

# Social Value Orientation and the Law

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## SOCIAL VALUE ORIENTATION AND THE LAW

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### ABSTRACT

*Social value orientation is a psychological trait defined as an individual's natural preference with respect to the allocation of resources. Law and economics scholarship takes as its starting point the rational actor, who is by definition interested solely in maximizing her own personal utility. But social psychology research demonstrates that, in study after study, approximately half of individuals demonstrate a "prosocial" orientation, meaning that they are interested in maximizing the total outcome of the group and are dedicated to an equal split of resources. Only around a quarter of individuals identify as "proself" individualists who prefer to maximize their own outcome per the rational actor model, and members of yet another, smaller group identify as "proself" competitors who want to maximize the relative difference between their own and others' outcomes. This Article presents social psychologists' findings regarding the nature of social value orientation and the role that it plays in guiding behavior. It then assesses legal theory and doctrine through the lens of social value orientation in several discrete substantive areas—contract law, corporate law, and family law—as well as in legal procedure and process, showing that "proself" and "prosocial" categories offer a meaningful and helpful way of understanding current doctrine and its effects on behavior. A consideration of social value orientation provides an important, empirical counterbalance to the rationality assumptions of law and economics, helping*

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*to show that personal utility maximization neither consistently guides the development of legal doctrine nor dictates human behavior in response to the law. In addition, taking social value orientation seriously suggests insights for the very nature of the relationship between law and human behavior, implicating “nudges,” the potential “crowding out” effect of laws that invoke extrinsic motivation, and the ultimate character of human utility.*

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## INTRODUCTION

Contemporary legal analysis often relies on the rational actor model—presuming an individual whose goal is to maximize utility—to understand how law is and should be crafted, and how individuals will respond to benefits and liabilities set forth by the legal system.<sup>1</sup> However, over the past two decades, the rational actor paradigm has increasingly faced challenges from psychological research on cognitive biases and heuristics.<sup>2</sup> The heuristics and biases research shows that individuals systematically fail to behave like rational actors in judgment and decision-making because of consistent errors in processing information.<sup>3</sup> In particular, research on the cognitive distortions that occur because of the human propensity to evaluate different options as deviations from a current frame of reference—prospect theory—has achieved a significant degree of prominence.<sup>4</sup> Although this research poses a challenge to the predictions of the rational actor model, at its heart, it does not truly threaten the model, because it suggests that deviations in real behavior from predictions of the rational actor model are explicable as systematic human error.<sup>5</sup> People want to maximize their utility—they just make predictable mistakes along the way.<sup>6</sup>

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1. See generally Claire Finkelstein, *Legal Theory and the Rational Actor*, in THE OXFORD HANDBOOK OF RATIONALITY 399, 399-401 (Alfred R. Mele & Piers Rawling eds., 2004).

2. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-78, 1504, 1545 (1998).

3. See, e.g., Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 197-99 (1991); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 346, 348 (1984).

4. Psychologist Daniel Kahneman received the Nobel Memorial Prize in Economic Science for his work on prospect theory. See Daniel Altman, *A Nobel That Bridges Economics and Psychology*, N.Y. TIMES (Oct. 10, 2002), <http://www.nytimes.com/2002/10/10/business/a-nobel-that-bridges-economics-and-psychology.html> [<https://perma.cc/65AZ-QMV7>].

5. Indeed, some scholars even suggest that these biases may be at once distorting and rational. For example, CEOs are overconfident, but this overconfidence propels them to the head of companies. See Anand M. Goel & Anjan V. Thakor, *Overconfidence, CEO Selection, and Corporate Governance*, 63 J. FINANCE 2737, 2739-40 (2008); Donald C. Langevoort, *Behavioral Approaches to Corporate Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 442, 444 (Claire A. Hill & Brett H. McDonnell eds., 2012).

6. See, e.g., Goel & Thakor, *supra* note 5, at 2739-40.

However, other strands of research in psychology simultaneously challenge the assumption of the rational utility-maximizer from a host of different angles.<sup>7</sup> Research on the psychology of justice, for example, suggests that individuals may be motivated by concerns that are not fully represented by traditional economic conceptions of utility.<sup>8</sup> These noninstrumental concerns<sup>9</sup> include a desire for dignity, respect, fair treatment, and legitimacy.<sup>10</sup> Similarly, as another example, research on extrinsic and intrinsic motivation challenges the primacy of economic incentives and sanctions.<sup>11</sup> And research on temporal construal suggests that the conceptualization of events in the near and long term can differ significantly and in ways that make a difference for decision-making.<sup>12</sup>

From a variety of perspectives, psychological research makes clear that sanctions and incentives—sticks and carrots—are not, alone, responsible for individuals' behavior. Nor are they in an obvious way the only guiding star for the design of the legal system. Values play a critical role in influencing actions and in shaping the structure and content of the law.<sup>13</sup> Values may refer to moral,

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7. See, e.g., Colin F. Camerer & Ernst Fehr, *When Does "Economic Man" Dominate Social Behavior?*, 311 *SCIENCE* 47 (2006).

8. Robust research in the field of procedural justice, across a wide variety of domains, finds that individuals care deeply about the fairness of the process by which a decision is made, regardless of the fairness or favorability of the decision itself. For a review, see Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 *ANN. REV. L. & SOC. SCI.* 171, 171-72 (2005). For further examples of settings in which procedural justice plays an important role, see *infra* note 99.

9. Tom Tyler and David De Cremer explain the distinction between instrumental and noninstrumental motivations as follows: "Instrumental motivations reflect people's desire to gain material resources and avoid material losses. Social motives, as discussed by psychologists, differ in that they are motivations that flow from within the person, leading to self-regulatory behaviors." Tom R. Tyler & David De Cremer, *Cooperation in Groups*, in *SOCIAL PSYCHOLOGY AND ECONOMICS* 155, 157 (David De Cremer et al. eds., 2006).

10. See MacCoun, *supra* note 8, at 171-72.

11. See, e.g., Rebecca Hollander-Blumoff, *Intrinsic and Extrinsic Compliance Motivations: Comment on Feldman*, 35 *WASH. U. J.L. & POL'Y* 53 (2011).

12. See Nira Liberman et al., *The Effect of Temporal Distance on Level of Mental Construal*, 38 *J. EXPERIMENTAL SOC. PSYCHOL.* 523, 523-24 (2002) (finding that people typically construe events in the distant future at a "higher level," broadly and abstractly, but construe events in the near term more specifically, thinking about the concrete features of the event).

13. For a normative critique of the rational actor paradigm, see LYNN A. STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* (2011); see also Camerer & Fehr, *supra* note 7, at 52.

ideological, philosophical, or religious beliefs, and they may also reflect internalized social norms.<sup>14</sup> However defined, values typically encompass principles that may be orthogonal or even oppositional to pure economic utility,<sup>15</sup> a point certainly made by critics of law and economics,<sup>16</sup> although Ronald Dworkin notably argued that the embrace of economic utility provides its own moral approach.<sup>17</sup> Looking at human values is another way to understand how law has been and should be crafted, and how individuals may respond

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14. See, e.g., Yehezkel Dror, *Values and the Law*, 17 ANTIOCH REV. 440, 440 (1957) (“By its very nature, law consists of a number of norms which constitute obligatory rules of behavior for the members of the society. These legal norms are closely related to various social values, being either a direct expression of them or serving them in a more indirect way.”).

15. Of course, some law and economics scholars explicitly encourage the inclusion of noneconomic values in their conception of utility. See generally Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001). This adds considerable complexity to the rational actor model, because utility is defined broadly to encompass nonmonetary or resource-based considerations that may differ from person to person. See *id.* at 979-80. While that model of utility would suggest that social value orientation (SVO) itself could be subsumed within any one person’s conception of utility—for example, a prosocial person, as defined *infra*, text accompanying note 22, derives utility from acting in a way that shares monetary value equally, rather than gaining more money than another person—that variegated and nuanced model of utility is not the model that is most often used in the application of economic theory to legal paradigms. In particular, much of the very influential work of Richard Posner eliminated or limited serious consideration of nonmonetary or resource-based utility in academic and doctrinal analyses. See *infra* notes 24-26 and accompanying text. Additionally, though, the SVO measurement tool uses “points,” rather than money, allowing individuals within the paradigm to provide their own definition of utility for each point. Paul A.M. Van Lange et al., *Development of Prosocial, Individualistic, and Competitive Orientations: Theory and Preliminary Evidence*, 73 J. PERSONALITY & SOC. PSYCHOL. 733, 736 (1997). This leads to a fundamental tension—some individuals do choose “points” that lower their “utility” as measured by those very points; the utility that they receive is not quantified within the points of the game itself. See *id.*

16. For example, in her review of Richard Posner’s book *Sex and Reason*, Robin West argues,

We cannot and should not rely on the tools of economics to guide our individual moral judgments and intuitions about right and wrong or good and evil in matters of sexuality. And if Posner is right that our sexual behaviors are as rational as our other behaviors, then we should not rely exclusively on economics to guide our communitarian decisions about the rest of our social life either.

Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L.J. 2413, 2416 (1993) (book review).

17. Dworkin writes of Richard Posner, “[H]is arguments show the opposite of what he intended: they show that moral theory cannot be eliminated, and that the moral perspective is indispensable, even to moral skepticism or relativism. Posner is himself ruled by an inarticulate, subterranean, unattractive but relentless moral faith.” Ronald Dworkin, *Darwin’s New Bulldog*, 111 HARV. L. REV. 1718, 1738 (1998).

to particular tenets of legal doctrine and process.<sup>18</sup> Philosophical and jurisprudential inquiries have long considered this a fundamental way to approach the study of the legal system.<sup>19</sup>

This Article considers the intersection of values and the law from a different, and somewhat less grandiose, perspective. I search not for a grand unified theory of morals or values in law but instead consider the legal implications of psychological research on values—in particular, one area of research in the psychology of values called social value orientation, hereinafter referred to as SVO. For over fifty years, social psychologists have extensively studied SVO, which describes individual preferences in allocating resources between oneself and others.<sup>20</sup> SVO provides a framework for understanding one's stance toward outcomes that involve oneself and others.<sup>21</sup> In its simplest terms, SVO asks: Does a person prefer to gain the lion's share of resources for herself (proself-individualist), prefer to “win” relative to another person (proself-competitive), or prefer to equalize outcomes and expand the available “pie” to its largest potential (prosocial-cooperative)?<sup>22</sup> SVO implicates underlying values about the relative importance of collective versus individual outcomes, as well as about equity and inequity in resource distribution.<sup>23</sup>

SVO is a particularly useful place to start in looking at the role of the psychology of values in the law, because it takes as its central concern individuals' orientation regarding resource allocation. Resource allocation is the primary concern of the economic approach to law that has been widely influential over the last half-century.<sup>24</sup> Law and economics posits, as a fundamental underpinning, that “many of the doctrines and institutions of the legal system are best understood and explained as efforts to promote the efficient

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18. See *infra* Part II.B.

19. See *infra* Part II.B.

20. See generally Morton Deutsch, *The Effect of Motivational Orientation upon Trust and Suspicion*, 13 HUM. REL. 123 (1960); David M. Messick & Charles G. McClintock, *Motivational Bases of Choice in Experimental Games*, 4 J. EXPERIMENTAL SOC. PSYCHOL. 1 (1968).

21. Wing Tung Au & Jessica Y.Y. Kwong, *Measurements and Effects of Social-Value Orientation in Social Dilemmas: A Review*, in CONTEMPORARY PSYCHOLOGICAL RESEARCH ON SOCIAL DILEMMAS 71, 71 (Ramzi Suleiman et al. eds., 2004).

22. See Van Lange et al., *supra* note 15, at 733.

23. See Au & Kwong, *supra* note 21, at 71.

24. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 30 (8th ed. 2011).



allocation of resources.”<sup>25</sup> Efficiency is defined as an “allocation of resources in which value is maximized.”<sup>26</sup> While law and economics makes the case for the primacy of efficiency in the allocation of resources, SVO provides a different perspective on what individuals want—what they value—when they think about these same resource allocation problems.<sup>27</sup> Because SVO begins from the same starting point—questions regarding what goals we have for resource allocation—it provides a useful lens through which to look at the law, especially running alongside the law and economics focus on utility maximization.

Problems regarding resource allocation, also called social dilemmas, are often researched in social science using relatively simple paradigms that distill the essence of many complex social problems, including how to get individuals to cooperate when doing so directly conflicts with their own personal utility.<sup>28</sup> Social dilemmas form the core of social problems, such as adherence to laws that may benefit society as a whole but will not yield much benefit to any one individual.<sup>29</sup> For example, complying with environmental regulations may be cumbersome for any one individual, who herself may never experience the potential benefit that stems from the burden. Studying social dilemmas is thus of great interest to scholars in a variety of disciplines, including psychology, economics, and law. While the field of social dilemmas encompasses many facets, SVO “is perhaps the most studied individual differences variable in social dilemmas.”<sup>30</sup> However, SVO, per se, has not yet received any sustained attention from legal scholars.<sup>31</sup>

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25. *Id.*

26. *Id.* at 16. Note the critical distinction between the two ironically close terms, “value” and “values”: value is worth, but values are principles.

27. *See infra* Part IV.A.

28. *See* Au & Kwong, *supra* note 21, at 71-74.

29. *See* Scott T. Allison et al., *The Quest for “Similar Instances” and “Simultaneous Possibilities”: Metaphors in Social Dilemma Research*, 71 *J. PERSONALITY & SOC. PSYCHOL.* 479, 479 (1996).

30. Au & Kwong, *supra* note 21, at 71.

31. As Paul Van Lange and his colleagues note, “[W]e have seen that anthropologists, evolutionary biologists, economists, neuroscientists, political scientists, psychologists, and sociologists increasingly work together to address fundamental questions about human cooperation.” Paul A.M. Van Lange et al., *The Psychology of Social Dilemmas: A Review*, 120 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 125, 129 (2013). Van Lange does not include legal scholars in this litany. *See id.*

This Article has two overarching goals: first, to explicitly bring SVO research into the legal literature and conversation; and second, to explore how SVO may relate to critical questions about the way that legal doctrine both reflects and shapes norms and behavior. In addition, a sustained exploration of SVO also sheds light, as a collateral but not insignificant matter, on the question of the degree to which individuals may actually resemble rational utility maximizers.

Part I offers a view of the landscape of SVO research in psychology, providing background and engaging in a deeper discussion of the distinctions between orientations, data about individual differences, demographic data about orientations, implications of orientations on real behavior, and contextual features that may activate orientations. Then, armed with a more nuanced psychological understanding of how and when individuals are oriented differently with respect to social value, and what effects might stem from different social value orientations, I consider in turn two broad areas of interest—legal doctrine and legal process.<sup>32</sup> Part II examines the potential intersection between SVO and doctrine in several areas of law, including contract, corporate, and family law. Part II explores the way each doctrinal area both makes assumptions about, and implicitly shapes, the regulated audience's SVO. I chose these particular doctrinal areas in an effort to consider fields of law in which a lay perspective might imagine, perhaps stereotypically, a strong SVO: proself-individualist or proself-competitive in the case of contract or business law, and prosocial-cooperative in the case of family law. Part III explores the relationship between SVO and legal dispute resolution processes, offering an opportunity to understand how the behavior of parties during the resolution of disputes is, and could be, shaped by different orientations toward resource allocation. I suggest ways in which SVO may provide a basis for thinking differently about both the role of the law and the design of the legal system in dispute resolution, especially in light of the research surrounding SVO and perceptions of fairness. Part IV considers the broader implications of SVO research and the role of different SVOs in doctrine and process. These implications reveal

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32. This Article considers only civil, not criminal, law.

the tremendous potential of the SVO paradigm in the law, as well as the deep lack of inevitability of the primacy of the rational actor paradigm.

### I. A BRIEF PRIMER ON SOCIAL VALUE ORIENTATION

This Part first describes the basic research on SVO, and then turns to an exploration of the effects that have been connected to distinct orientations.

#### A. *What Is Social Value Orientation?*

In psychology, the field of SVO describes the attitude or stance of an individual with respect to the allocation of resources between herself and others.<sup>33</sup> SVO among individuals has been divided into two broad categories, proself and prosocial.<sup>34</sup> Proself individuals are largely concerned with their own outcomes, and prosocial individuals care more about the outcome of all parties.<sup>35</sup> These broad categories are further distilled into narrower divisions by various researchers; dominant categories of SVO include cooperation (prosocial), individualism (proself), and competition (also proself).<sup>36</sup> Individuals with prosocial orientations are concerned with equality of division between the parties as well as maximizing joint value; prosocial individuals want to minimize differences in outcome between the self and other and share in the largest “pie.”<sup>37</sup> Prosocial individuals who are neutral with respect to their own versus another’s performance are deemed cooperative.<sup>38</sup> Prosocial behavior

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33. Au & Kwong, *supra* note 21, at 71.

