

Intrinsic and Extrinsic Compliance Motivations: Comment on Feldman

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In 1975, the Ford Motor Corporation issued an internal memo explaining that the \$11 gas cap filter it could install on its Pinto model cars would cost more than Ford would likely have to pay in damages for potential human injury and loss of life stemming from the lack of the filter. Ford estimated the total cost for all affected vehicles at \$137.5 million; the cost in terms of injury and death was only \$49.53 million.¹ In purely economic terms, then, defining the cost of injury and death as quantified by the National Highway Safety Commission, Ford made the correct decision. Nowhere did Ford's memo consider the non-monetary value of human life weighed against the cost of a relatively simple and inexpensive "fix" to the Pinto. This well-known story still stands as a noteworthy example of corporate behavior motivated by profit maximization rather than moral concerns about customer safety.

In the terms used by modern theorists, it seems that Ford's position, which reduced the value of human life to less than \$11 per vehicle, represents an example of "crowding out," where an extrinsic motivation undermines an intrinsic one.² The likely penalties of the American tort system acted as an extrinsic motivation that effectively "crowded out" Ford's intrinsic motivation to protect its customers from harm.³ In his essay for this symposium volume, Yuval Feldman

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1. Memorandum from E.S. Grush & C.S. Saunby, Fatalities Associated with Crash Induced Fuel Leakage and Fires 6, available at http://www.autosafety.org/uploads/phpq3mJF_FordMemo.pdf.

2. Yuval Feldman, *The Complexity of Disentangling Intrinsic and Extrinsic Compliance Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law*, 35 WASH. U. J.L. & POL'Y 11 (2011).

3. I suggest here for rhetorical ease that Ford's management did have some intrinsic motivations that were crowded out. Of course, this might not be true, which would present a

tackles the relationship between intrinsic and extrinsic motivations, explaining that extrinsic motivation has the potential to act in concert with intrinsic motivation or to undermine intrinsic motivation.⁴ Although research on the interplay between intrinsic and extrinsic motivation has not yet fully identified the necessary conditions that elicit “crowding out” or acting supportively, Feldman offers several insights and suggestions about how the law might respond to the problems posed by these multiple motivations.

This Comment proceeds in three parts. I first expand on Feldman’s briefly noted concerns about the nature of the distinction between intrinsic and extrinsic motivation. The intrinsic/extrinsic dichotomy, while stylistically appealing, may needlessly complicate questions of motivation in the legal context. This divide is not of Feldman’s making, to be sure, and serves an important and useful role in decades of social science research. However, the distinction has grown ever less stark and more complex over time, and I posit here that separating intrinsic from extrinsic motivation, per se, may not be the most fruitful path for legal scholars interested in what motivates individuals to comply with law. Second, I consider more fully the implications of the crowding out literature that Feldman discusses, suggesting that tort law, especially as it applies to corporate actors who have knowledge about potential harm to others, is an arena likely to engender crowding out. I argue here that in certain legal contexts where society truly wants to deter certain behavior, higher penalties may simply make concern over crowding out moot. Third, I go beyond Feldman’s analysis of intrinsic and extrinsic compliance motivations to consider his paradigm in a different setting. Specifically, I suggest that a consideration of the motivation of actors in our legal system is incomplete when we focus only on the potential tortfeasor, contract breacher, or other actor considering whether or not to comply with the law. I briefly explore the issue of motivation from the perspective of the person seeking recovery from harm, suggesting ways in which different motivations could affect potential litigants.

different case. *See infra* notes 43–44 and accompanying text.

4. *See generally* Feldman, *supra* note 2.

THE LINE BETWEEN INTRINSIC AND EXTRINSIC MOTIVATION

It is difficult, as Feldman briefly notes, to adequately demarcate the line between intrinsic and extrinsic motivation.⁵ As a preliminary matter, it is hard even to define intrinsic and extrinsic motivation in a fully satisfying way.⁶ In their “pure” form, one comes completely from outside the individual, and one comes solely from within. For a theoretical example of pure extrinsic motivation, one might consider an individual who would not engage in some behavior that she otherwise believes to be the right thing to do only because of the negative consequences that are likely to ensue, or who would engage in some behavior that she otherwise believes wrong because it will bring about positive consequences for her.⁷ For an example of pure intrinsic motivation, imagine an individual doing what she believes is right in the face of negative consequences, or refusing to do what she thinks is wrong despite the positive consequences.⁸

