporary feminist writers emphasize the altruistic aspect of surrogacy, which also reflects the solidarity between women.[124] Beyond the theoretical discussions, an approach sympathetic to surrogacy has also developed in court decisions in recent years.[125]

In general, we share this sympathetic attitude toward surrogate-motherhood contracts. Yet we maintain that a proper legal arrangement should also attempt to take into account the traditional approach's apprehensions regarding the commodification of bearing children and the application of commercial contract norms to surrogate-motherhood contracts.[126]

The example of surrogate-motherhood contracts illustrates the third type discussed in this article—the "shielding of altruistic motivation." This type relates to instances where the law should encourage a certain type of altruistic activity ex ante. Additionally, the law should recognize the ex post entitlement of monetary compensation for the efforts and the risk that people have undertaken. Yet legislatures may fear that the excessive prominence of compensation may cast the action in an excessively commercial light in a way that could harm the psychological and social quality of the action.

In the background of these competing interests, we propose a procedure for surrogate-motherhood contracts that will, on one hand, encourage such agreements and, on the other hand, contend with the issue of commodification and the crowding-out effect. The law should allow surrogacy contracts and clarify that such contracts are to be honored. Instead of setting forth an explicit price tag in the contract itself in a manner that focuses on the commercial

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124. *See, e.g.*, Sanger, *supra* note 119, at 75–78 (describing the motivation of surrogate mothers as "a complex blend of altruism and gain"); Scott, *supra* note 122 (analyzing the first wave of feminist objection to surrogacy agreements).

125. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993) (en banc) (enforcing a gestational-surrogacy agreement against the gestational-surrogate mother). Yet it is important to note that, unlike the *Baby M* case that addresses full surrogacy, most of the modern cases have addressed gestational surrogacy. For criticism on the distinction between gestational- and traditional-surrogacy contracts in the existing law, see generally Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885 (2009). For a survey on the existing laws in various countries, see Hugh V. McLachlan & J. Kim Swales, *Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts*, 72 LAW & CONTEMP. PROBS. 91, 92–96 (Summer 2009).

126. *Cf.* Martha M. Ertman, *What's Wrong with a Parenthood Market? A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 58–59 (2003) (proposing an "antiessentialist" theory of commodification of parental roles that accounts for "multiple meanings").

aspect, administrative bodies[127] should, ex post, determine the proper payment for surrogate motherhood, in accordance with the criteria set forth under the law.

In this manner, legal support for surrogate-motherhood contracts will be attained, while a veil of uncertainty will be drawn over their commercial–economic aspects. In the spirit of the crowding-out literature and according to our approach, someone interested in surrogacy solely due to the monetary aspect will refrain from entering into such a contract because of the uncertainty regarding the amount of the payment. In contrast, someone who is interested in surrogacy because of the altruistic nature of the act, but who also has a desire for monetary compensation, will not be deterred from participating in such an act for lack of precise knowledge of the sum of the compensation.

Furthermore, the prohibition of surrogate-motherhood contracts containing a price tag and the establishment of external agencies would limit the fears of the exploitation of weak parties. In this sense, the establishment of a veil of uncertainty in the realm of surrogate-motherhood contracts may have a distributive effect supportive of economically weak parties.

As an aside, the arena of organ donations is also marked by the tension between the fear of exploitation, commodification, and crowding-out effects and the desire to encourage donations, acknowledging that some compensation to the donor is fair and just. In most countries, these fears have led to a prohibition of trading in organs. We believe that, in this context as well, it is possible for administrative agencies to place a veil of uncertainty that would determine ex post the compensation due to donors, while diminishing the fears of exploitation, commodification, and crowding-out.

VI

CONCLUSION

For the most part, uncertainty and ambiguity have a bad reputation in legal scholarship. This paper did not challenge that assertion, but rather demonstrated the positive role that ambiguity may play in various legal contexts. Our argument had two prongs: jurisprudential and behavioral.

The jurisprudential argument identified a typology of three contexts and circumstances where creating a "veil of ignorance," which masks people's awareness and knowledge of the ex post legal consequences of their acts, may be desirable.

The behavioral argument suggested that a "veil of ignorance" in those three types may be achieved through the use of ambiguity within the law. Our behavioral and empirical analysis addressed the way people react to ambiguous benefits. We argued that legal ambiguity may cause people to undermine their

127. Apparently, the function of completing the accurate reimbursement fees could have been fulfilled by the courts. Nonetheless, we believe that administrative agencies have greater expertise and are less likely than courts to antagonize the parties by creating unnecessary rivalry between them.

consideration for the law altogether and refer to alternative motivational goals. Therefore, our focus was not on how people make decisions under conditions of uncertainty, but rather on how people may avoid taking legality into account and choose alternative paths of behavior when the law cannot give them certainty.

Following this theoretical discussion, we used an experimental survey approach to measure one's response to uncertainty within the law. This hypothetical context explored the decision-making process of an employer who had to decide whether to employ an individual as an employee or as a contractor. Our findings suggested that under conditions of both uncertainty and ambiguity, participants were less affected by benefits granted under the law. In contrast, when participants were asked to evaluate the behavior of others, uncertain benefits did have an effect on their evaluations. Furthermore, we identified the existence of an interaction between the effect of uncertainty and the strength of an individual's preferences. Uncertainty was especially relevant for individuals with low and intermediate levels of preference for employees' rights but not for those with strong preferences. Based on the behavioral demonstration, we explored the distorting effect of the law and suggested using a "veil of uncertainty" as a means to curb this distorting effect.

At the same time, we recognized that such a "veil of uncertainty" may certainly undermine important functions of the law such as guiding one's behavior through the use of deterrence and incentives, expressing social values, and influence on social institutions.

This article recognized some of the drawbacks may arise due to uncertainty and hence illustrated several refinements and limitations regarding the use of a "veil of uncertainty" mechanism in order to improve its potential benefits for lawmakers. In the last part of the article, we demonstrated the potential rule of the "veil of uncertainty" as well as its application to various areas of law (for example, marriage law, bankruptcy law, employment law, tax law, and surrogacy contracts). This last part demonstrated that, properly used, uncertainty can dramatically enhance efficiency and fairness and prevent the undesirable phenomena of excessive commodification of certain relationships, as well as crowding-out.