34. *See id.* As discussed in greater detail below, although there may be a moral valence associated with a prosocial or proself orientation in any given context, SVO per se does not describe a specific set of moral values and principles; however, it can be a predictor of liberal or conservative outlook.

35. *See* Van Lange et al., *supra* note 15, at 733.

36. *Id.* As Au and Kwong note, there have been many efforts over the years to categorize SVO, leading to models with three, four, seven, and ten labels. Au & Kwong, *supra* note 21, at 71. However, most research in the past few decades has relied on a three-category model involving individualists, competitors, and cooperators. *Id.* at 76.

37. *See* Van Lange et al., *supra* note 15, at 733.

38. *See id.* Those who prefer to see the other party do better than themselves are called altruistic, but altruism does not figure prominently in SVO literature, in large part because it has been found relatively rarely in the context of SVO studies, and will therefore not form

stems from an underlying belief in social responsibility (a concern with others' outcomes) and reciprocity (a concern for equality in outcomes).<sup>39</sup> Prosocial individuals are motivated by three simultaneous goals: maximizing their own outcomes, maximizing joint outcomes, and achieving equality in outcomes.<sup>40</sup>

In contrast, an individual with proself orientation is most concerned with maximizing her own outcome.<sup>41</sup> Proself individuals are further divided into two camps—proself-individualist and proself-competitive.<sup>42</sup> In a proself-individualist orientation, one is indifferent to others' outcomes, focusing merely on ensuring that one's own outcome is as high as possible; in a proself-competitive orientation, one wants to enhance and maximize the difference between the outcome of oneself and the other party, making relative outcome more important than absolute outcome.<sup>43</sup> Motivation for a proself orientation comes from self-interest, but the motivation for the proself-competitive orientation also comes from social comparison—a focus on evaluating oneself through relative position to others—and a desire to bolster oneself at the expense of others.<sup>44</sup> The proself-individualist orientation closely tracks the assumptions of the rational actor model: the goal is to maximize one's own utility, regardless of the outcome of the other.<sup>45</sup>

SVO is a unique brand of values research; it does not address, per se, individuals' orientation toward specific types of moral or religious values, such as those that might guide judgments about controversial topics that typically implicate values, including abortion, gay marriage, and the like. Instead, SVO is concerned with the distinction between valuations of outcomes with respect to oneself

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the basis of the subsequent discussion here. See Au & Kwong, *supra* note 21, at 73-74.

39. David De Cremer & Paul A.M. Van Lange, *Why Prosocials Exhibit Greater Cooperation than Proselfs: The Roles of Social Responsibility and Reciprocity*, 15 EUR. J. PERSONALITY S5, S14 (Supp. 2001).

40. *Id.* at S15.

41. *See id.* at S7.

42. *See* Van Lange et al., *supra* note 15, at 733.

43. *See id.*

44. *See* Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. REL. 117, 118-19 (1954). For a more recent approach, see generally Stephen M. Garcia et al., *The Psychology of Competition: A Social Comparison Perspective*, 8 PERSPS. ON PSYCHOL. SCI. 634 (2013).

45. *See* Van Lange et al., *supra* note 15, at 733.

and to another.<sup>46</sup> SVO primarily represents different perspectives regarding the division of resources in society.<sup>47</sup> However, as discussed in greater detail below, resources may not always be purely economic in nature: legal endowments can be considered a form of resources,<sup>48</sup> as can access to, and the nature of, legal process.<sup>49</sup> Although many legal endowments are about the division of economic resources, some are harder to cast in those terms alone—for example, the right to marry<sup>50</sup> or abortion rights.<sup>51</sup> Nonetheless, even though SVO does not encompass moral principles relating expressly to these controversial areas of the law, SVO may influence the nature of arguments that are made regarding these issues. Courts and advocates may use rhetoric and arguments that reflect inherently prosocial or proself views of society, and also may understand legal rights as a particular type of resource that must be allocated among the members of a group.

Research has found robust individual differences in “baseline” SVO—individual differences that, in the aggregate, pose a challenge to the assumptions of the rational actor model.<sup>52</sup> Additionally, and perhaps more importantly for the relationship between SVO and the legal system, research suggests that some differences in SVO may depend on contextual cues.<sup>53</sup> Although individuals may

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46. See Ryan O. Murphy et al., *Measuring Social Value Orientation*, 6 JUDGMENT & DECISION MAKING 771, 771 (2011).

47. See *id.*

48. See, e.g., MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 91 (2010) (noting the “goods at stake” in debates over same-sex marriage).

49. See *infra* note 99 and accompanying text.

50. Of course, the right to have a legally recognized marriage can impact economic resources. See, e.g., M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081, 1115 (2010) (“Overall, the evidence for the economic value of marriage is strong, suggesting same-sex couples are harmed economically when not allowed to marry.”). At an even more abstract level, the differential recognition of family ties and relationships by the law can “increase inequalities of wealth and opportunity, since closer families may be more likely to distribute resources within their family.” EICHNER, *supra* note 48, at 107.

51. That is not to say that abortion rights are completely unconnected to economic resources. Those with greater financial resources may have better access to legal abortion through travel, and those who are unable to access abortion may end up with a greater financial burden due to childbirth and childcare expenses. See, e.g., E.B., *Abortion in America: A Costly Choice*, ECONOMIST (Oct. 27, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/10/abortion-america> [<https://perma.cc/655S-DUJE>].

52. See *supra* notes 2-6 and accompanying text.

53. See *infra* notes 105-14 and accompanying text.

have predispositions regarding orientations toward social value,<sup>54</sup> both culture and context help to promote SVOs. Field research suggests that culture plays an important role in fostering social value-related behavior; SVO relates to the distinction between collectivist and individualistic cultures, for example.<sup>55</sup> Laboratory studies indicate that manipulating contextual cues can change individuals' SVO and related behavior; such cues can trigger more prosocial or more proself behavior, depending on what behavior is suggested as expected, desired, or conforming to norms.<sup>56</sup>

Like many personality measures, SVO is measured through tests that have been extensively developed and tweaked over the years.<sup>57</sup> SVO is typically measured by offering an individual a series of matched pairs of outcomes to choose among.<sup>58</sup> For example, out of an array of paired choices, an individual who most often chooses a pair that maximizes joint outcomes rather than merely her own outcomes would be classified as a cooperative individual.<sup>59</sup> An individual who more often chooses the options yielding her the highest total, regardless of the cost or benefit to the other party, would be called individualistic, while an individual who systematically chooses the pairings that would result in the greatest differential between herself and the other party would be considered competitive.<sup>60</sup>

As an illustration, a measure of SVO might ask a participant to choose among three options:

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54. See Van Lange et al., *supra* note 15, at 743-44 (suggesting that SVO develops in childhood as at least a partial response to situational factors surrounding social interaction). Interestingly, prosocials are more likely to have greater numbers of siblings, and there is also little apparent difference between the sexes with respect to patterns of SVO. *Id.* at 743.

55. See, e.g., Craig D. Parks & Anh D. Vu, *Social Dilemma Behavior of Individuals from Highly Individualist and Collectivist Cultures*, 38 J. CONFLICT RESOL. 708, 709-10 (1994).

56. See *infra* notes 105-14 and accompanying text.

57. For a nuanced exploration of the various measurement tools of SVO, see Murphy et al., *supra* note 46, at 771-72.

58. See Au & Kwong, *supra* note 21, at 72.

59. See *id.*

60. See *id.*

- (1) *Option A*: 480 points for self and 80 points for other;<sup>61</sup>
- (2) *Option B*: 540 points for self and 280 points for other; and
- (3) *Option C*: 480 points for self and 480 points for other.<sup>62</sup>

In this set of choices, because Option A represents the largest difference between self and other, that is the most competitive choice.<sup>63</sup> Option B represents an individualist outcome because it produces the highest outcome for oneself.<sup>64</sup> Finally, Option C provides the greatest joint outcome, with an equal division of resources, and so it represents the prosocial, cooperative choice.<sup>65</sup> SVO is measured through the use of a questionnaire that provides a series of these types of choices.<sup>66</sup> Other options presented to the test taker could include choices in which an individual received the highest amount out of an array, but the partner received even more, testing the distinction between competitive and individualist orientations.

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61. I note here that the decomposed games do not specify a particular “other,” which of course may influence the general predilection regarding the allocation of resources. Paul A.M. Van Lange et al., *From Games to Giving: Social Value Orientation Predicts Donations to Noble Causes*, 29 BASIC & APPLIED SOC. PSYCHOL. 375, 377 (2007). The division of resources that one might choose as between oneself and, respectively, a stranger, a neighbor, a spouse, or a child, could differ. *See id.* However, the lack of specificity in the SVO literature tracks the assumptions underlying the rational actor model, which typically presumes an actor who wants to maximize utility for herself in the vague face of all typically unspecified others. *See* Van Lange et al., *supra* note 15, at 733.

In addition, because the paradigm does not specify the identity of the “other,” we could potentially assume that participants imagine a range of others, and that if that imagined “other” is randomly distributed among participants (that is, some imagine a friend, some a stranger, etc., but in no systemic pattern), then the identification of SVO would be “true” across conditions. Even if that assumption is wrong, and those who are more prosocial individuals may be more likely to imagine others with whom they are more connected, while individualists and/or competitors are more prone to imagine a neutral other, a stranger other, or even a hostile other, this projection of a type of other onto an indeterminate term is also telling. When individuals think about legal obligations and distribution of liability or rights between themselves and others, they too have to “imagine” which “other” is implicated.

62. Van Lange et al., *supra* note 61, at 377.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See, e.g.,* Daniel Eek & Tommy Gärling, *A New Look at the Theory of Social Value Orientations: Prosocials Neither Maximize Joint Outcome nor Minimize Outcome Differences but Prefer Equal Outcomes*, in *NEW ISSUES AND PARADIGMS IN RESEARCH ON SOCIAL DILEMMAS* 10, 11 (Anders Biel et al. eds., 2008) (describing decomposed games and explaining that an individualist would prefer an outcome of 560 points to self and 300 points to other, while a competitor would choose an outcome of 500 points to self and 100 points to other).

Research shows that individuals vary in their orientations. A meta-analysis by Wing Tung Au and Jessica Y.Y. Kwong suggests that, without prior manipulation, priming, or contextual cues, the population of individuals studied is divided roughly between prosocials (46 percent) and proselves (individualists, 25 percent; competitors, 13 percent).<sup>67</sup> This meta-analysis considered the results of all studies of so-called “decomposed games” (described above as selections of matched pairings) published since 1973, including forty-seven individual studies.<sup>68</sup> These results suggest that the rational utility-maximizing actor, although a tidy paradigm, does not accurately represent the majority of individuals.<sup>69</sup> This is a key finding that challenges the vitality and applicability of the rational actor model.<sup>70</sup>

Much of the research on SVO takes place in European countries, so it is important to consider whether these findings hold up in the United States. Another recent meta-analysis by Daniel Balliet and his colleagues looked at eighty-two SVO studies, including fifteen that focused either exclusively or in part on participants from the United States, and found a similar pattern of prosocial individuals as the one identified in the earlier Au and Kwong review.<sup>71</sup>

### *B. What Are the Effects of Social Value Orientation?*

Merely understanding that individuals might prefer different resource allocations in a series of decomposed choices with an unspecified “other,” however, does not tell us what effects such measured preferences might have on real behavior. But research suggests that SVO has a host of effects on actual behavior. Individuals allocate real resources in games in accordance with measured

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67. Au & Kwong, *supra* note 21, at 74 (listing values that represent medians found from the meta-analysis); *see also* Murphy et al., *supra* note 46, at 775 (finding that 59 percent of individuals are prosocial, 35 percent are individualist, and the remainder are either unclassifiable or competitive).

68. *See* Au & Kwong, *supra* note 21, at 73.

69. *See id.* at 74.

70. *But see* Murphy et al., *supra* note 46, at 771 (“[C]onsidering a spectrum of different SVOs is not a challenge to rational choice theory *per se*, but rather the extension of a postulate in an effort to increase the theory’s psychological realism and descriptive accuracy.”); *see also* Au & Kwong, *supra* note 21, at 90.

71. Daniel Balliet et al., *Social Value Orientation and Cooperation in Social Dilemmas: A Meta-Analysis*, 12 GROUP PROCESS & INTERGROUP REL. 533, 537-40 (2009).



social value preferences.<sup>72</sup> In addition, individuals' SVO is a relevant predictor of other types of real-world behavior that may benefit societal groups rather than individual self-interest.<sup>73</sup> Finally, SVO significantly correlates with other important psychological processes beyond allocation of resources and social behavior, such as perceptions of fairness and legitimacy.<sup>74</sup> Research indicates that individuals with different SVOs assess fairness of process differently, and make both procedural and distributive justice judgments along different dimensions.<sup>75</sup>

SVO has been linked to significant differences in behavior in decision-making settings.<sup>76</sup> For example, SVO predicts behavior in empirical studies.<sup>77</sup> Individuals who measure as cooperative through an SVO measurement tool display greater actual cooperation in experimental games involving the distribution of resources, such as the prisoner's dilemma, the ultimatum game, and the dictator game, than individuals who have been classified as individualists and competitors.<sup>78</sup> SVO significantly influences the outcome of such games, directly affecting how the "pie" is divided among participants.<sup>79</sup>

SVO correlates not just with outcomes but also with process behaviors, such as the strategic use of fairness in negotiation. Proself individuals, for example, are tougher and less problem-solving in negotiation settings.<sup>80</sup> Researchers distinguish between

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72. See *infra* note 78 and accompanying text.

73. See *infra* notes 88-89 and accompanying text.

74. See *infra* notes 90-92 and accompanying text.

75. See *infra* notes 90-92 and accompanying text.

76. See Balliet et al., *supra* note 71, at 543.

77. See, e.g., Carsten K.W. De Dreu & Terry L. Boles, *Share and Share Alike or Winner Take All?: The Influence of Social Value Orientation upon Choice and Recall of Negotiation Heuristics*, 76 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 253, 256 (1998); Sylvia G. Roch et al., *Cognitive Load and the Equality Heuristic: A Two-Stage Model of Resource Overconsumption in Small Groups*, 83 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 185, 205-06 (2000); Sylvia G. Roch & Charles D. Samuelson, *Effects of Environmental Uncertainty and Social Value Orientation in Resource Dilemmas*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 221, 229 (1997).

78. See Charles G. McClintock & Wim B.G. Liebrand, *Role of Interdependence Structure, Individual Value Orientation, and Another's Strategy in Social Decision Making: A Transformational Analysis*, 55 J. PERSONALITY & SOC. PSYCHOL. 396, 407 (1988).

79. See generally *id.*

80. See Eric van Dijk et al., *Social Value Orientations and the Strategic Use of Fairness in Ultimatum Bargaining*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 697, 705 (2004).

true concern for fairness, demonstrated by prosocials, and strategic use of fairness by proselfs.<sup>81</sup> Interestingly, this suggests that proself individuals may be more sensitive to environmental cues than prosocial individuals.<sup>82</sup> This is particularly surprising because other research demonstrates that prosocial individuals are more likely to demonstrate “behavioral assimilation.”<sup>83</sup> Behavioral assimilation means that if an individual is presented with cooperation, she will cooperate; if an individual is presented with self-interested behavior, she will reciprocate with self-interested behavior.<sup>84</sup> But responsiveness to one’s surroundings is qualitatively different for proself and prosocial individuals; proself individuals continue to maintain their goal of maximizing their own outcome, but may adjust their behavior, strategically and if necessary, to achieve this goal.<sup>85</sup> In contrast, prosocials are more responsive as a matter of reciprocity.<sup>86</sup> Indeed, this desire for reciprocity may even lead to a preference for equality over joint outcome maximization.<sup>87</sup>

SVO also relates to real world, outside-the-lab behavior such as donations to social causes. Prosocials donate more to others—SVO is particularly predictive of donations to the poor and the sick.<sup>88</sup>

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81. *Id.* at 704.

82. *See id.* at 704-05.

83. De Cremer & Van Lange, *supra* note 39, at S14; Paul A.M. Van Lange, *The Pursuit of Joint Outcomes and Equality in Outcomes: An Integrative Model of Social Value Orientation*, 77 J. PERSONALITY & SOC. PSYCHOL. 337, 347 (1999).