Even these extreme examples are subject to a greater criticism: that the definitions of extrinsic and intrinsic are themselves flawed. Take, for example, law and economics scholar Robert Cooter’s perspective on moral commitments, which are often considered the essence of intrinsic commitments. Cooter’s theory postulates that “people will tend to make moral commitments when doing so causes a sufficiently large increase in their opportunities.”⁹ That is to say, according to Cooter, people only have so-called intrinsic moral beliefs when extrinsic factors motivate them to do so. On the other end of the spectrum, one might suggest that extrinsic motivations, such as fear of punishment or promise of reward, only have meaning when someone already has an intrinsic propensity to care about his or her liberty or financial gain or loss. Without an intrinsic sense of the

5. *Id.* at 18–19.

6. *Id.*

7. Imagine a person who fails to correct a bank error in her favor in order to avoid the bank taking back the money, or a person who wrongly turns in another person for a crime that person did not commit merely to collect reward money.

8. Imagine a political dissident who speaks out against the government while knowing it will result in harsh punishment, or a manager refusing to take a corporate bribe even when it is certain to go undetected.

9. Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 19 (2000).

worth of these extrinsic factors, they are meaningless. These arguments suggest a grave difficulty with trying to parse individuals' motivations along simple extrinsic/intrinsic dimensions.

Even if one accepts the existence of a true and knowable divide between intrinsic and extrinsic motivation, several other problems present themselves. Less fundamentally fatal to the distinction, but more pragmatically problematic, most behavior—both action and inaction—does not appear to fit squarely in one of the extreme examples discussed above. Situations rarely present themselves in such an obvious and dichotomous manner, and in the vast middle area, these motivations are likely to twine together, perhaps inextricably. Multiple motivations are certainly capable of coexisting in the same individual. Many people, for example, find aspects of their jobs personally satisfying: the motivation to perform certain tasks because one finds them gratifying can easily exist simultaneously with individuals' motivations to earn money through work.

Additionally, as Feldman notes, quite rightly, there are more than two simple types of motivation, and many types of motivation “could not be easily defined as either extrinsic or intrinsic.”¹⁰ Any particular motivation one might identify may be subject to multiple interpretations along extrinsic/intrinsic lines. Feldman briefly mentions fairness motivations, suggesting that although they have traditionally been understood as intrinsic, a more nuanced view would suggest that fairness has both intrinsic and extrinsic components.¹¹ Although a large body of research in social psychology has supported the importance that the fairness of process (procedural justice) plays in individuals' formations of judgments about decisions that affect them, theorists disagree about the reasons for this effect. Under the original instrumental theory proposed by Thibaut and Walker, effect on monetary outcome explained concerns about fair process.¹² People wanted a fair outcome and they felt that a

10. Feldman, *supra* note 2, at 18.

11. *Id.* at 19.

12. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 94 (1975).

fair process would achieve it.¹³ More recently, Van den Bos and others have suggested that fair process matters to individuals because it serves as a proxy by which people judge their outcomes.¹⁴ This focus on outcomes sounds, on its face, like an extrinsic motivation: people are motivated by a desire to receive the right amount of money.

Yet even this outcome focus is perhaps less purely instrumental than it appears at first glance. *Why* is a fair outcome important to anyone? On one hand, perhaps self-serving biases dictate that individuals will believe that only a positive outcome for them is a fair outcome for them—that is, no bad outcome could possibly be fair. And it is certainly true that individuals do define fairness differently depending on their position relative to others.¹⁵ But taking the idea that people want a fair outcome seriously suggests that people have some motivation to receive not merely a positive outcome but one that comports with some fairness norm, which suggests in turn a need for fair treatment that does not fit squarely within the traditional extrinsic motivation paradigm.

Even assuming that people do care about procedural justice because of extrinsic motivation, other theorists have suggested that instrumental reasons incompletely account for why people care about fairness of treatment. Tom Tyler and Allan Lind argue that procedural justice also matters to individuals because their treatment by others reflects their status within society and that this status information is a key component in people's sense of self-worth and self-esteem.¹⁶ Indeed, they suggest that this status information is more influential than concern about outcome.¹⁷ Self-worth and self-

13. *Id.*

14. Kees van den Bos, E. Allan Lind, Riël Vermunt & Henk A.M. Wilke, *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCHOL. 1034, 1044 (1997).