84. *See* Van Lange, *supra* note 83, at 338.

85. *See* Daniel Eek & Tommy Gärling, *Prosocials Prefer Equal Outcomes to Maximizing Joint Outcomes*, 45 BRIT. J. SOC. PSYCHOL. 321, 333 (2006).

86. *See id.*

87. *See id.* Although Daniel Eek and Tommy Gärling make a strong case for prosocials’ preference of equality over joint outcome maximization, in contrast to earlier work on prosocials, I remain largely agnostic here on that distinction. Part of the problem with using the distinction at this juncture is that earlier meta-analyses such as the Au and Kwong review do not make the distinction between studies that measured prosocials in equality terms versus joint outcome maximization terms, making it hard to parse the true meaning of this distinction for conclusions in earlier work about the size of the prosocial population. *See generally* Au & Kwong, *supra* note 21. In this Article, I engage with SVO on its own, broadly defined terms. Certainly, more nuance in understanding the ways in which individuals approach resource allocations, with categories defined in more finely grained terms than current SVO research permits, would be helpful to further discussion. To the extent that this suggests that SVO is a fairly blunt object, that is true, but by no means disqualifying; it certainly provides more nuance than an assumption that individuals are (or should be) driven by a desire to maximize their own outcomes.

88. *See* Van Lange et al., *supra* note 61, at 380-81.

Prosocial individuals are more likely than proself individuals to take public transportation and to link that decision to issues of collective welfare.<sup>89</sup> SVO also significantly affects individuals' perceptions of procedure.<sup>90</sup> Fairness assessments may differ depending on the SVO of the participant in the process; individuals who measure as proself have a more heightened sensitivity to whether or not they have had a voice in a particular process, leading to what Jan-Willem van Prooijen and his colleagues call the "egocentric justice hypothesis."<sup>91</sup> Prosocial individuals care most about the equality of procedures, while proselfs mainly assess their own procedures without regard to others' experiences.<sup>92</sup>

*C. Social Value Orientation as More than a Personality Dimension: Social Value Orientation and Context*

Law and economics presumes a rational actor at least in part because it permits clearer and more logical predictions than other assumptions.<sup>93</sup> Heuristics and biases, and prospect theory more generally, have been embraced by economists—even "creating" the field of behavioral economics<sup>94</sup> and behavioral law and economics—because systematic effects across populations mean that predictions about (predictably irrational) behavior may be possible.<sup>95</sup> Not everyone

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89. Mark Van Vugt et al., *Car Versus Public Transportation? The Role of Social Value Orientations in a Real-Life Social Dilemma*, 25 J. APPLIED SOC. PSYCHOL. 258, 274 (1995).

90. Jan-Willem van Prooijen et al., *The Egocentric Nature of Procedural Justice: Social Value Orientation as Moderator of Reactions to Decision-Making Procedures*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1303, 1303-04 (2008).

91. *Id.* at 1305.

92. Jan-Willem van Prooijen et al., *Injustice for All or Just for Me? Social Value Orientation Predicts Responses to Own Versus Other's Procedures*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 1247, 1254 (2012).

93. Indeed, part of the point of such economic predictions is to expressly "abstract[] the common and crucial elements from the mass of complex and detailed circumstances surrounding the phenomena to be explained and permit[] valid predictions on the basis of them alone." MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3, 14 (1966); see also POSNER, *supra* note 24, at 21 ("[L]ack of realism ... is a precondition of theory.").

94. See Richard H. Thaler, *Behavioral Economics: Past, Present, and Future*, 106 AM. ECON. REV. 1577, 1597 (2016) (noting that behavioral economics can be traced right back to Adam Smith, and that perhaps in the future the word "behavioral" will be dropped to reflect the fundamental role of human behavior in economics).

95. See, e.g., DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 239-40 (rev. & expanded ed. 2009); RICHARD H. THALER & CASS R. SUNSTEIN,

is affected by these cognitive distortions, but many people across a range of studies and contexts are.<sup>96</sup> Even some of the other challenges to the rational actor paradigm, such as procedural justice research, similarly rely on the broad applicability of supporting findings: procedural justice effects are robust across populations, settings, and individuals.<sup>97</sup> Again, although some individuals may not be affected by concerns about fairness of process, or may feel the effects less strongly, the research suggests largely consistent and significant effects across populations.<sup>98</sup> The strength and consistency of procedural justice findings suggest that we could incorporate insights from procedural justice research into legal process to increase the perceived fairness and legitimacy of our legal system across the population at large.<sup>99</sup>

SVO, however, is distinct because it does not represent some shared phenomenon with individual shades of variation, such as procedural justice or framing effects.<sup>100</sup> Instead, SVO is *explicitly* about differences, and has sometimes been characterized as a personality variable—a particularized and ex ante unknowable difference among individuals.<sup>101</sup> As such, it might be tempting to conclude

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NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 7-8 (2008).

96. See, e.g., Thaler, *supra* note 94, at 1581.

97. See *infra* Part III.A.

98. See *infra* Part III.A.

99. Procedural justice effects are found in settings including, but not limited to, the civil and criminal legal system, alternative dispute resolution, the workplace, and the family. See, e.g., Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 503 (1988); Mark R. Fondacaro et al., *Procedural Justice in Resolving Family Disputes: A Psychosocial Analysis of Individual and Family Functioning in Late Adolescence*, 27 J. YOUTH & ADOLESCENCE 101, 102 (1998); E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 235-36 (1993); Jennie J. Long, *Compliance in Small Claims Court: Exploring the Factors Associated with Defendants' Level of Compliance with Mediated and Adjudicated Outcomes*, 21 CONFLICT RESOL. Q. 139, 140-41 (2003); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 346-47 (1988); Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 327 (1993).

100. See *supra* Part I.A.

101. See *supra* Part I.A. Although the exact nature of personality variables is a complex problem well outside the scope of this Article, personality variables are understood in personality psychology literature to require external measurement: as one author explained, "[T]he strength of a personality variable in a given person is indexed by the proportion of times that he makes a particular response in a specified situation." Donald W. Fiske, *Problems in Measuring Personality*, in CONCEPTS OF PERSONALITY 449, 459 (Joseph M. Wepman & Ralph W. Heine eds., 1963).

that SVO cannot possibly be a meaningful distinction upon which to ground any kind of legal framework or doctrine, or even any analysis of such doctrine. Other personality variables, such as those that comprise the “Big Five” of personality research in psychology—extraversion, agreeableness, openness, conscientiousness, and neuroticism—differ greatly among individuals.<sup>102</sup> While these variables provide tremendously useful information and can predict behavior,<sup>103</sup> we might find it odd to analyze the role of, say, extroversion in the legal system, or to even consider what assumptions the law does or should make about agreeableness, or to find interesting or useful an examination of existing law along the lines of neuroticism. Personality variables are simply too unpredictable and variegated to make this a worthwhile endeavor, this argument might go. Just as we would not craft or analyze the law based on, say, openness, we could argue that we ought not fall down the SVO rabbit hole and use SVO as the basis for policy or doctrine or look for insights into the law through an SVO lens.

Yet SVO is different from more traditional psychological personality variables that make up the “Big Five” of personality research. Although researchers understand that personality variables are not absolutes and may be subject to some change, either in different settings or over time, personality variables are largely conceptualized as fixed and fairly stable traits.<sup>104</sup> For example, merely attending a lively dinner party will not change an individual with strong introversion tendencies into a chatterbox. But research indicates that SVO and its related behavior are highly susceptible to social cues and context.<sup>105</sup> In one study, researchers found that merely

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102. See generally Oliver P. John, *The “Big Five” Factor Taxonomy: Dimensions of Personality in the Natural Language and in Questionnaires*, in HANDBOOK OF PERSONALITY: THEORY AND RESEARCH 66, 71-73 (Lawrence A. Pervin ed., 1990) (providing overview and history of the five-factor model).

103. See Brent W. Roberts et al., *The Power of Personality: The Comparative Validity of Personality Traits, Socioeconomic Status, and Cognitive Ability for Predicting Important Life Outcomes*, 2 PERSP. ON PSYCHOL. SCI. 313, 336 (2007).

104. Gabriela Carrasco & Eric Kinnamon, *An Examination of Selfish and Selfless Motives: A Review of the Social Psychological and Behavioral Economics Literature*, in APPLIED BEHAVIORAL ECONOMICS RESEARCH AND TRENDS 93, 98 (Rodica Ianole ed., 2017).

105. See Craig D. Parks & Anh D. Vu, *Social Dilemma Behavior of Individuals from Highly Individualist and Collectivist Cultures*, 38 J. CONFLICT RESOL. 708, 715 (1994). Similarly, Elizabeth Chamblee Burch noted, in the legal context, that “[w]e act with mixed motives that fluctuate depending on social cues and context.” Elizabeth Chamblee Burch, *Litigating*

changing the name of a prisoner's dilemma game affected participants' goals regarding resource allocation between themselves and others in the game dramatically.<sup>106</sup> When participants were told that they were participating in the "Wall Street Game," they acted significantly more competitive toward their opponents than when they were told that they were participating in the "Community Game."<sup>107</sup> This difference in behavior occurred even though the rules of the game were identical in both settings and participants were given the same goal—to maximize their utility.<sup>108</sup> Suggesting that the overarching setting of one game was Wall Street—where norms of wealth acquisition run rampant<sup>109</sup>—made participants act competitively, while suggesting that the setting of the other game was a "community" invoked norms of cooperation and communal interests, prompting cooperative behavior.<sup>110</sup> Relatedly, a large-scale cross-cultural study found significant differences in behavior during the ultimatum game, suggesting that some of individuals' orientation toward resource allocation must come from cultural cues.<sup>111</sup>

In sum, SVO is a "personality" variable, but it is not *just* about personality. Rather, SVO can be highly influenced by social context, such as a legal framework providing norms regarding behavior in different settings.<sup>112</sup> As one researcher suggested, "[S]ocial value orientation reflects dispositions that are at least somewhat stable yet open to modification, particularly over a relatively longer period of time."<sup>113</sup> Additionally, SVO is expressly about how individuals function in groups in ways that are relevant to legally governable be-

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*Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 135 (2011).

106. See Varda Liberman et al., *The Name of the Game: Predictive Power of Reputations Versus Situational Labels in Determining Prisoner's Dilemma Game Moves*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1175, 1182 (2004).

107. See *id.*

108. See *id.* at 1176-77.

109. As Gordon Gekko explains in the 1987 movie *Wall Street*, "Greed is good." See WALL STREET (Twentieth Century Fox 1987).

110. But see Tore Ellingsen et al., *Social Framing Effects: Preferences or Beliefs?*, 76 GAMES & ECON. BEHAV. 117, 128 (2012) (finding results that suggest framing effects signal coordination around a norm rather than trigger a change in desires by participants).

111. See Joseph Henrich et al., *"Economic Man" in Cross-Cultural Perspective: Behavioral Experiments in 15 Small-Scale Societies*, 28 BEHAV. & BRAIN SCI. 795, 813 (2005).

112. See Liberman, *supra* note 106, at 1182.

113. Van Lange, *supra* note 83, at 343 n.6.

havior.<sup>114</sup> Much of the law is about the appropriate allocation of resources between the self and others, as well as about governing individual behavior in light of collective societal goals.<sup>115</sup> Unlike personality traits of introversion/extroversion, agreeableness, neuroticism, or others, SVO directly relates to attitudes and behaviors that are critical to the successful functioning of the legal system.<sup>116</sup> As such, it is worth considering how SVO may relate to predictions about legal behavior and norms reflected by legal doctrine.

## II. SOCIAL VALUE ORIENTATION IN THE LAW

This Part considers several diverse areas of legal doctrine and the potential connection between that doctrine and SVO. Because law governs so many potential human interactions, it is worthwhile to consider doctrinal areas that, at least at first glance, appear to address dramatically different contexts. This Part is by no means an exhaustive and in-depth examination of particular doctrinal areas. Rather, I suggest that SVO is a useful lens that can provide some meaningful insight into how we might think about underlying values expressed through different doctrines and begin that exploration. Here, I look first at corporate and contract law, which are often perceived as largely focused on rational actors and typically are thought to consider economic gain paramount.<sup>117</sup> Then, I consider family law, which governs individuals in the private sphere of their personal lives, where issues related to interpersonal connection and relationships are more prominent.<sup>118</sup> In these areas, I consider what thinking about doctrine in terms of, and in light of, SVO might reveal.

Because of the differences in the nature of these doctrinal areas, an examination of the relevant law's SVO assumptions and implications should be particularly revealing. For example, although corporate law and contract law appear at first glance to be focused on rational profit seeking, the law also encompasses doctrines that

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114. *See supra* Part I.A.

115. *See supra* notes 25-27 and accompanying text.

116. *See supra* Part I.A.

117. *See infra* Parts II.A-B.

118. *See infra* Part II.C.

are extremely prosocial and encouraging of cooperative behavior.<sup>119</sup> In contrast, the casual observer might imagine that family law, governing relationships between individuals in family systems, would encapsulate cooperative values.<sup>120</sup> Yet family law doctrine and theory can be quite individualistic.<sup>121</sup> This analysis of legal doctrine and theory through the lens of psychological research on preferences regarding resource allocation provides insight for the law and legal scholars about the nature of “rational actors,” values, and the role of the law.

### A. *Corporate Law*

Corporate law has traditionally been perceived as the realm of individualism and competition. The notion that “greed is good” is the mantra of Wall Street—and not just for movie villains.<sup>122</sup> Players in the corporate world are expected to use every advantage to reap higher and higher profits—and higher and higher salaries.<sup>123</sup> In his book *Liar’s Poker*, Michael Lewis describes a culture of gambling, hazing, and one-upmanship that permeates the trading desks at Salomon Brothers.<sup>124</sup> Portraying characters he calls “Sangfroid” and the “Human Piranha,” Lewis depicts the firm’s training for new recruits as a parade of capitalist indoctrination in which trainees learn how to be ruthless.<sup>125</sup> According to Frank Partnoy in his book *F.I.A.S.C.O.*, the mentality of Wall Street is that investment banking is like war, and he further states that “[w]hen an account called to say hello, I needed to be prepared to blow his head off, if necessary, to make a sale.”<sup>126</sup> Both Partnoy and Lewis describe traders referring to “ripping [a client’s] face off” (unironically, if not literally) as part of a business deal.<sup>127</sup> The frame is an

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119. See *infra* Parts II.A-B.

120. See *supra* Part II.C.

121. See *supra* Part II.C.

122. See WALL STREET, *supra* note 109.

123. See MICHAEL LEWIS, LIAR’S POKER: RISING THROUGH THE WRECKAGE ON WALL STREET 202-03 (1989).

124. See *id.* at 120-21.

125. *Id.* at 39-41, 70, 72.

126. FRANK PARTNOY, F.I.A.S.C.O.: BLOOD IN THE WATER ON WALL STREET 108 (1997).

127. PARTNOY, *supra* note 126, at 61; LEWIS, *supra* note 123, at 71.



entirely competitive one: it is not enough simply to make money; the other party has to lose.<sup>128</sup>

While corporate and securities law has never endorsed such a bellicose perspective, it is thought to at least follow an individualistic SVO. The foundation for American corporate law is the norm of shareholder primacy: namely, that corporate directors and officers are there to govern the corporation in the interests of the shareholders.<sup>129</sup> The doctrine is generally traced back to *Dodge v. Ford Motor Co.*, in which the Michigan Supreme Court held that Henry Ford had improperly failed to provide Ford's shareholders with a dividend.<sup>130</sup> The court famously stated: "A business corporation is organized and carried on primarily for the profit of the stockholders."<sup>131</sup> In determining that the company must issue a dividend, the court noted that there was an important distinction between potentially allowable "incidental humanitarian expenditure of corporate funds for the benefit of the employés [sic]" and an impermissible "general purpose and plan to benefit mankind at the expense of others."<sup>132</sup> Although the power of the shareholder primacy norm is hotly debated in academic circles,<sup>133</sup> the Delaware Court of Chancery recently reaffirmed the basic principle.<sup>134</sup>

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128. See *supra* notes 43-44 and accompanying text.

129. In fact, Milton Friedman famously disclaimed any other purpose for a corporation other than the drive to maximize the returns to shareholders. Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17; see also Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34 (2012) ("[S]tockholders' best interest must always, within legal limits, be the end. Other [corporate] constituencies may be considered only instrumentally to advance that end.").

130. 170 N.W. 668, 685 (Mich. 1919).

131. *Id.* at 684.

132. *Id.*

133. See Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 176 (2008) ("Corporations seek profits for shareholders, but they seek other things, as well, including specific investment, stakeholder benefits, and their own continued existence. Teaching *Dodge v. Ford* as anything but an example of judicial mistake obstructs understanding of this reality.").

134. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders."); see also Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1033 (2012) ("Although the vibrancy of shareholder primacy has at times been called into question as a matter of law, both boardrooms and courts have taken the

The theory behind the shareholder primacy norm is that shareholders are the most vulnerable set of stakeholders in the corporation and, therefore, deserve to hold the power over the rest of the stakeholders.<sup>135</sup> According to the theory, shareholders have control rights because they are entitled to the residual profits that the corporation generates.<sup>136</sup> Because all other stakeholders in the corporation—namely, employees, suppliers, and customers—are entitled to their contractual claims before profits are paid, shareholders are in the best position to maximize the overall wealth generated by the corporation.<sup>137</sup> Under this theory of corporate governance, all the sets of players act in their own self-interest, and the players with the last bite at the apple have overriding power in order to make sure that they get their fair share.<sup>138</sup> This perspective on corporate structure is very individualistic in nature, as it assumes that each group will act in its own (collective) self-interest.<sup>139</sup>

Despite these competitive and individualist norms, however, much of corporate law centers around prosocial norms. When dealing with matters internal to the firm, the law often expects cooperation rather than competition.<sup>140</sup> As representatives of the shareholder electorate, the board of directors is expected to act on behalf of the shareholders and owes fiduciary duties of care and loyalty to both the shareholders and the corporation itself.<sup>141</sup> Although

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normative call for shareholder wealth maximization increasingly to heart. There is little doubt that the revolution has not only substantially affected legal theory but also legislation, court decisions, and corporate behavior.” (footnotes omitted).

135. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 67 (1991).

136. See *id.*

137. See *id.*

138. See *id.* at 67-68.

139. See *id.*

140. See *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986).

141. See *id.* (“In performing their duties the directors owe fundamental fiduciary duties of loyalty and care to the corporation and its shareholders.”). Directors may also arguably owe a duty of good faith to the corporation. See Melvin A. Eisenberg, *The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 3 (2006) (“An important development in corporate law is the explicit recognition in recent cases that corporate managers—directors and officers—owe a duty of good faith in addition to their duties of care and loyalty.”). However, the Delaware Supreme Court has described the duty of good faith as a subsidiary element or condition of the duty of loyalty. See *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (“[A]lthough good faith may be described colloquially as part of a ‘triad’ of fiduciary duties that includes the duties of care and loyalty, the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as

the duty of care is limited by the business judgment rule,<sup>142</sup> the duty of loyalty is, essentially, a duty to act in the best interests of the other.<sup>143</sup> Directors have a responsibility to act in the interests of the corporation and the shareholders—not themselves—when they are performing their roles within the corporation.<sup>144</sup> The officers that the directors appoint, such as the chief executive and financial officers, also owe these duties to the corporation.<sup>145</sup> Majority shareholders also owe fiduciary duties to the corporation, which generally inure to the protection of minority shareholders.<sup>146</sup>

These duties carry over to other types of business organizations as well. In one of the most famous business law cases, *Meinhard v. Salmon*, the Court of Appeals of New York explained that the duty to one's own partners was much higher than to another person:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.<sup>147</sup>

In particular, the court said, the defendant Walter Salmon was not guilty of defrauding his partners.<sup>148</sup> The court acknowledged that he was not acting with ill intent or in a way that implicated moral

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the duties of care and loyalty." (footnote omitted).

142. See Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. PITT. L. REV. 945, 955-56 (1989).

143. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) ("Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally."), *modified*, 636 A.2d 956 (Del. 1994).

144. See *id.*

145. See *Gantler v. Stephens*, 965 A.2d 695, 708 (Del. 2009) ("[C]orporate officers owe fiduciary duties that are identical to those owed by corporate directors.").

146. *NHB Assignments LLC v. Gen. Atl. LLC (In re PMTS Liquidating Corp.)*, 452 B.R. 498, 507 (Bankr. D. Del. 2011) ("[U]nder both Florida and Delaware law, a majority shareholder unquestionably owes a fiduciary duty to the corporation.").

147. 164 N.E. 545, 546 (N.Y. 1928).

148. See *id.* at 548.

issues of right and wrong.<sup>149</sup> Nonetheless, Salmon breached his fiduciary duty to his partner, because he “had put himself in a position in which thought of self was to be renounced, however hard the abnegation.”<sup>150</sup> In the language of SVO, Salmon’s behavior marked him as an individualist, but the court held him to the standard of cooperator.<sup>151</sup> Partners in a partnership owe one another a duty of loyalty that must supersede individual self-interest.<sup>152</sup>

Of course, these fiduciary duties do not turn directors and partners into self-abnegating altruists. But they do seek to balance the competitive aspects of the market with the cooperative nature of team production. Corporate law looks to police both ends of the continuum—the perils of extreme self-interest, on one hand, must be guarded against, and we must remind individuals of the need to cooperate. On the other hand, too much cooperation is unacceptable and parties may need to be reminded of the primacy of self-interest. This balancing act is evident in takeover law.<sup>153</sup> In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court required directors to maximize shareholder returns when conducting an auction for the sale of control of the corporation.<sup>154</sup> Once the sale of the company was ensured, “[t]he duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit.”<sup>155</sup> In other words, the directors’ duty was “getting the best price for the stockholders at a sale of the company.”<sup>156</sup>

However, in *Paramount Communications, Inc. v. Time, Inc.*, the same court held that Time could take evasive actions to avoid an extremely generous buyout offer from Paramount.<sup>157</sup> The court stated that “absent a limited set of circumstances as defined under *Revlon*, a board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value

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149. *See id.*

150. *Id.* at 548.

151. *See id.*

152. *See id.* at 546.

153. *See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

154. *Id.*

155. *Id.*

156. *Id.*

157. 571 A.2d 1140, 1154-55 (Del. 1989).

in the short term, even in the context of a takeover.”<sup>158</sup> The court also recognized that the board may take into account a variety of factors in defending against a hostile takeover, including “the impact on ‘constituencies’ other than shareholders.”<sup>159</sup> By supporting a more ecumenical approach to the best interests of the firm, the court allowed for a more communitarian approach by the corporation’s board.<sup>160</sup>

Indeed, there are indications that courts and companies may be moving away from the notion that shareholder wealth maximization should be the corporation’s ultimate purpose. The U.S. Supreme Court addressed the potential goals of a corporation in *Burwell v. Hobby Lobby Stores, Inc.*<sup>161</sup> The majority held that for-profit companies could have religious and other “not profit” motivations too:

While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.... If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.<sup>162</sup>

At the same time, however, the Court seemed to put the power to exercise religious beliefs largely in the hands of the shareholders.<sup>163</sup> Noting the unanimity of the litigant companies’ shareholders as to their religious beliefs, the Court seemed to base the corporation’s religious identity primarily on shareholder religious identity.<sup>164</sup> To this extent, *Hobby Lobby* allows shareholders to pursue their

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158. *Id.* at 1150.

159. *Id.* at 1153 (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985)).

160. *See id.*

161. 134 S. Ct. 2751, 2771 (2014).

162. *Id.* at 2771.

163. *See id.* at 2774.

164. *See id.*

individual religious beliefs by escaping government-imposed benefits for their employees.<sup>165</sup>

The “expressive function”<sup>166</sup> of corporate law thus points in two directions: one, a self-interested individualist direction, and the other, a cooperative direction, concerned for joint outcome and shared benefits.<sup>167</sup> These contrasting SVOs act together to police the boundaries of the corporate form itself. On the one hand, the expressive function decries the cooperator who seeks joint value for others outside of the corporate form *per se* (à la *Ford Motor Co.*),<sup>168</sup> and on the other hand decries the individualist who seeks benefit outside the corporate form (à la *Salmon*).<sup>169</sup> Individualist orientation *on behalf of* the firm is good, and cooperation *within* the firm is good, but individualist orientation on behalf of an actual individual—both within and outside of the firm—and cooperation with others outside the firm, are both undesirable.

### B. Contracts

For decades, contract law has been the province of law and economics scholars; as Eric Posner noted, “[E]conomic analysis of contract law ... has become the dominant academic style of contract theory.”<sup>170</sup> Contract law is particularly susceptible to the lure of a cost-benefit analysis since it is predicated on the idea that people bargain for an exchange of money, goods, or duties with a clear eye toward weighing costs and benefits.<sup>171</sup> The economic analysis of

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165. *See id.* at 2785.

166. The expressive function of the law is “in ‘making statements’ as opposed to controlling behavior directly.” Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996).

167. *Cf.* Marcel Kahan & Edward Rock, *Symbolic Corporate Governance Politics*, 94 B.U. L. REV. 1997, 1998 (2014) (“[C]onsider the possibility that corporate governance politics, like politics more generally, may have a significant ‘symbolic’ element.”); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997) (“[T]he Delaware courts generate in the first instance the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers) largely through what can best be thought of as ‘corporate law sermons.’”).

168. *See supra* text accompanying notes 129-32.

169. *See supra* text accompanying notes 147-52.

170. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 829 (2003).

171. *See* Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 691 (1986) (discussing the parties’ cost-benefit analysis

contract law assumes that “individuals have preferences over outcomes, that these preferences obey basic consistency conditions, and that individuals satisfy these preferences subject to an exogenous budget constraint. Contracts scholars usually assume that individuals do not have preferences regarding the consumption or well-being of other individuals.”<sup>172</sup>

In particular, the doctrine of efficient breach is a high-water mark for the role of the rational actor.<sup>173</sup> If one contracts in one setting, but finds that it is better for one’s own self-interest to breach—that is, even after accounting for the cost of breach, one is still better off economically by breaching—then one ought to be able to breach a contract without additional repercussions.<sup>174</sup> Of course, there are critics of this approach, who argue that the purely economic understanding of contractual obligation misses an important component of contract law—namely, the moral importance of a promise.<sup>175</sup> Efficient breach reflects an inherently proself-individualist vision.<sup>176</sup> One does not consider the relative benefit to the other party after breach (a proself-competitive orientation), or the joint benefits or the equality of the outcomes between the contracting parties (a prosocial perspective).<sup>177</sup> Instead, one merely looks to the position in which one will find oneself—and oneself alone—after any consequent benefits and damages from the breach are tallied.<sup>178</sup>

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over contingencies in contract formation).

172. Posner, *supra* note 170, at 832.

173. See generally Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977) (analyzing liquidated damages clauses in the context of efficient breach).

174. See *id.* at 558-59.

175. See generally CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981) (arguing for a moral basis of contract law); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 712 (2007) (“Legal rules must be constructed and justified in ways that take into account the fact that law embodies a system of rules and practices that moral agents inhabit, enforce, and are subject to alongside other aspects of their lives, especially their moral agency.”).

176. Efficient breach defenders explain that efficient breach essentially fills in terms of a contract that is not fully complete—terms that both parties would have agreed to *ex ante* if only the particulars of the ensuing situation had been apparent. See Kornhauser, *supra* note 171, at 691-92.

177. See Goetz & Scott, *supra* note 173, at 558-59.

178. See *id.*

Recent scholarship interrogates “the assumption that individuals uniformly perceive their consent as creating a legal obligation [that] lies at the heart of contractual obedience.”<sup>179</sup> In particular, research focuses on the way that framing a contract can influence contract adherence. For example, one study found that when a contract included a liquidated damages clause—an express structure designed to compensate for breach of contract—individuals were more willing to engage in efficient breach of the contract than when a contract did not include such a clause.<sup>180</sup> The study thus indicated that moral intuitions surrounding contractual promises may provide a disincentive to breaching a contract even when it might maximize economic utility to do so, but that the liquidated damages clause allowed individuals to feel better about maximizing self-interest.<sup>181</sup> Another way of considering these results is that the liquidated damages term was helpful in expressing the individualist SVO and sent contextual cues to participants that an individualist approach was called for and even expected.

Relatedly, another study recently found that appeals to moral frameworks were more predictive of adherence to contractual obligations than were appeals to legal incentives and deterrents.<sup>182</sup> In this study, participants made a contract to complete survey research and were then asked to complete an intentionally prohibitively lengthy survey.<sup>183</sup> When, as expected, many of them tried to end their involvement prior to completing the contracted-for task, the participants were prompted to complete the task with either a legal, moral, instrumental, or social prompt.<sup>184</sup> The legal prompt reminded participants that they signed a contract, the moral prompt exhorted participants to “live up to their word,” and the instrumental prompt reminded participants of the promised “reward” for completion.<sup>185</sup> Finally, the social prompt indicated that most participants completed the task, asking for completion by reference to

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179. Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67, 69 (2012).

180. Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 663 (2010).

181. *Id.* at 663-64.

182. *See* Eigen, *supra* note 179, at 70.

183. *Id.* at 72-73, 78.

184. *Id.* at 81.

185. *Id.*



social conformity.<sup>186</sup> The moral prompt was the most successful in encouraging completion, while the legal prompt alone was far less successful.<sup>187</sup> The least successful prompt was the instrumental prompt, which reminded participants of the incentive structure of the task.<sup>188</sup> The social prompt was not as effective as the moral prompt, but exceeded the performance of the legal and instrumental prompts.<sup>189</sup> The study's results suggest that the SVO that is activated by certain prompts impacts behavior.<sup>190</sup> Here, the proself-individualist prompt failed to produce compliance with the contract; the prosocial-cooperation prompt was better, but not as good as an express appeal to morality.<sup>191</sup>

In another study that illustrates the potential role of SVO in the contract compliance setting, researchers in Israel discovered that imposing fines on parents who were late in picking up their children at a day care center increased, rather than decreased, the frequency of late pickups.<sup>192</sup> Although economics would predict that increasing the price (here, imposing a price on a previously free behavior) of an action would reduce the frequency of the action,<sup>193</sup> the imposition of the fine instead appeared to change the perspective of the parents at the center.<sup>194</sup> Previously, the researchers suggested, the parents were motivated to pick up on time by an array of potential factors, including, perhaps, a desire not to inconvenience the day care staff, or even a lack of information about what the consequences might be.<sup>195</sup> When the consequences were spelled out as a monetary penalty, the study suggested, some parents changed their perspective, reconceptualizing the fine as a price that they were willing to pay for a late pickup.<sup>196</sup>

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186. *Id.*

187. *Id.* at 85.

188. *Id.* at 86.

189. *Id.* at 87.

190. *See id.* at 86-87.

191. *See id.*

192. *See* Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 *J. LEGAL STUD.* 1, 3 (2000).

193. *See* Emanuela Carbonara et al., *Legal Innovation and the Compliance Paradox*, 9 *MINN. J.L. SCI. & TECH.* 837, 838 (2008) (claiming that Gneezy and Rustichini's results were "surprisingly different" from typical cost-benefit analysis).

194. *See* Gneezy & Rustichini, *supra* note 192, at 3.

195. *See id.* at 10.

196. *See id.* at 14.

Recasting these findings through the lens of SVO, one could imagine the parents, pre-fine, in a prosocial orientation.<sup>197</sup> Although the absence of a price does not purely implicate a cooperative-prosocial SVO, it does implicitly encourage parents to weigh the costs and benefits to both parties when they pick up their children and to act in a way that considers the resources that their behavior will consume on the part of the other party when they are late.<sup>198</sup> Parents pay others to watch their children, acknowledging that time without the children provides some benefit, whether it be in order to work outside the home or engage in other pursuits.<sup>199</sup> The time that day care workers spend with the children is compensated, acknowledging that the time spent with the children in that setting is a burden offset by the payment for services.<sup>200</sup> In this situation, then, the allocation of resources to be divided might be free time without children, and prosocial parents want the time to be distributed equally, or at least so that it matches the payment given to offset the burden. If I impose my children on you during your ostensibly free time, then I am taking the lion's share of the benefit by having child-free time at your expense; if I pick up on time, I am (theoretically) dividing the benefits and burdens equally. Thus, a prosocial SVO would provide motivation to pick up one's children on time so as to produce an equivalent division. One could argue, then, that the imposition of the fine activated an individualist SVO and diminished a prosocial SVO for parents, who were induced to weigh the value of their own time against the value of their own money and to choose the option that maximized their own utility rather than placing the other party's needs in the equation.<sup>201</sup>

This growing body of empirical contract law research suggests that the framing of contracts matters—that casting contractual behavior in different legal terms can make a difference in how individuals behave under the contract. Language highlighting the nature of contract as a set of economic incentives and deterrents

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197. *See id.* at 13-14.