15. See Max H. Bazerman & Margaret A. Neale, *The Role of Fairness Considerations and Relationships in a Judgmental Perspective of Negotiation*, in BARRIERS TO CONFLICT RESOLUTION 86, 106 (Kenneth J. Arrow et al. eds., 1995).

16. See Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 115, 162–66 (1992); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 837 (1989).

17. Tyler & Lind, *supra* note 16, at 165.

esteem certainly appear to be factors that are more intrinsic than extrinsic, although one could debate that point as well. Because research has supported both instrumental and relational reasons for caring about procedural justice, it seems impossible to cleanly categorize procedural justice motivation in either the intrinsic or the extrinsic camp.

One might perform a similar analysis for any number of motivations noted by Feldman.¹⁸ Indeed, Feldman's own suggestion that the love or money divide echoes the intrinsic/extrinsic categories further highlights the problematic nature of the categories. Feldman calls love "one of the most basic intrinsic motivations,"¹⁹ and, indeed, social psychologists have suggested that the human need for social connection is fundamental.²⁰ Yet what is love if not extrinsically oriented? Love for another person provides not just intrinsic motivation but a very clearly defined external individual towards whom one directs action and affective behavior. Indeed, individuals often define love almost entirely in light of the object of that love: parent/child, romantic, familial, or friendship love are conceptualized differently and in terms of that love's recipient. And one of the hallmarks of love—caring deeply about satisfying the needs and desires of another party—sounds quite extrinsic.

A deeper question lurks behind these efforts to describe various motivations—trust, altruism, fairness, morality, enrichment—as intrinsic or extrinsic. Individuals have different orientations towards all of these motivations. Yet where do these orientations—or preferences—themselves come from? Psychologists have long suggested that all behavior is a function of the interplay between the self and society,²¹ another echo of the distinction between intrinsic and extrinsic motivation; economists have only begun to seek

18. Feldman, *supra* note 2, at 16.

19. *Id.* at 12.

20. See Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497, 522 (1995).

21. Kurt Lewin developed the so-called "Lewinian equation," $B=f(PE)$, which suggested that behavior is a function of the person and the environment. Edward E. Jones, *Major Developments in Five Decades of Social Psychology*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY 3, 35 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

answers to the question of the origins of preferences.²² This is perhaps simply yet another version of the age-old nature versus nurture debate. Do our preferences come from within us, or are they shaped by our environment, or both? Attempts to neatly cleave the extrinsic from the intrinsic are necessarily suspect when considered through this broad lens. In sum, Feldman implies, and I argue further, that the distinction between extrinsic and intrinsic—or, potentially, love and money—is a false dichotomy. The intrinsic and the extrinsic cannot be fully teased out from one another in any meaningful way in complex human behavior, or, often, even understood as distinct theoretical constructs.

Nonetheless, there is still room for consideration of how different motivations affect individuals and situations differently. Moral values and monetary fines, love and rewards, trust and punishment, fairness and deposits—these may still have differential effects on behavior. I merely suggest here that a primary focus on defining and explaining the relationship between extrinsic and intrinsic motivation may create an overly complex and unworkable paradigm. Considering multiple motivations and their effect on behavior makes more sense and will be richer and more reflective of reality when it avoids an unneeded focus on the origins of the motivation.

HOW CROWDING OUT UNDERMINES MORALITY

Crowding out appears as a disturbing phenomenon when it has the effect of either discouraging behavior that society wants to encourage or promoting behavior that society wishes to prohibit. That is, when a reward for behavior leads to a decrease in the behavior, or when a fine or penalty for a behavior leads to an increase in the behavior, crowding out represents a problem. Although social science research on crowding out has largely focused on the effect of rewards, rather than sanctions,²³ and although there are ways in which the law provides incentive structures for certain behaviors,²⁴ crowding-out

22. Cooter, *supra* note 9, at 18.

23. See, e.g., Edward L. Deci & Richard M. Ryan, *The Empirical Exploration of Intrinsic Motivational Processes*, 13 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 40 (1980).

24. See, e.g., Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 *TEX.*

effects have also been found with penalties, and far more of our legal system is based on the idea that we prohibit certain actions and support that prohibition with the threat of negative consequences. That is, most law contains negative consequences for breaking it, rather than positive consequences for compliance: the positive consequences for compliance are usually the absence of negative consequences.

Feldman, while noting both possibilities, appears more interested in incentives; in this section, I take a closer look at crowding out in the context of penalties. I suggest, first, that crowding out may accurately capture a very real threat to individuals' motivation to comport with the law. Second, I argue that, in the settings where we ought most to worry about crowding out, this threat may easily be mitigated simply by increasing fines, prices, or penalties.