198. *See id.*

199. *See id.*

200. *See id.*

201. Conversely, one could also argue that the fine allowed prosocial individuals to maintain their prosocial outlook on dividing these resources, because the price imposed suggested that the benefit and burden *were* being divided equally.

encourages behavior that relies on economic self-interest—it helps to promote an individualist SVO as a general norm and as the appropriate norm for specific contract-related behavior.<sup>202</sup> Language that either does not make this conceptualization salient or that specifically substitutes a different premise, such as moral obligation discussed above, encourages behavior that includes adherence to the contract even in the face of less personal gain. Presumably, continued adherence to the contract promotes the gain of the other party, yielding more equivalent economic outcomes and more joint gain.<sup>203</sup>

Looking at contractual behavior through the lens of SVO yields several insights. First, understanding the distribution of individuals between different SVOs suggests at least one way of understanding the lack of correspondence between what law and economics scholars predict and what the doctrine actually looks like.<sup>204</sup> When individuals differ in their SVO, they will form markedly different understandings of what the appropriate outcome in a contract dispute (often a real world social dilemma) should be. When individuals who differ in SVO are distributed across the population, including among judges, lawyers, and legal scholars, it is not surprising that there is a lack of consensus as to the correct way to conceptualize these problems.<sup>205</sup>

Second, one can see that framing the language of contract—and of contract law—can change the way that individuals understand their obligations.<sup>206</sup> Looking at legal doctrine, one can see that some common law approaches expressly encourage an individualistic SVO, while others encourage a more prosocial SVO. In one particularly counterintuitive case, *Market Street Associates Ltd. Partnership v. Frey*, Judge Posner wrote an opinion that chastised one party for using a contract provision that had been overlooked by the other party in order to gain an advantage for itself.<sup>207</sup> In explaining why

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202. See *supra* notes 180-81 and accompanying text.

203. See *supra* notes 182-91 and accompanying text.

204. See Posner, *supra* note 170, at 830 (“[T]he economic approach does not explain the current system of contract law, nor does it provide a solid basis for criticizing and reforming contract law.”).

205. But see *infra* Part III.C for a discussion about whether these populations will look like the general population with respect to SVOs.

206. See *supra* notes 180-91 and accompanying text.

207. 941 F.2d 588, 594 (7th Cir. 1991) (calling the deliberate taking advantage of such

this failure to point out the oversight did not fall into the category of excusable failures to disclose, Posner wrote,

Before the contract is signed, the parties confront each other with a natural wariness. Neither expects the other to be particularly forthcoming, and therefore there is no deception when one is not. Afterwards the situation is different. The parties are now in a cooperative relationship the costs of which will be considerably reduced by a measure of trust. So each lowers his guard a bit, and now silence is more apt to be deceptive.

.... Despite its moralistic overtones [the duty of good faith] is no more the injection of moral principles into contract law than the fiduciary concept itself is.<sup>208</sup>

Posner took pains to adhere to an economic analysis, continuing,

It would be quixotic as well as presumptuous for judges to undertake through contract law to raise the ethical standards of the nation's business people. The concept of the duty of good faith like the concept of fiduciary duty is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute....

It is true that an essential function of contracts is to allocate risk, and would be defeated if courts treated the materializing of a bargained-over, allocated risk as a misfortune the burden of which is required to be shared between the parties (as it might be within a family, for example) rather than borne entirely by the party to whom the risk had been allocated by mutual agreement.<sup>209</sup>

However, Posner's ultimate conclusion spun in a different direction. After carefully constructing the contracting parties as sophisticated individual business entities, he went on to suggest that once the parties were involved in a contract, they could no longer be viewed solely as individual actors.<sup>210</sup> That is, he explained, "[C]ontracts do

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oversight "sharp dealing that ... [may] be actionable as fraud or deceit").

208. *Id.* at 594-95 (first citing *AMPAT/Midwest, Inc. v. Ill. Tool Works Inc.*, 896 F.2d 1035, 1040-41 (7th Cir. 1990); and then citing *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984)).

209. *Id.* at 595.

210. *See id.*

not just allocate risk. They also (or some of them) set in motion a cooperative enterprise, which may to some extent place one party at the other's mercy."<sup>211</sup>

This express change in a party's status from an individual to a member of a group makes all the difference, Posner thought, in terms of legal obligation: "The parties to a contract are embarked on a cooperative venture, and a minimum of cooperativeness in the event unforeseen problems arise at the performance stage is required even if not an explicit duty of the contract."<sup>212</sup> Interestingly, but unsurprisingly, given the facts of the case, Posner did not believe that a mutually dependent cooperative relationship will alone yield prosocial behavior.<sup>213</sup> Indeed, he wrote, "The office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule."<sup>214</sup>

Posner suggests that a mutually dependent cooperative relationship ought to be governed by different rules than other interactions.<sup>215</sup> While we can expect individuals to attempt to maximize their self-interest to the full extent possible, we can still mandate that they behave in a prosocial manner through legal rules.<sup>216</sup> Just as we, as a society, are a complex combination of prosocial and proself SVOs, the case reflects an odd admixture of individualist and cooperative SVOs.

### C. Family Law

Perhaps nowhere is the connection and the tension between the individual and the collective more prominent than in family law, which focuses on "the legal regulation of the family and its members."<sup>217</sup> Certain doctrines in family law expressly govern the distribution of economic resources, such as child support or alimony, but relatedly, and perhaps more interestingly, the proself/prosocial

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211. *Id.*

212. *Id.* (quoting *AMPAT/Midwest, Inc.*, 896 F.2d at 1041).

213. *See id.*

214. *Id.*

215. *See id.* at 594-95.

216. *See, e.g., id.*

217. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* xxxv (5th ed. 2013).

dichotomy is also relevant to a broader debate over the purpose and trajectory of family law at large.<sup>218</sup> I sketch out several observations regarding SVO in both contexts below.

### 1. Doctrine

Some legal scholars see no-fault divorce, especially unilateral no-fault divorce, as a classic expression of self-interest triumphing over the form of the collective.<sup>219</sup> No-fault divorce, which ascended in the 1970s in the United States, allowed a party to a marriage to sue for marital dissolution without showing, as the fault regime required, that she was “innocent and injured.”<sup>220</sup> On its face, the evolution of a legal doctrine that allowed for individual interest to dictate the end of a marriage seems largely to embrace, endorse, and foster a proself view of the family.<sup>221</sup> Without any other “reason” to end a marriage, an individual can simply decide that, from her perspective, the marriage is broken, and her own self-interest will control the outcome.<sup>222</sup> This proself outcome may explicitly have negative consequences for other parties, such as dependent children or a dependent spouse,<sup>223</sup> but the utility-maximizing rational actor, who determines that this marriage is no longer for her, can satisfy her needs under this system.<sup>224</sup>

Simultaneously with the rise of no-fault divorce, courts began to shift their views on classic resource distribution, such as child support and alimony.<sup>225</sup> Courts and legislatures questioned the

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218. See *infra* Parts II.C.2-3.

219. See, e.g., Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & Its Predecessors*, 16 STAN. L. & POL'Y REV. 135, 136 (2005).

220. See Mary Kay Kisthardt, *Re-Thinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance*, 21 J. AM. ACAD. MATRIM. LAW. 61, 67-68 (2008); see also Alvaré, *supra* note 219, at 137-38.

221. See *supra* note 22 and accompanying text.

222. See Alvaré, *supra* note 219, at 137.

223. See, e.g., Liana C. Sayer, *Economic Aspects of Divorce and Relationship Dissolution*, in HANDBOOK OF DIVORCE AND RELATIONSHIP DISSOLUTION 385, 390 (Mark A. Fine & John H. Harvey eds., 2006) (finding that women and children experience substantial declines in economic well-being after marriage dissolution).

224. The fact that family law has taken a more individualistic turn in recent years is not a new observation. See Alvaré, *supra* note 219, at 136.

225. See generally Kisthardt, *supra* note 220, at 67-70 (discussing the reforms in the 1970s and 1990s on property distribution at divorce).

assumption that a working spouse ought to continue, on into the future, to support a nonworking spouse.<sup>226</sup> In the form of a social dilemma, this turn suggested a privileging of the proself model; each individual ought to seek to maximize his or her own resources. Alimony, which could be seen as an effort to stamp divorced couples with a prosocial, quasi-egalitarian outcome, became increasingly disfavored.<sup>227</sup>

On the other hand, other doctrines in family law appear to be more prosocial. Although the legal standard of “best interests of the child”—what will maximize the utility of the child—might sound proself initially, because it focuses on the individual needs of the child, when one considers those interests within the context of the family, one can see that the effort is more prosocial than it might appear at first glance.<sup>228</sup> Rather than simply looking at what will promote utility for the individual child, the Uniform Marriage and Divorce Act, and statutes following this model, state that the best interest of the child includes a variety of factors, such as “the wishes of the child’s parent or parents,” the child’s wishes, “the interaction and interrelationship of the child [with parents, siblings, or others],” “the child’s adjustment to his home, school, and community,” and finally, “the mental and physical health of all individuals involved.”<sup>229</sup>

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226. *Id.* at 68.

227. *See, e.g.*, Alimony Reform Act of 2011, ch. 124, 2011 Mass. Acts 574; *see also* CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* 5 (2014). It is hard to classify behavior or norms as purely proself or prosocial without thinking about the contours of the relevant group. As with a corporation, it depends on who you think the group is—that is, between whom you are dividing the pie. On the one hand, no-fault divorce appears proself because it allows one party to the marriage to dissolve the marriage. On the other hand, it appears prosocial because it allows parties to maximize their collective interests. To some degree, these conflicting views rely on different perceptions of empirical facts. For example, are parties collectively better when an unhappy spouse may leave the marriage, even if it results in economic hardship? Do children grow up better with happily divorced parents or unhappily married parents? How do we measure the outcome when one party is happy and the other is unhappy to end the marriage?

228. *See* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL’Y & L. 5, 8 (2002) (“[M]any states still follow the traditional rule that a parental agreement concerning custody at divorce is not enforceable unless the court determines that it serves the child’s best interests.”).

229. UNIF. MARRIAGE & DIVORCE ACT § 402 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1970).

In fact, considering the problem of child custody from an entirely different angle, it becomes clear that the doctrine is actually quite explicitly prosocial. Imagining time spent with the child as a resource, and considering the allocation as between two parents, the law sometimes consciously acts to encourage prosocial allocations rather than proself allocations. The trend in custody laws toward “friendly parent” provisions, which promote a legislative policy to ensure contact with both parents, demonstrates this prosocial orientation.<sup>230</sup> These laws expressly discourage parents from demonstrating individualist or competitive behavior toward the allocation of time with the child, and in fact, provide a strategic advantage to parents who are inclusive of the other parent.<sup>231</sup>

Looking through the lens of SVO can also help shed light on the patchwork of legal doctrine on the subject of assisted reproduction. For example, the varied legal approaches to gestational surrogacy arrangements reveal differences in SVO perspectives.<sup>232</sup> Some states prohibit the process entirely,<sup>233</sup> but other states allow surrogacy as long as it is uncompensated,<sup>234</sup> in essence mandating that anyone who becomes a surrogate must be driven by at least prosocial, if not altruistic, motives. In a system that permits surrogacy but does not allow financial compensation, surrogacy could be understood as an effort to expand the “pie” of available resources (provide more children for a greater number of desirous parents) and share those resources equally with others (sharing fertility with those who are not able to bear children themselves). A state where financial compensation is not permitted for surrogacy sends a clear message that personal individual gain should have no place in the decision to act as a surrogate, thus disfavoring proself motives in that context. In other states, however, surrogacy may be compensated financially,<sup>235</sup> implicitly endorsing a proself perspective: under these states’ laws, an individual may receive financial benefit for the “use” of a

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230. See, e.g., MO. REV. STAT. § 452.375 (2016). The following subsections contain “friendly parent” provisions: 452.375.1(3); 452.375.2(2), (4); and 452.375.4. See also Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 288.

231. See, e.g., MO. REV. STAT. § 452.375.2(4).

232. I am grateful to Anne Dailey for suggesting this area of inquiry.

233. See, e.g., MICH. COMP. LAWS § 722.855 (2017).

234. See, e.g., FLA. STAT. ANN. § 742.15(4) (2017).

235. See, e.g., 750 ILL. COMP. STAT. 47/25(d)(3) (2005).



resource that provides the other party with a desired outcome.<sup>236</sup> And permitting financial reward for surrogacy may “crowd out” more prosocial motivations;<sup>237</sup> some critics of surrogacy fee arrangements suggest that treating surrogacy as a fee-based market service not only discourages prosocial behavior but also encourages women to “sell” their gestational services in a way that raises ethical concerns about exploitation for those with limited earning capacity.<sup>238</sup>

Similarly, the shift over time in discussions surrounding egg donors reveals a potential change in conceptualizations of SVO. Originally, medical professionals regarded egg donation as a generous act of altruism,<sup>239</sup> and that perception acted as a strong impediment to payment. But since at least 1994, the Society for Assisted Reproductive Technology and the American Society for Reproductive Medicine have recognized that egg donors could ethically be reasonably compensated for the process.<sup>240</sup> However, in 2000, the groups instituted price recommendations and a price cap on donation.<sup>241</sup> A class of egg donors challenged this price cap in a class action antitrust lawsuit, and the resulting settlement eliminated restrictions on price and the mention of a suggested appropriate price.<sup>242</sup> Expressly allowing donors to benefit financially for the harm they suffer in the form of a complex and potentially dangerous medical procedure rewards donors with a proself motive. Yet the

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236. *See id.*

237. *See infra* Part IV.C.

238. *See, e.g.*, Arthur Caplan, *Paid Surrogacy Is Exploitative*, N.Y. TIMES (Sept. 23, 2014, 10:59 AM), <http://www.nytimes.com/roomfordebate/2014/09/22/hiring-a-woman-for-her-womb/paid-surrogacy-is-exploitative> [<https://perma.cc/HU2N-TLTZ>] (“I have no issue with altruistic surrogacy. It is paid surrogacy that gives me ethical heartburn .... The problem is exploitation.... The problem is that the only motive for being a paid surrogate is poverty.”).

239. *See, e.g.*, Rene Almeling, *Gender and the Value of Bodily Goods: Commodification in Egg and Sperm Donation*, 72 LAW & CONTEMP. PROBS., Summer 2009, at 37, 44 (“[I]n many of the first egg-donation programs, physicians sought altruistic women from the surrounding community.”); Kimberly D. Krawiec, *Sunny Samaritans and Egomaniacs: Price-Fixing in the Gamete Market*, 72 LAW & CONTEMP. PROBS., Summer 2009, at 59, 61 (“[D]espite the overwhelming evidence to the contrary, there is a clear societal and industry consensus that egg donors are—and should be—motivated primarily by altruism and the desire to help the infertile, rather than by the desire for monetary compensation.”).

240. Kelly Knaub, *Egg Donors Get Pay Limits Axed with Antitrust Settlement*, LAW360 (Feb. 1, 2016, 7:01 PM), <https://www.law360.com/articles/753389/egg-donors-get-pay-limits-axed-with-antitrust-settlement> [<https://perma.cc/5MC9-ZF6B>].

241. Robert L. Klitzman & Mark V. Sauer, *Kamakahi vs ASRM and the Future of Compensation for Human Eggs*, 213 AM. J. OBSTETRICS & GYNECOLOGY 186, 186 (2015).

242. *See* Knaub, *supra* note 240.

now-defunct price caps reflected a tenuous balance between prosocial and proself SVOs, allowing payment—but not *too much* payment.<sup>243</sup>

Comparing egg and sperm donation, as has been remarked elsewhere,<sup>244</sup> reveals an interesting distinction: men have long been paid for sperm donation, a relatively easy and very safe process, whereas compensating women for egg donation, a much more invasive and potentially hazardous procedure, has faced much more scrutiny and criticism.<sup>245</sup> Considering this distinction in the face of SVO reveals an alignment of SVO stereotype to practice: women, in stereotype more selfless and oriented toward others (prosocial), versus men, in stereotype more agentic and self-interested (proself).<sup>246</sup> Notably, despite the stereotypical congruence in the previous rules adopted by the medical organizations,<sup>247</sup> there is no evidence that SVO consistently or significantly correlates with gender.<sup>248</sup>

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243. As Kimberly Krawiec explains, “[T]he United States exhibits a distinct unease with a complete commodification of egg donation, embracing instead an apparent middle ground possessing elements of both gift and market exchange.” Kimberly D. Krawiec, *Markets, Morals, and Limits in the Exchange of Human Eggs*, 13 *Geo. J.L. & Pub. Pol’y* 349, 354 (2015). Of course, I do not mean to suggest the entire surrogacy and egg donor doctrine can be boiled down to a simple analysis of SVO. There are many other important facets to the debate, including, but in no way limited to, the idea of taboo markets and parental rights perspectives.