In one of the most notable examples of research on crowding out due to penalties, Gneezy and Rustichini found that—in contrast to their expectations—imposing fines for late pickup at a child day care center increased rather than decreased late pickup.²⁵ Economic theory suggested that increasing the price of a behavior would reduce the incidence of the behavior, but instead, the study suggested that some parents apparently felt that the fine was a price for late pickup that they were willing to pay.²⁶ Gneezy and Rustichini offered two explanations for the adherence to the rule prior to the imposition of the fine: lack of information about what might happen if parents are late, or a refusal to violate social norms regarding “a generous, nonmarket activity.”²⁷ However, another way to look at the pre-fine behavior is that some parents were deterred merely by their unwillingness to inconvenience others or to feel bad about themselves for breaking rules. With the fine, this moral or social motivation²⁸ was no longer at work for some of them: in essence, the fine meant that parents could replace feeling bad about inconveniencing others with a simple monetary transaction.²⁹ This

L. REV. 1151 (2010).

25. See Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 15 (2000).

26. See *id.* at 14.

27. See *id.* at 13.

28. Under the framework discussed by Feldman, this would be an intrinsic motivation.

29. See, e.g., Brian Sheppard & Fiery Cushman, *Evaluating Norms: An Empirical*

result is surprising to economists³⁰ because the idea of intrinsic motivation as a deterrent has not been popular as an economic model.³¹ And yet raising monetary or other purely quantifiable costs³² is not the only way to raise the costs of behavior—witness the theoretical debate over shaming in the criminal law context. The idea that we could increase embarrassment and shame as a punishment rather than increasing prison time or fines suggests that intrinsic motivation has already been put to use in the law.³³

Returning to the example in my introduction, why did the tort system's monetary damages apparently crowd out any potential moral imperative Ford might have felt with respect to its faulty gas-cap placement? Our tort system nicely comports with the factors that Feldman suggests must be in place in order to make certain penalties feel merely like prices for engaging in certain behavior. As Feldman explains, his research with Teichman identified three factors that make payments seem like prices: first, that a payment is more certain than uncertain; second, that payment is made up-front; and third, that a harmed individual rather than a third party gets the money.³⁴ All of these suggest that tort law, especially as it applies to sophisticated corporate actors,³⁵ may be more likely to undermine than support

Analysis of the Relationship Between Norm-Content, Operator, and Charitable Behavior, 63 VAND. L. REV. 55, 64 (2010) (“[P]arents acted as if the fine were nothing more than the low price for showing up late.”).

30. Emanuela Carbonara, Francesco Parisi & Georg von Wangenheim, *Legal Innovation and the Compliance Paradox*, MINN. J.L. SCI. & TECH. 837, 838 (2008) (asserting that Gneezy and Rustichini's results were “surprisingly different” from typical cost-benefit analysis).

31. See, e.g., Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 638–40 (2010) (noting that economic predictions about contract behavior ignore moral elements related to making and keeping promises).

32. Increasing prison time for convicted criminals is an example of non-monetary but quantifiable costs. *But see* sources cited *infra* note 40 (debate between Markel & Flanders and Bronsteen et al.).

33. See, e.g., Brian Netter, *Avoiding the Shameful Backlash: Social Repercussions for the Increased Use of Alternative Sanctions*, 96 J. CRIM. L. & CRIMINOLOGY 187, 187–88 (2005) (describing shaming punishments such as drunk drivers advertising misdeeds on bumper stickers, thieves with sandwich boards about their transgressions, and public television appearances by prostitute solicitors).

34. Feldman, *supra* note 2, at 27–29.

35. Although individuals driving down the street are unlikely to perform an expected value calculation when they fiddle with their radio rather than alertly scanning oncoming

intrinsic motivation. First, the expected value calculation that is currently at the heart of tort law creates a number that represents likelihood times payment—the whole point is to remove the uncertainty factor from the calculation. That is, expected value calculation is designed to represent a real number that already incorporates likelihood rather than an abstract damages number with some corresponding probability of liability. Similarly, expected value calculation can make it seem as though the money is set aside upfront: by calculating the costs and benefits, one has already implicitly mentally “set aside” that sum for payment to individuals who are harmed. Finally, tort law provides harmed individuals with direct recovery. What the day care study suggests for tort law is that penalties may have the potential, when set at a low enough level,³⁶ to replace, for some people, the potential “intrinsic” deterrent effect of feeling bad about harming others (or violating social norms) with a “price for doing business” attitude.³⁷