244. Krawiec, *supra* note 239, at 62 (“[I]nsistence that sperm donors are motivated primarily by a desire for monetary compensation is so strong that potential donors expressing altruistic motivations are viewed with suspicion.”).

245. *See id.* at 61.

246. *See* Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes Stem from the Distribution of Women and Men into Social Roles*, 46 *J. Personality & Soc. Psychol.* 735, 736 (1984) (“Perceivers generally assume that men are oriented toward agentic goals and women toward communal goals.”).

247. *See* Krawiec, *supra* note 239, at 62.

248. *See* Aukje Nauta et al., *Social Value Orientation, Organizational Goal Concerns and Interdepartmental Problem-Solving Behavior*, 23 *J. Organizational Behav.* 199, 211 (2002) (finding no correlation between SVO and gender). *But see* Kerstin Grosch & Holger A. Rau, *Gender Differences in Compliance: The Role of Social Value Orientation 1* (Research Training Grp. 1666: “GlobalFood”—Transformation of Glob. Agri-Food Sys., Univ. Göttingen, GlobalFood Discussion Papers, No. 88, 2016) (finding that gender differences in cheating in a simple laboratory game could be traced to SVO, specifically to individualist men).

## 2. *Rights and Theory*

Some scholars and jurists suggest that over time, doctrines in family law have become more individual-based and less cooperatively oriented, even beyond the division of purely economic resources.<sup>249</sup> Disputes regarding resources such as legal entitlements, including the right to marry, to be a parent, or to not be a parent, increasingly revolve around divisions between prosocial and proself orientations.

What is especially interesting about this shift in orientation is that both conservative and liberal family law scholars alike note the shift, but these scholars deploy prosocial and proself orientations for different aims in different contexts. So, for example, one conservative scholar noted that “alterations to family law include an expansion of the concept of increasing individuality and a contracting sense of community,” and explicitly tied this development to legal doctrine around abortion rights.<sup>250</sup> Yet more liberal scholars can equally decry the proself orientation toward the primacy of the individual, albeit in other areas of family law. Martha Fineman, for instance, argues vehemently against what she calls “the myth of autonomy,” claiming that legal systems should not ignore connected dependencies between people, as well as the costs of meeting the needs of dependents.<sup>251</sup> Scholars focused on a critique of “the privatization of dependency”<sup>252</sup> argue that the costs of child care and

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249. See Lynne Marie Kohm, *Roe’s Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1341 (2014).

250. *Id.*

251. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 271 (2004).

252. Explaining the idea of the privatization of dependency, Brenda Cossman writes:

Family law has always involved the public enforcement of private responsibilities of individual family members. But, in an era of privatization and the emergence of a neo-liberal state, characterized by a reduction in government social spending and a transfer of these responsibilities to the private sphere, it might be expected to have a newfound importance. Indeed, in many western nations, family law has become a more important regulatory instrument for the enforcement of private support obligations for economically dependent family members. More specifically, society has called upon family law to address the economic needs of women and children at precisely the moment when it is dismantling the welfare state and public financial assistance has become increasingly scarce.

Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Depen-*

other dependent care ought to be shared broadly in society through greater government support,<sup>253</sup> taking what is arguably a prosocial stance regarding the division of resources and responsibilities.<sup>254</sup> Conversely, typically more conservative voices argue for individual responsibility in the allocation of resources toward dependent care, taking a more proself position.<sup>255</sup>

In another example, Justice Samuel Alito recently described the evolution of family in terms that invoke the prosocial/proself divide in his dissent in *United States v. Windsor*,<sup>256</sup> which struck down the portion of the federal Defense of Marriage Act that restricted marriage to heterosexual couples.<sup>257</sup> Rather than dynastic, interfamilial, economic, or procreative arrangements involving the family, “an ancient and universal human institution,” current marriage focuses on a romantic love ideal that has at its core two individuals reaching out to one another.<sup>258</sup> Justice Alito contrasted these two competing ideas of marriage—one, prosocial, with the pedigree of “human history and ... many cultures,” is “inextricably linked to procreation and biological kinship,” while the other, proself, is “consent-based” and characterized “by strong emotional attachment and sexual attraction ... between two persons.”<sup>259</sup> Although there are two people involved in the more recent view of marriage, Justice Alito cast this as, at heart, a fundamentally individualistic perspective: every

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gency, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 416-17 (2005) (footnotes omitted).

253. See, e.g., Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 25, 38 [hereinafter Alstott, *Neoliberalism*]; Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL'Y REV. 3, 28 (2010).

254. The Family and Medical Leave Act, for instance, could be imagined as a prosocial effort to divide resources and responsibilities more equally between individuals and employers with regard to family obligations. See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601-2654 (2012)). Thanks to Susan Appleton for this useful insight.

255. See Cossman, *supra* note 252, at 505-06. One might consider this last position individualistic, as the goal is merely to make sure that individuals do not suffer a loss through the actions of others. But some arguments against using shared resources for dependent care draw on a more competitive strand, suggesting a focus on relative advantage over another person or group.

256. 133 S. Ct. 2675, 2715 (2013) (Alito, J., dissenting).

257. *Id.* at 2695 (majority opinion).

258. *Id.* at 2715 (Alito, J., dissenting).

259. *Id.* at 2718.

person has a right to choose with whom to spend her life, as the expression of her own individual self-interest.<sup>260</sup>

This focus on the individual and the rights of the individual in *Windsor*—and the unhappiness with such a focus from dissenters—was not new, but rather part of a trend emerging over the last forty-plus years. In *Eisenstadt v. Baird*, a 1972 case, the Supreme Court invalidated a restriction on the right to distribute contraception to unmarried individuals, noting that a married couple “is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”<sup>261</sup> The Court conceptualized the *individual’s* right to privacy as critical.<sup>262</sup> Similarly, in *Lawrence v. Texas*, the Supreme Court struck down a criminal sodomy statute on the ground that the law “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”<sup>263</sup>

One interesting observation that stems from looking at SVO in family law is that SVO and political or moral ideology do not consistently match up along clear and obvious lines, despite the fact that research on SVO and political orientation has found a connection between more prosocial leanings and liberalism, and proself orientation and conservatism.<sup>264</sup> In the economic sphere, one might expect a pro-market conservative to be more proself and imagine that a liberal who supports government intervention might be more prosocial, and indeed, these findings are supported in the research.<sup>265</sup> Similarly, they track perspectives like Fineman’s, noted above, in which a left-leaning approach advocates against the

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260. *See id.*

261. 405 U.S. 438, 453 (1972).

262. *See id.*

263. 539 U.S. 558, 578 (2003); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (discussing the liberty rights of the individual).

264. *See* Kennon M. Sheldon & Charles P. Nichols, *Comparing Democrats and Republicans on Intrinsic and Extrinsic Values*, 39 J. APPLIED SOC. PSYCHOL. 589, 616 (2009) (finding connection between conservatism and proself orientation among law students in the United States); Paul A.M. Van Lange et al., *Are Conservatives Less Likely to Be Prosocial than Liberals? From Games to Ideology, Political Preferences and Voting*, 26 EUR. J. PERSONALITY 461, 469 (2012) (finding same connection among general population in Italy and the Netherlands).

265. *See* Sheldon & Nichols, *supra* note 264, at 616; Van Lange et al., *supra* note 264, at 469.

individual, market-based approach to dependent care.<sup>266</sup> Yet in the family law sphere, we see Justice Alito in *Windsor* casting a skeptical eye on gay marriage by espousing largely prosocial and anti-proself rhetoric.<sup>267</sup>

The disagreements among family law scholars on the left and the right are notable for how both sides at once can decry and praise the individual perspective, and then, simultaneously but in other contexts, do the same with the prosocial perspective. This distinction may suggest fundamental ideological distinctions in opinions about whose interest ought to be paramount in what particular sphere. So, for instance, political liberals might be prosocials in the economic sphere but proself in the individual, constitutional rights sphere,<sup>268</sup> while political conservatives might be proself in the economic arena but more prosocial with respect to individual, constitutional rights. Again, as with corporate law, these distinctions also serve to highlight the importance of the definition of whose interest is defined as part of the collective and against whom we perceive the interests of the individual to be pitched. In family law, it is especially notable that scholars on both sides of the political divide appear to find prosocial arguments particularly appealing, and to want to cast their critiques of modern doctrine in prosocial terms, perhaps in an unconscious desire to tap into the implicit idea that the “family” is a prosocial, not a proself, entity.

### 3. *Family Law Practice*

Interestingly, even as some of the prominent modern developments of family law appear to be largely driven by proself norms and to reinforce the norm of proself behavior, one of the most

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266. See FINEMAN, *supra* note 251, at 271.

267. See *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting).

268. Indeed, scholars writing about rights in family law characterize “the liberal conception of humans as able, autonomous adults”—underscoring an individualist perspective—as a “moral ideal.” See EICHNER, *supra* note 48, at 3. Here, the liberal strand of thought gives rise to a proself, not a prosocial, value orientation. See *id.* Family law scholars push back against the conception of liberal ideals of autonomy as monolithic. For example, Jennifer Nedelsky situates the self not within a tradition of individual autonomy, but rather, as the nexus of relationships in which an individual is involved—the “relational self.” JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND THE LAW* 4 (2011). She adds that “a relational self requires relational conceptions of values, which then require appropriate forms of law and rights built around those conceptions.” *Id.* at 5.

innovative new developments in the practice of family law involves “collaborative law,” which is an effort to rethink family law conflict resolution mechanisms.<sup>269</sup> In collaborative law, parties agree to use a particular set of attorneys and engage in a collaborative process with a shared team of specialists, such as financial consultants or other experts, in order to resolve their disputes.<sup>270</sup> If this process and these efforts fail, parties must find new counsel to represent them in subsequent proceedings.<sup>271</sup> One of the critical aspects is that the attorneys engaged in the collaborative alternative dispute resolution process will not be the same attorneys who will litigate the case; the theory is that this change of counsel will foster collaborative and amicable behavior during the initial process without efforts to strategically position oneself for the potential ultimate court resolution.<sup>272</sup>

The collaborative law movement, like the increasing trend toward mediation in family disputes (and beyond), represents an effort to behave cooperatively in order to benefit all of the members of the dissolving family, and originated as a movement formed directly against what was perceived as a highly proself, and indeed, proself-competitive, field of practice in which scorched earth tactics were often employed.<sup>273</sup> The collaborative law movement, along with the use of mediation in family law, represents a trend in dispute resolution that explicitly attempts to use legal process to encourage

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269. The Uniform Collaborative Law Act has been enacted in fifteen states and Washington, D.C. See *Legislative Enactment Status: Collaborative Law Act*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/LegislativeMap.aspx?title=Collaborative%20Law%20Act> [https://perma.cc/27FF-NX3K].

270. See UNIF. COLLABORATIVE LAW ACT § 2(3)-(4) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

271. See *id.* § 9(a).

272. See, e.g., *Mandell v. Mandell*, 949 N.Y.S.2d 580, 582 (Sup. Ct. 2012) (“[Collaborative law] is a form of dispute resolution in which the parties retain counsel specially trained in collaborative law and enter into a contract to negotiate a settlement without involving the Court or a third party arbitrator. As part of the process the parties may agree to engage neutral experts to assist them, such as accountants or appraisers. One of the principal features of the process is that, if the matter is not resolved, the attorneys who represented the parties in the unsuccessful effort to collaborate upon a settlement may not represent the parties in the ensuing litigation. The theory is that pre-litigation posturing is eliminated and clients have a greater degree of influence in candid negotiations in which the clients participate directly.”).

273. See PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 4 (2001).

more prosocial disputing. The next Part more specifically addresses considerations regarding SVO and dispute resolution processes.

### III. SOCIAL VALUE ORIENTATION AND DISPUTE RESOLUTION

Legal disputes often arise because of underlying social dilemmas. Individuals disagree about resource allocation and bring their disputes to the legal system for resolution. As noted in the Part above, legal doctrine weighs in on these disputes with rules and rhetoric that can both reflect and espouse SVOs. Legal disputes, in turn, are social dilemmas that invoke legal rules and legal process for resolution. The legal system's intervention in the resolution of a social dilemma suggests an important role for perceptions of justice and fairness, and psychologists have studied how individuals' SVO affects perceptions of justice. Psychologists have found that conceptions of what justice—as an abstract principle—means to people are often prosocial.<sup>274</sup> For example, notions of equality underpin many conceptions of justice, and equality is part of a prosocial orientation.<sup>275</sup> The following Part considers the relationship between justice research and SVO, and its potential implications for legal dispute resolution.

#### *A. Social Value Orientation, Procedural Justice, and Legitimacy*

A robust literature provides support for the importance of procedural justice in individuals' perceptions of the fairness, justice, and legitimacy of the law.<sup>276</sup> Enhancing procedural justice is often considered a natural, largely costless fix for increasing perceptions of legitimacy and promoting self-regulation.<sup>277</sup> Yet, despite the fact that procedural justice effects are found across populations and in a variety of settings, individual differences may alter the way that procedural justice effects occur—that is, individuals may process

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274. *Cf. supra* notes 90-92 and accompanying text.

275. *Cf. supra* notes 90-92 and accompanying text.

276. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (finding that people comply with the law if they believe the law is legitimate, more than because of fear of punishment).

277. *See id.* at 4.



fairness cues differently or use different factors to evaluate fairness. In order to attain the benefits associated with perceptions of process fairness, it is critical to know how individuals make assessments about fair treatment. SVO is one individual difference that helps shed light on how procedural justice may best be provided.

In one study, researchers found that, in making procedural justice judgments, proself individuals are largely indifferent to procedures by others, while prosocial individuals are more attuned to the procedures that the other party experiences.<sup>278</sup> In one study, researchers varied the voice opportunities for both sides in a dispute.<sup>279</sup> When individuals were either granted or denied voice in a decision-making process, only proselfs still found the process procedurally just when the other party was denied voice.<sup>280</sup> That is, both groups were influenced by their own voice process when the other party had a voice, but only proselfs continued to rate the process as fair when the other party was denied voice.<sup>281</sup> Prosocials even preferred a no voice condition in which both parties were denied voice to a condition where only one side received a voice.<sup>282</sup>

Additionally, other work suggests that procedural justice is important to both proself and prosocial individuals, and that enhancing procedural justice across the board may be a perfect response to the differences in perspective between prosocials and proselfs. A long-standing critique of procedural justice suggests that it is merely for individuals who are interested in groups and connectedness.<sup>283</sup>

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278. See van Prooijen et al., *supra* note 92, at 1254.

279. *Id.* at 1249.

280. *Id.* at 1251.

281. *Id.* at 1254.

282. *Id.*

283. Tom Tyler and E. Allan Lind's "group engagement" or "group value" model, which has become a dominant explanation in psychology for the importance of procedural justice, helps to explain this result. The Thibaut and Walker instrumental model of procedural justice posited that individuals only cared about process to the extent that it made a difference in outcome. JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 6-9 (1975). In contrast, Tyler and Lind's model suggested that people derived some important sense of self-worth and connection from their treatment by authority figures in their relevant group. See Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115, 140 (1992); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 *J. PERSONALITY & SOC. PSYCHOL.* 830, 831 (1989); see also E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 230-40 (1988) (discussing the group value model generally). The dominance of the Tyler and Lind model undermined the rational actor model, but it also made

However, research indicates that proself individuals actually experience greater (negative) procedural justice effects when they are denied voice than do prosocials.<sup>284</sup> Additionally, research demonstrates that procedural justice is a stronger predictor of certain positive behaviors among proself than among prosocial individuals.<sup>285</sup>

### *B. Negotiation Paradigms and Social Value Orientation*

SVO offers yet another lens through which to understand disparities in what economic theory predicts vis-à-vis legal settlement and actual negotiation behavior. As other work notes, scholars often treat legal negotiation as a “Wild West” of human behavior.<sup>286</sup> Individuals are perceived to care only about the bottom line,<sup>287</sup> but prior research demonstrates, in contrast to that vision, that negotiators often care deeply about fairness, both of the outcome<sup>288</sup> and of the process.<sup>289</sup> Understanding that individuals have different motivations with respect to resource allocation can help us broaden our understanding of what it means to do well in negotiation. When data suggests that more than half of the population may value maximizing joint outcomes, as well as equality of outcomes, it indicates that a one-size-fits-all approach to settlement negotiation may not be the best way to serve clients.<sup>290</sup>

The two dominant frames in negotiation theory are, on the one hand, the positional or competitive model of bargaining<sup>291</sup> and, on the other, so-called “principled,” problem-solving, or collaborative

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procedural justice more susceptible to criticism from commentators who suggested, despite robust research findings, that only some people, those who care about dignity or status within a group, would find it compelling.

284. See van Prooijen et al., *supra* note 90, at 1310.

285. See *id.* at 1311-12.

286. See Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381, 386 (2010).

287. *Id.* at 399.

288. See, e.g., Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367, 384 (1982).

289. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 494 (2008).

290. However, there may be differences between the SVOs of lawyers and clients, a point I consider in greater depth below. See *infra* Part III.C.

291. See, e.g., James J. White, *The Pros and Cons of “Getting to YES,”* 34 J. LEGAL EDUC. 115, 123 (1984) (reviewing ROGER FISHER & WILLIAM URY, *GETTING TO YES* (1981)).

negotiation.<sup>292</sup> Both models purport to provide a way for individuals to maximize their own outcome, but the former model clearly relies on assumptions of a proself SVO, suggesting small concessions, withholding information, beginning with inflated numbers, and other tactics designed to ensure the smallest outcome for one's adversary along with the highest outcome for oneself.<sup>293</sup> In contrast, principled negotiation asks negotiators to stand in the other party's shoes,<sup>294</sup> understand all parties' interests,<sup>295</sup> and brainstorm options for mutual gain.<sup>296</sup> This vision of collaborative negotiation does not expressly require a cooperative SVO; it may be that an individual uses collaborative, problem-solving tactics purely out of self-interest. But the demonstrated behavior *looks* prosocial.

SVO offers a useful way to understand the clash between these approaches to negotiation. Rather than thinking about them as competing with one another to be the "best" approach, understanding them through the lens of SVO indicates that one approach may be the manifestation of proself orientation, and one approach may be the manifestation of prosocial orientation. Slightly differently, the positional, competitive model may be the best prescriptive method for individuals with proself SVO, and the principled, collaborative model may be better for those with prosocial SVO. Thinking about the distribution of the population with respect to SVO offers a new way to examine older research, such as that of Gerald Williams and Andrea Kupfer Schneider, who found that in contrast to expectations, most lawyers reported that their negotiations were more collaborative than competitive, and collaborative, problem-solving negotiators were perceived as more effective than their positional counterparts.<sup>297</sup>

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292. See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN xviii (Bruce Patton ed., 2d ed. 1991); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758, 840-42 (1984).

293. See Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 346-48.

294. FISHER & URY, *supra* note 292, at 23.

295. *Id.* at 40-43.

296. *Id.* at 56-59.

297. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 18-19 (1983); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 196-97 (2002).

On the other hand, negotiation is an area in which competition may play an even larger role than in other arenas, because so often, real benchmarks do not exist against which to measure outcomes. Social comparison cues are particularly acute in this (often dyadic) interaction, in which it may be that the perceived disparity between the parties' outcomes is one of the only extant markers of success or failure. However, as noted above, an understanding of SVO may provide negotiators with a useful insight: even a negotiator with a proself SVO may become convinced of the strategic need to care about the other party's outcome. Indeed, this may be the most provocative idea in *Getting to Yes*: acting collaboratively can be the best tool to maximize your own interests, and convincing the other party—even if she is purely self-interested—that she needs to care about your interests in order to meet her own goals can be a tremendously effective negotiation strategy.<sup>298</sup>

Past research suggests a positive correlation between collaborative behavior in negotiation and perceptions of procedural justice.<sup>299</sup> Additionally, research suggests that a prosocial SVO also fosters more cooperative, open, and trusting behavior during negotiation,<sup>300</sup> hallmarks of a collaborative negotiation style. This suggests that perhaps prosocial individuals “create” more procedural justice during negotiations, while proself individuals “create” less. Interestingly, recent findings relating to voice and procedural justice in negotiation suggest that individuals use their own behavior and another's behavior about equally in assessing the relationship between voice and fair process,<sup>301</sup> and that they use the other person's behavior more in assessing the relationship between trust and fair process.<sup>302</sup> But with respect to the impact of courtesy and respect on assessments of fair process, parties rely more on their own behavior than on the behavior of the other party.<sup>303</sup> However, there is also a significant correlation between perceptions of one's own behavior

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298. See FISHER & URY, *supra* note 292, at 59.

299. See Hollander-Blumoff & Tyler, *supra* note 289, at 490.

300. Carsten K.W. de Dreu & Paul A.M. Van Lange, *The Impact of Social Value Orientations on Negotiator Cognition and Behavior*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1178, 1187 (1995).

301. Rebecca Hollander-Blumoff, *Formation of Procedural Justice Judgments in Legal Negotiation*, 26 GROUP DECISION & NEGOT. 19, 35 (2017).

302. *Id.* at 36.

303. *Id.*

and perceptions of the other party's behavior.<sup>304</sup> These findings may suggest that, if prosocial individuals are largely looking to their own behavior to assess procedural justice, or using their own behavior to make assessments about the other party's behavior, and simultaneously are more likely to act in collaborative ways that foster perceptions of procedural justice, then they are quite possibly more likely to experience greater procedural justice in the negotiation setting.

While this might indicate that prosocial individuals, then, can act toward others with impunity, this is not the case. That is because research also suggests that prosocials are more sensitive to equality of treatment.<sup>305</sup> A prosocial individual would only look to her own treatment,<sup>306</sup> suggesting that a prosocial individual might lack any incentive to behave in a fair manner. However, data indicate that a prosocial actor will behave fairly in a negotiation setting if she believes it is in her strategic interest to do so.<sup>307</sup> To the extent that procedural justice effects are useful for gaining adherence to negotiated agreements, and to producing impressions of system legitimacy, even prosocial individuals ought to recognize their strategic benefits.

### *C. Lawyers, Clients, and Social Value Orientation*

Although there has not been any profession-specific measurement of SVO, context suggests that lawyers might potentially be more individualistic or competitive than cooperative.<sup>308</sup> In other settings, some research suggests that lawyers adhere more closely to the rational actor model than do laypeople.<sup>309</sup> The individualistic/competitive frame is dominant in legal structures in the United States. Law students are acculturated to the practice of law in an adversarial system through the Socratic Method in law school,<sup>310</sup> and are

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304. *Id.* at 37.

305. See van Prooijen et al., *supra* note 92, at 1251.

306. *Id.* at 1249.

307. *Id.* at 1251.

308. See *supra* Part III.B.

309. See generally Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997) (finding that lawyers were less susceptible to cognitive biases in assessing settlement offers than laypeople).

310. Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in*

trained to be zealous, partisan advocates for their clients.<sup>311</sup> However, as an older *Paper Chase* law school norm gives way to changing ways of interaction in the classroom, this acculturation may have become more attenuated.

In contrast, clients may not be steeped in years of adversarial training. Although self-selection by those who bring suit may suggest that clients are more likely to be proself than prosocial, some plaintiffs may find other redress impossible, while defendants, of course, have little say in whether they are sued. Thus, there may be a clash in SVO between lawyers and clients,<sup>312</sup> similar to the potential conflict between lawyers and clients with respect to the importance of apologies<sup>313</sup> and the role of procedural justice judgments.<sup>314</sup>

Differences in perspective between lawyers and clients can be a source of tension generally.<sup>315</sup> Understanding this potential difference in SVO, and how it may affect lawyers' and clients' desired courses of action,<sup>316</sup> may prove useful and important in facilitating communication between lawyers and their clients. If lawyers are trained to understand this potential difference in perspective, they

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*a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 527 (2007).

311. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 511 (1994) (noting the professional ideology for lawyers requiring zealous advocacy).

312. *But see id.* at 510-11 (studying how cooperation and conflict among lawyers in dispute resolution detracts the lawyers' clients, for whom the lawyers are acting as agents); see also Rachel Croson & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 26 J. LEGAL STUD. 331, 332 (1997) (testing Gilson and Mnookin's idea that client principals may be able to cooperate more often by choosing agent lawyers with reputations for cooperation).

313. See generally Jennifer K. Robbenolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 396-97 (2008) (researching how and why lawyers and clients (laypeople) view the implications of apologies for their settlement-related judgments and decisions differently).

314. See Hollander-Blumoff, *supra* note 286, at 420-31 (discussing differing procedural justice considerations among lawyers and clients).

315. Robert Mnookin and his colleagues suggest that this tension between agents and principals is one of the central issues in legal negotiation, along with the tension between creating and claiming value and the tension between empathy and assertiveness. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 9-10 (2000).

316. Lawyers' perspectives influence their presentation of information to their clients. "Even where they think of themselves as merely providing information for clients to integrate into their own decisions, lawyers influence clients by myriad judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt." William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 217 (1991).

may be better able to understand their clients and be explicit about their clients' orientations as well as their own in their thinking, planning, and advising. Some have argued that one advantage of lawyers is that they are able to be more "clear-eyed" and rational than clients.<sup>317</sup> To the extent that the lawyer may believe that a proself orientation is more appropriate than a prosocial orientation in a given transaction or lawsuit, the terminology of SVO will give a lawyer a useful way to begin to discuss strategy that may be more proself in nature. Thinking about this difference as one of SVO rather than a choice between "rational" and "irrational" behavior may give lawyers a more appealing way to frame this issue with their clients. Similarly, it may provide lawyers a greater degree of comfort to think about taking client-directed actions that may differ from their own instincts, if they can reconceptualize these actions not as irrational but rather taken in the service of an SVO different than their own.

#### IV. IMPLICATIONS

The research on SVO provides a novel and robust lens through which to think about a host of issues in the law. The above Parts introduced the idea of SVO in a range of legal contexts, providing several examples of insights related to SVO in selected doctrinal and systemic areas. But SVO's implications in the legal system go well beyond these domains. Indeed, issues about our individual and collective burdens and benefits are at the core of the organization of our society under law. In a speech in Flint, Michigan, then-President Barack Obama discussed his perspective on what led to the Flint water contamination crisis,<sup>318</sup> highlighting SVO in language that could not have been more explicit unless he had used the term itself:

[The source of the contamination is] a mindset that says environmental rules designed to keep your water clean or your

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317. See Korobkin & Guthrie, *supra* note 309, at 81-82.

318. See generally Scott Atkinson et al., *Anger and Scrutiny Grow over Poisoned Water in Michigan City*, N.Y. TIMES (Jan. 15, 2016), [https://www.nytimes.com/2016/01/16/us/flint-water-michigan-attorney-general.html?\\_r=1](https://www.nytimes.com/2016/01/16/us/flint-water-michigan-attorney-general.html?_r=1) [<https://perma.cc/2BBS-NEES>] (discussing the Flint water contamination crisis).

air clean are optional or not that important or unnecessarily burden businesses or taxpayers. It's an ideology that undervalues the common good, says we're all on our own, and what's in it for me, and how do I do well, but I'm not going to invest in what we need as a community. And as a consequence, you end up seeing an underinvestment in the things that we all share that make us safe, that make us whole, that give us the ability to pursue our own individual dreams. So we underinvest in pipes underground. We underinvest in bridges that we drive on and the roads that connect us and the schools that move us forward....

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And that attitude ignores how this country was built, our entire history, which is based on the idea that we're all connected and that what happens in a community like Flint matters [to] everybody and that there are things that we can only do together, as a nation, as a people, as a State, as a city, that no man is an island.<sup>319</sup>

Choices about resource allocation govern the way that legislatures behave when they act to divide social goods directly, such as when budgets include benefits to certain groups, whether that group comprises those that drink tap water or those that take a certain bridge on their route to work. So too, tax laws allocate benefits and burdens among and between different people.

But laws distribute social goods that are beyond directly financial or even indirectly financial resources, including rights and privileges. SVO often undergirds the rhetoric that advocates and critics alike use to argue for and against political choices and allocations of rights and resources. President Donald Trump famously embraced a competitive SVO during his campaign, repeatedly stressing his plan to “have so much winning if I get elected that you may get bored with winning,” and conceptualizing both foreign and domestic policy matters in terms of winners and losers.<sup>320</sup> Similarly, Senator Mitch McConnell, the Senate Majority Leader, recently expressed

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319. Remarks in Flint, MI, 2016 DAILY COMP. PRES. DOC. 3-4 (May 4, 2016).

320. Ian Schwartz, *Trump: “We Will Have So Much Winning if I Get Elected that You May Get Bored with Winning,”* REALCLEAR POL. (Sept. 9, 2015), [http://www.realclearpolitics.com/video/2015/09/09/trump\\_we\\_will\\_have\\_so\\_much\\_winning\\_if\\_i\\_get\\_elected\\_that\\_you\\_may\\_get\\_bored\\_with\\_winning.html](http://www.realclearpolitics.com/video/2015/09/09/trump_we_will_have_so_much_winning_if_i_get_elected_that_you_may_get_bored_with_winning.html) [<https://perma.cc/U9VU-S5NB>].



his view on political activity after an election in, notably, competitive terms: “[W]inners make policy and losers go home.”<sup>321</sup>

Contemplating SVO in the political landscape suggests a potential role for SVO in better understanding the rise of neoliberalism. In the last decade, legal scholars have begun to explore the intersection of legal doctrine with neoliberalism—the notion that “the measures and values of the market are used to index the success of the state and its citizens,”<sup>322</sup> and that “[t]he market-model of choice and efficiency is extended to the level of the individual.”<sup>323</sup> Neoliberalism is built on an individualist SVO—it focuses on the aggregate behavior of individuals acting in their own self-interest.<sup>324</sup> Backlash against neoliberal legal and political choices has come, in recent years, from both prosocial and proself-competitive angles. For example, opposition to free trade treaties and lower tariffs helped propel President Trump’s protectionist, proself-competitive policies to victory;<sup>325</sup> in contrast, the debate over the Affordable Care Act was largely between individualists embracing a market approach and prosocials advocating an equal split of health care resources.<sup>326</sup>

SVO helps understand the role of neoliberalism in other areas of the law, as well. For instance, Deborah Dinner recently considered the potentially symbiotic, rather than oppositional, relationship between neoliberalism and Title VII.<sup>327</sup> While a traditional perspective might see antidiscrimination law and free market ideals as fundamentally at odds, Dinner draws out the connection between them by noting how antistereotyping and efficiency are core underpinnings of support for Title VII.<sup>328</sup> Both of these values can be

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321. Rebecca Savransky, *McConnell: ‘Winners Make Policy, Losers Go Home,’* HILL (Feb. 21, 2017, 3:18 PM), <http://thehill.com/homenews/senate/320506-mcconnell-winners-make-policy-and-losers-go-home> [https://perma.cc/SD45-FN22].

322. Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 71, 72.

323. *Id.* at 73.

324. *Id.* at 87.

325. See Alexia Fernández Campbell, *Trump’s Protectionist Economic Plan Is Nothing New*, ATLANTIC (Jan. 9, 2017), <https://www.theatlantic.com/business/archive/2017/01/trumps-protectionist-economic-plan-is-nothing-new/512585/> [https://perma.cc/2HFN-FKLK].

326. See *Repeal Obamacare*, INTELLIGENCE SQUARED U.S. (Jan. 11, 2011), <http://www.intelligencesquaredus.org/debates/repeal-obamacare> [https://perma.cc/9PAS-JA5R].

327. See Deborah Dinner, *Beyond “Best Practices”: Employment Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1064 (2017).

328. See *id.* at 1064-65.

traced back to, in some large part, concerns over the rights of individuals, rather than the needs of a collective. As Dinner explains, neoliberalism and Title VII share a view “that the fundamental subject of law is the individual rather than the collective.”<sup>329</sup> Thinking about Title VII, or other legal doctrine, from a SVO perspective could prove fruitful in better understanding the connection between free market perspectives and doctrinal individualism.<sup>330</sup>

#### *A. Social Value Orientation as a Lens to Understand Doctrine*

Thinking about the multifaceted ways in which laws are tools of resource allocation—both narrowly and broadly defined—helps demonstrate the broad power of the SVO paradigm. One key takeaway from my analysis here is simply that SVO provides an important lens through which to view our legal system—one with the potential to provide insights that are just as significant as the central idea from law and economics that laws are crafted to optimize a cost-benefit analysis.<sup>331</sup> While law and economics has been a transformational lens through which to look at legal doctrine, process, and theory over the last several decades, SVO is also a transformational lens that provides more depth and nuance with respect to the realities of human behavior.