Feldman suggests that perhaps law may function differently than monetary penalties, and that there may be potential to positively exploit the difference between penalties and law because money may undermine intrinsic motivation, but law might enhance it.³⁸ Feldman implicitly suggests that the symbolic additive feature of “the law” weighing in, with the moral judgment that law carries, may provide protection against crowding out. This point is an important one, and merits further development and research. Law, as a philosophical matter, self-consciously intends to serve both an expressive and deterrent function—that is, both to tell individuals what behavior is morally right and wrong, *and* to set penalties for choosing the morally wrong actions. However, civil law about recovery for harm is, in practice, almost completely about the allocation of money. Certainly, the Ford Pinto example, along with other high-profile torts cases and examples from law and economics scholarship, suggests that many people view the tort system as simply a set of monetary

traffic, corporate actors and their attorneys are more likely to be familiar with the expected value calculation paradigm, especially as they develop or market new products or services.

36. As Gneezy and Rustichini note, “It is true that a ‘large enough’ fee would eventually reduce the behavior.” Gneezy & Rustichini, *supra* note 25, at 15.

37. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1531 (1984).

38. See Feldman, *supra* note 2, at 43–44.

penalties rather than a reflection of a moral imperative for behavior.³⁹ The day care study suggests that perhaps setting the penalty too low makes the rule fail on an expressive level, because the low magnitude of the penalty itself embodies the moral judgment about the behavior—that is to say, not that immoral at all. However, this assessment would change if the penalty were set high enough to suggest a societal judgment about morality: just as the criminal law calibrates punishment to reflect society's level of disapprobation of certain behavior,⁴⁰ civil monetary penalties might be set so high that they signal a negative moral judgment about behavior.

For this reason, law ought to be careful to pitch penalties at the right—high—level⁴¹ when dealing with behavior that it always wants to deter, such as intentional tort or gross negligence.⁴² When the level of penalty is high enough, we receive multiple benefits. First, we may achieve some expressive value, as noted above. Second, though, we can be sure that we deter the behavior: those with no intrinsic motivation will only be affected by the penalty because, as Feldman suggests, we need not worry about undermining intrinsic motivation if people are not already intrinsically motivated. And those with some intrinsic motivation may find such motivation crowded out by the penalties—but if the penalty is high enough, they will still refrain from the behavior in order to avoid the penalty, even if they ignore the expressive function. Although society might benefit when people

39. See, e.g., Kyle D. Logue, *Coordinating Sanctions in Tort*, 31 CARDOZO L. REV. 2313, 2314–15 (2010).

40. See generally John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463 (2010); Dan Markel & Chad Flanders, *Bentham on Stilts? The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907 (2010).

41. In essence, this is the flip side of the argument that Gneezy and Rustichini make in a different paper about the effects of rewards on intrinsic motivation: they suggest that the reward ought to be high enough, or one shouldn't offer it at all. Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115 Q.J. ECON. 791 (2000).

42. Similarly, a system of strict liability for products that society wants corporations to take extra care in constructing also increases penalties. In a context like breach of contract, the law may pitch damages lower on purpose—that is, both not to deter everyone (so as to encourage so-called efficient breach) and to signal that the breaching of a contract does not represent a significant moral harm. For an interesting discussion of crowding out in the contracts setting, see Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010).

abstain from action on moral rather than economic grounds, if the law's main point is to prevent certain behavior, the underlying motivations may be irrelevant and raising penalties will be effective. Deterrence and expressive functions of the law work in sync here, because it is only when we really believe something is sufficiently bad that we will raise penalties to the level where they send this expressive message, and at that high level, they will also have a deterrent effect.

Both the findings of the day care study and others by Feldman seem to suggest the existence of different populations of individuals with respect to their potential to be affected by crowding out.⁴³ Some individuals appear mostly intrinsically motivated (say, parents who never picked up late under either regime), some may be mostly extrinsically motivated (say, any parents who stopped picking up late after the imposition of the fine), some have an unclear motivation (those who were already picking up late, even before the fine), and finally some have an intrinsic motivation that is crowded out by extrinsic motivation (the group who only picked up late after the imposition of the fine). In his essay, Feldman suggests that perhaps we need not worry much about the intrinsically motivated: they, after all, are less sensitive to variation in the framing of extrinsic motivation.⁴⁴ If this proposition is the case, then perhaps crowding out is not all that pervasive a phenomenon. Additionally, this statement raises a question: certainly those who lack any intrinsic motivation aren't likely to behave better than those who have some such intrinsic motivation, are they? That is, even if extrinsic motivation undermines the intrinsically motivated person, it seems unlikely to make them any *worse* than the person who never possessed intrinsic motivation. So crowding out is likely merely to put that first person in the same position as the purely extrinsically motivated person. In either case, the law's primary focus ought to be on setting the level of deterrence high enough to prevent the action.