A related conclusion is that using the SVO lens reveals more readily the considerations that play into some doctrinal decisions. In particular, once one taps into the SVO framework, it becomes easy to see how judges and scholars may be grappling with an effort to balance and appropriately weigh different orientations. In some circumstances, existing legal frameworks may privilege one orientation over another, but often, these frameworks seem to try to balance between them, struggling, for example, to protect prosocial interests in a more stereotypically proself-seeming setting like contract or business law,<sup>332</sup> but protecting proself interests in a more

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329. *Id.* at 1062.

330. For other works that consider the connection between neoliberalism and legal doctrine, see, for example, Alstott, *Neoliberalism*, *supra* note 253 (examining the connections between neoliberalism and family law); and Amy Kapczynski, *Intellectual Property's Leviathan*, 77 *LAW & CONTEMP. PROBS.*, no. 4, 2014, at 131 (exploring the connection between intellectual property law and neoliberalism).

331. See POSNER, *supra* note 24, at 30.

332. See *supra* Parts I.A-B.

obviously communal setting like family law.<sup>333</sup> This constant balancing approach reflects, most likely, our inherent discomfort with completely proself or completely prosocial orientations. SVO is not a one-size-fits-all paradigm, and the mixed nature of prosocial and proself strands in the law illustrates that tension.

*B. Social Value Orientation as a Challenge to the Utility Assumptions of Law and Economics*

Another important insight is that SVO research poses a threat to the descriptive, predictive claims of the rational actor model. Simply put, we are not all—or even mostly—rational actors in the sense of wishing our economic utility to be maximized across all settings.<sup>334</sup> In yet another way, this strand of research provides further evidence that real human psychology does not match the rational actor, and offers additional support for the idea that economics must take into account actual human behavior in considering implications in the legal context.<sup>335</sup>

This is a more important point than may initially be apparent. It is not just that law and economics' rational actor model is not a good positive descriptor. From Adam Smith's "invisible hand"<sup>336</sup> onwards, the basic economics framework to maximize collective utility has been understood to be to maximize individual utility and then aggregate.<sup>337</sup> Each individual, acting in the service of his or her own individual utility, should collectively maximize societal utility.<sup>338</sup> Indeed, one might imagine that the prosocials in the simple allocation games are making, to be blunt, the wrong choice.<sup>339</sup> Indeed, the question might then be: How can we get these misguided souls to change their minds and act rationally? But that question assumes the rightness of its own framework built around the importance of

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333. See *supra* Part II.C.

334. See *supra* Part I.C.

335. See Thaler, *supra* note 94, at 1577-79.

336. 2 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 242 (J. Maynard 1811) (1776) ("[B]y directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain; and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.").

337. See Kaplow & Shavell, *supra* note 15, at 977.

338. See *id.*

339. My thanks to Kathryn Spier for this insight.

individual utility. When utility is deeply bound up with relational concerns, the notion of individual maximization loses some conceptual force and appeal.

For example, if an individual's utility is greater in a 480 points for self–480 points for other split than in a 540 points for self–280 points for other split,<sup>340</sup> then the utility of the 480 points is greater than the utility of the 540 points, a nonintuitive outcome. The economist might insist that even though they are cast in the research as “points,” these numbers must represent dollars or another incomplete utility measurement, rather than “utils,”<sup>341</sup> because choosing the lower number clearly indicates that there is hidden utility in the choice of fewer points. But if roughly half the population regularly derives meaningful utility from the even split of resources, even at a loss to self, and *potentially* even when the total pie is smaller,<sup>342</sup> this suggests that our understanding of utility ought consistently to be more capacious. In addition, another significant portion of the population, competitors, receive utility from besting others, even when their own economic results may suffer.<sup>343</sup> On both sides, then, a focus on aggregation of individual utility blinds us to the importance of relational conceptions of utility.

If only roughly one-quarter of all individuals naturally consider utility as a purely individual matter,<sup>344</sup> ignoring the relational effects of utility misses out on the implications of a vast majority of human behavior. Although more legal scholars are increasingly turning to an examination of the explicit importance and role of relationships in the law,<sup>345</sup> a more robust focus on interconnection and its implications for the law, especially from the law and economics community, would only amplify our understanding of the way the law does, and should, work. Highlighting the importance

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340. See *supra* notes 61–62 and accompanying text.

341. Utils are a nonmonetary measurement unit that economists use to capture or represent utility. See Marc Davis, *Microeconomics: Assumptions and Utility*, INVESTOPEdia, <http://www.investopedia.com/university/microeconomics/microeconomics2.asp?lgl=v-table> [<https://perma.cc/V2FQ-R9GK>].

342. See De Cremer & Van Lange, *supra* note 39, at S14.

343. See Eek & Gärling, *supra* note 66.

344. See Au & Kwong, *supra* note 21, at 74.

345. See, e.g., ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT (2011); NEDELSKY, *supra* note 268; Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

of SVO in fundamental perceptions about how resources should be allocated suggests the need for a radical realignment of our current approach, in which the primacy of the individual and of individual utility is largely unchallenged. Thinking about *individual* decision-making from the perspective of individuals who are focused on *relational* outcomes offers a radically different angle from which to view legal doctrine.

### *C. Social Value Orientation and the Function of the Law*

A third conclusion here stems from the fact that the law both expresses our ideal of optimal behavior and sends us cues about the behavior we ought to exhibit.<sup>346</sup> That is, law captures our intuition about what the law ought to be *and*, at the same time, molds how we act.<sup>347</sup> Because research shows that populations are divided between prosocial and proself orientation,<sup>348</sup> the classic law and economics paradigm does not provide a positive account of how all or even most people think about resource allocation questions that affect what the law should be. Thus, SVO provides a way of conceptualizing many of the choices made by the law—whether they enshrine a prosocial or a proself vision of ideal behavior. The fact that individuals are divided in this way helps to surface and crystallize the insight that the law is encapsulating choices—and not inevitable ones—about these allocations.

The mix of prosocial and proself strands in the law also points to the complex interplay between the expressive function of the law and the normative function of the law.<sup>349</sup> On the one hand, we may expect that the law represents a manifestation of the will of the people, so that it merely reflects what we believe ought to happen generally speaking, or what most people would believe they should do, and perhaps only reins in the behavior of a few bad apples at the

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346. See Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 5-6 (2000).

347. *Id.*

348. See Au & Kwong, *supra* note 21, at 74.

349. The expressive function of the law is to share some norm in a meaningful way as it is expressed; thus, it too has a normative component in that it intends to both express the norm and to shape individuals toward adopting that norm. See, e.g., Sunstein, *supra* note 166, at 2024-25.

margins.<sup>350</sup> For example, a law forbidding murder represents the collective view of society; most people, we might imagine, would not kill others even without an express penalty for doing so, but some people would, and so the law expresses the general sentiment while acting as a potential deterrent to some minority. On the other hand, we might imagine that the law represents a normative vision of how human passions and desires ought to be channeled, *against* their natural inclinations. For instance, if we imagine that most people would, left to their own choice, steal from others, then a law that outlaws theft runs counter to their nature but attempts to shape and encourage different behavior.<sup>351</sup>

Translating this difference to the SVO context, there may be places where the expression of a particular SVO through law is a reflection of our perceptions that most individuals share that orientation, but in other places, the expression of an SVO through statute or doctrine may indicate a desire to change perceived “natural” inclinations—to tell individuals to act against their baseline desires. The difficulty of untangling which situation falls in which camp is further complicated by the fact that, as we know from SVO research, individuals are divided into prosocial and proself camps.<sup>352</sup> Thus, the same law may express the inclinations of some while attempting to shape the inclinations of others.

Although it is intuitively appealing that the law might encapsulate our previously held perspective on the allocation of resources, such congruence is not without its own potential costs. In particular, a law that attempts to mandate or encourage prosocial behavior

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350. Oliver Wendell Holmes famously expounded the idea of the law as essentially a set of predictions about what courts will do—a set of predictions most important from the perspective of “the bad man.” O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897). Interestingly, Holmes’s “bad man” was motivated by a proself individualist SVO: he was conceptualized as one who would not otherwise comply with a moral mandate, caring only for the material consequences to himself. *Id.* at 459. The bad man thus follows the law only in order to avoid material deprivation; Holmes suggested that the law is primarily designed to rein in the vices of the malfeasant through a change in costs versus benefits, casting the “bad man” as a rational actor unbound, seeking to maximize his utility without a sense of morals or other values to constrain his behavior. *See id.*

351. While invoking or activating a SVO can be very powerful, it is not the only driver of compliance with a law. Other factors and motivations, including deterrence and perceptions of procedural justice and legitimacy of the legal system, play an important role. *See TYLER, supra* note 276, at 91-93.

352. *See Au & Kwong, supra* note 21, at 74.

through a set of controls, such as costs and benefits, may, in fact, end by perversely discouraging a prosocial SVO.<sup>353</sup> This might happen due to “crowding out,” a phenomenon whereby the external incentives and burdens of law provide extrinsic motivation for behavior that can supplant more values-based choices based on intrinsic motivation.<sup>354</sup> Scholars have critiqued legal rules on the ground that when we provide incentives or burdens in a specific context, those incentives and burdens may provide extrinsic motivation for behavior that “crowds out” intrinsic motivation for that same behavior.<sup>355</sup> When individuals would not otherwise obey a law, extrinsic motivation can provide them with a reason to do so, but when individuals would typically engage in the desired behavior, or refrain from the undesired behavior, research suggests that the extrinsic motivation can negatively affect intrinsic motivation.<sup>356</sup>

For example, in the study involving day care discussed above, substituting a simple fine for intrinsic concerns about inconveniencing day care providers and appearing to be a bad person who takes advantage of others apparently encouraged parents to delay in picking their children up.<sup>357</sup> The fine (an extrinsic motivation) was not as powerful as the moral or social motivation (intrinsic motivation) in securing compliance with pickup times.<sup>358</sup> Thus a “law” that imposes costs, even if it has a prosocial motivation (say, picking up children on time from daycare, or recycling, or paying taxes), may induce people to perceive even a prosocially motivated law through proself eyes.<sup>359</sup> On the other hand, a law that is largely prosocial in nature may, instead, activate intrinsic motivations.<sup>360</sup>

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353. See Gneezy & Rustichini, *supra* note 192, at 3.

354. For a longer discussion of the complex interplay between intrinsic and extrinsic motivation, see Hollander-Blumoff, *supra* note 11; see also Edward L. Deci & Richard M. Ryan, *The Empirical Exploration of Intrinsic Motivational Processes*, 13 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 39 (1980); 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); Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 *TEX. L. REV.* 1151 (2010).

355. See Deci & Ryan, *supra* note 354, at 58.

356. See *id.*

357. See Gneezy & Rustichini, *supra* note 192, at 3.

358. See *id.* at 10.

359. See *id.*

360. See Eigen, *supra* note 179, at 70.

Intrinsic motivations can provide a powerful basis for self-regulation in accordance with the law, whereas extrinsic motivations rely on legal enforcement—a command and control system that can be costly in its monitoring and enforcement.<sup>361</sup>

In contrast, in other situations, in which individuals may be inclined to approach a problem with an underlying prosocial SVO, but the law mandates or suggests a proself SVO, such law may provide extrinsic motivation that could “crowd out” prosocial orientations. For example, in the famous case of Ford Motor Company’s poorly designed Pinto, which exploded when hit from behind because of the location of the car’s gas tank,<sup>362</sup> tort law served to undermine intrinsic motivation.<sup>363</sup> Ford conducted a cost-benefit analysis and determined that it was cheaper to pay for the future harm caused (including death) than to move the location of that tank.<sup>364</sup> Ford did not seriously consider the noncompensable harm to those injured or killed in future accidents in order to weigh the results for each side in this “allocation of resources” problem.<sup>365</sup> Another way to consider this decision, from the SVO perspective, is that tort law invoked a proself-individualist perspective, activating for Ford a focus on its own individual outcome. If legal doctrine did not explicitly suggest a cost-benefit analysis, perhaps managers at Ford might have been inclined to take a prosocial perspective and to choose a course of action driven by corporate social responsibility for the shared welfare of both customers and company.

The diversity of the population itself on SVO grounds means, ultimately, that congruence and incongruence between SVOs enshrined in legal doctrine and the natural SVOs of the people subject to the doctrine are *both* inevitable. And congruence and incongruence alike may produce both reinforcing and undermining effects, as demonstrated above. The multiple permutations of possible

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361. See TYLER, *supra* note 276, at 4.

362. See Hollander-Blumoff, *supra* note 11, at 53.

363. *Id.* at 61-62.

364. Ford employees wrote an internal memo noting that the eleven dollar gas cap filter they could install on the Pinto model cars would cost more than damages Ford would expect to pay for potential human injury and loss of life stemming from the lack of the filter. Memorandum from E.S. Grush & C.S. Saunby, Fatalities Associated with Crash Induced Fuel Leakage and Fires, <http://lawprofessors.typepad.com/tortsprof/files/FordMemo.pdf> [<https://perma.cc/4X7M-D3BR>].

365. See *id.*



effects discussed above make clear that there is no simple, one-size-fits-all takeaway for how SVO in the law can both express and shape SVO among individuals. But a closer analysis of SVO congruence and incongruence, and of the likely interaction between effects of a particular law's SVO underpinnings and human behavior, can only add to the broader debate about the role and meaning of law,<sup>366</sup> and benefit the ultimate effectiveness of legal regulation.

#### *D. Social Value Orientation Unmasks Choices*

Finally, the fact that SVO is so clearly influenced by cues demonstrates how important it is to send signals deliberately, and not accidentally, regarding the behavior that we want to encourage. Changing individuals' perspectives about the right choice to make in a given situation is a powerful way to encourage compliance with the law, and understanding the role that SVO plays in signaling appropriate behavior is an important potential tool to do so. When we want to stimulate prosocial or proself behavior, we are probably likely to be able to do so in no small number of cases, putting the prosocial or proself behavior choice squarely in the sights of the "nudge" movement, which seeks to use small interventions to change individual behavior.<sup>367</sup> Most "nudges" seek to change individual behavior in order to overcome cognitive biases; for example, the status quo bias leads individuals to choose default options in their retirement savings plans, suggesting that default options should be carefully crafted to ensure optimal savings.<sup>368</sup>

While the "nudge" literature explores the idea that law can mitigate the effects of cognitive biases, casting a broader "nudge" net that encompasses SVO suggests another area of potential intervention for legal and social nudges—to invoke proself or prosocial behavior. However, with a population split between natural inclination toward prosocial and proself tendencies, the decisions regarding what normative direction in which to "nudge" those who might change their behavior based on the intervention may be hotly

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366. See Cooter, *supra* note 346, at 5-6.

367. See THALER & SUNSTEIN, *supra* note 95, at 4.

368. *Id.* at 9-11.

contested. Given our highly polarized national political conversation, disputes over the direction of SVO nudges are quite likely.

In contrast to the interventions that make an effort to overcome cognitive biases, like a change in the default term in a retirement plan, the interventions on an SVO dimension are more likely to be controversial.<sup>369</sup> But the divide in the population between prosocial and proself individuals helps to unmask the fact that a proself legal doctrine (a “rational actor” based doctrine) is not an inevitable representation of how people do and should act.<sup>370</sup> Instead, because a proself legal rule may potentially shape and change the behavior of approximately half of the population, understanding SVO helps to demonstrate that such doctrine represents a normative decision by courts or other legal actors.

#### CONCLUSION

Taken together, the research on individuals’ measured SVO preferences, and those preferences’ susceptibility and malleability in the face of social cues, suggests that the law has options when it comes to what behavior we seek to invoke and that SVO may fluctuate in a dynamic, multifaceted environment. More than anything else, SVO research challenges the inevitability of doctrine and commentary that treat efficiency as a shared, obvious, and inexorable goal. Indeed, SVO research reveals, in part, that our insistent drumbeat of individual utility—in scholarship, legal doctrine, and even in law teaching—may provide cues that invoke that very notion, encouraging a proself orientation, especially among lawyers and litigants, which may undermine some people’s natural orientation toward prosocial resource allocation. SVO research suggests that frameworks for resource allocation can differ, and that there is no reason to assume that a proself, individualist approach is positively accurate or normatively desirable. SVO helps to more clearly surface the idea that efficiency and individual utility are choices—choices that not everyone is naturally inclined to make.

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369. Even these relatively straightforward interventions have come under some criticism as potentially unethical “libertarian paternalism.” See, e.g., MARK D. WHITE, *THE MANIPULATION OF CHOICE: ETHICS AND LIBERTARIAN PATERNALISM* 81-82 (2013).

370. See Au & Kwong, *supra* note 21, at 74.