43. Yuval Feldman & Oren Perez, *How Law Changes the Environmental Mind: An Experimental Study of the Effect of Legal Norms on Moral Perceptions and Civic Enforcement*, 36 J.L. & SOC'Y 501 (2009).

44. Feldman, *supra* note 2, at 41.

On the other hand, if people are differentially affected, it may be that an added extrinsic penalty or fine will promote behavior in some people but will prevent it in others. For example, in the day care study, it might be that some group of people with no intrinsic motivation to pick up their children on time are actually deterred by the fine, but for others, the fine acts as a price that also crowds out their intrinsic motivation. If so, then the main question becomes focused on what percentage of the population is affected in which way so that one can implement a system whose net effect would be to decrease the undesirable activity. However, because the law cannot tailor itself to different populations in this way, a better focus remains calibrating the penalty high enough to deter both groups.

THE ROLE OF INTRINSIC AND EXTRINSIC MOTIVATION IN LITIGANTS

Our civil legal system is largely designed around the idea of monetary compensation for harm. When a potential plaintiff decides whether or not to bring a lawsuit, contemporary economic analysis suggests that she will weigh the expected value of the potential recovery against the expected costs of litigation. This paradigm perfectly captures the extrinsically motivated individual. However, research in psychology and law has suggested a host of other, non-monetary factors that have an impact on how individuals perceive the resolution of their disputes.

The need for justice and moral satisfaction—a classic “intrinsic” motivation—also drives individuals in their determinations about whether to sue someone, what recovery will satisfy them, and how acceptable they will find the resolution of a dispute. For example, research in psychology and law has suggested that individuals are most satisfied by legal processes not when they win but when they are treated fairly.⁴⁵ Additionally, research has suggested that litigants, more so than attorneys, are particularly interested in—and value highly—receiving apologies.⁴⁶ So, too, scholars have suggested that

45. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 92 (2006); *see also* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477 (2008).

46. Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 350 (2008); *see also* Ashby Jones, *Postcards from Probation: A Florida*

restorative justice may be more meaningful for victims of crime than increased sentences for offenders.⁴⁷

Taking these “intrinsic” motivations seriously suggests that the law may want to account for these intangible benefits that parties may wish to receive. For example, some states have already enacted laws to encourage apologies between litigants.⁴⁸ Similarly, some have argued that the tremendous growth of alternative dispute resolution procedures has been fueled by those procedures’ ability to provide individuals with more engagement with their own disputes, including greater opportunity to be heard and to engage with the opposing party and craft more collaborative solutions.⁴⁹ Taking intrinsic motivation seriously in the context of the litigant may suggest that the law ought to make a greater effort to incorporate non-monetary aspects into its resolutions.

CONCLUSION

In his essay, Feldman has raised complex questions about compliance motivations. He has provided compelling research to support the idea that multiple motivations are in play in people’s behavior with respect to the law and that the relationship between intrinsic and extrinsic motivation is quite dynamic. In this Comment, I have suggested that, despite the importance of taking multiple compliance motivations seriously in order to understand why people follow the law, the intrinsic/extrinsic divide may be too simplistic. I have also argued that crowding out may indeed be a problem for our current legal system, but that raising penalties to a higher level would render moot concerns about crowding out for the affected population while not causing any decrease in compliance from other populations. Finally, I advocate considering multiple motivations from the “other

Story, WALL ST. J. (Nov. 12, 2010, 6:23 PM), <http://blogs.wsj.com/law/2010/11/12/postcards-from-probation-a-florida-story>.

47. Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 255 (2005).

48. See Robbennolt, *supra* note 46, at 350; see also Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 824–33 (2002).

49. See Nancy A. Welsh, *Disputants’ Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179, 180.

side” of the law equation: while dominant paradigms have focused on the so-called extrinsic motivations of those seeking recovery from harm, a deeper consideration of multiple motivations can add nuance and accuracy to our understanding of litigant behavior.