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Not from Guile but from Entitlement: Lawful Opportunism Capitalizes on the Cracks in Contracts

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ABSTRACT

Few concepts have been more pivotal to contract law scholarship over the last forty years than the opportunism attributed ex ante and ex post to contracting parties, yet the lawful form of opportunism identified by Nobel Laureate Oliver Williamson in 1991 remains surprisingly overlooked in favor of the blatant forms of opportunism that result from "self-interest seeking with guile." This Article extends Williamson's inchoate account of lawful opportunism and reports the first empirical study of the phenomenon.

The conceptual analysis of lawful opportunism is developed with reference to the bargaining underlying the classic impossibility decision, *Taylor v. Caldwell*. Three component elements are shown when combined to open "cracks" in contracts that tempt lawful opportunism: (1) the background doctrine of literal enforcement plus (2) a highly consequential disturbance that (3) strikes at the naïveté of the bargain. Because lawful opportunism leverages the legal entitlement to sue for breach of contract, its efficacy presupposes the counterparty's express awareness, which makes the concept categorically different from the blatant forms of

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opportunism prevalent in the scholarship. This premise grounds the Article's conclusion that the defining character of lawful opportunism is a strong enough sense of entitlement to choose to openly press for damages based on the letter of contract, notwithstanding the potentially punishing consequences to the counterparty of doing so under the circumstances.

The empirical study reported in this Article was designed to explore the individual-level factors that motivate participants to resort to lawful opportunism rather than cooperative—or blatantly opportunistic—alternatives. Our findings show, *inter alia*, that participants who viewed themselves as more entitled (the top 25% of all participants) were three times more likely to choose a lawfully opportunistic behavior in the crack of the contract. Lawful opportunism springs from a sense of entitlement, the way guile fuels blatant opportunism.

INTRODUCTION

Today's leading theories of economic governance converge on the premise that humans frequently interact with each other strategically,[1] as game theory would suggest, and also opportunistically, bending or breaking rules to their advantage.[2] The seminal rendering of the concept is given by Nobel Laureate[3] Oliver Williamson. The opportunism that grounds his theory of transaction cost economics is defined as "self-interest seeking with guile," where guile refers to "incomplete or distorted disclosure of information, [and] especially to calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse."[4]

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1. *See* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 25–26 (1975) (describing the various branches of the "decision-tree" that can be considered before contracting) (citing THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1960), and ERVING GOFFMAN, STRATEGIC INTERACTION (1969)).

2. Williamson clarifies that in his model humans need not always act opportunistically, just often enough to impact the governance forms that are selected and succeed (or fail). *Id*. at 27; *see also* Barak D. Richman & Jeffrey T. Macher, *Transaction Cost Economics: An Assessment of Empirical Research in the Social Sciences*, 10 BUS. & POL. 1, 4 (2008).

3. *See generally* Peter E. Earl & Jason Potts, *A Nobel Prize for Governance and Institutions: Oliver Williamson and Elinor Ostrom*, 23 REV. POL. ECON. 1 (2011).

4. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM:

Few concepts have been more pivotal to contract law scholarship over the last forty years than the opportunism attributed ex ante and ex post to contracting parties.[5] The observed and presumed tendency to act opportunistically through "calculated efforts . . . to mislead, renege, cheat or otherwise take advantage of the vulnerabilities of . . . trading partners,"[6] has been invoked to make sense of the entire warp and woof of the subject. Parties are said to make contracts to forestall opportunism,[7] and contracts are said to break down for failing to do so.[8] Courts of law and, especially, equity are seen to have evolved the doctrines they did to counteract opportunism,[9] and decade after decade scholars have called on courts to mitigate opportunism in contracting.[10]

FIRMS, MARKETS, RELATIONAL CONTRACTING 47 (1985).

5. *See id*.; *see also* Jeffrey M. Lipshaw, *Lexical Opportunism and the Limits of Contract Theory*, 84 U. CIN. L. REV. 217, 230 (2016) (attributing to Williamson "the importation of opportunism into law professors' theoretical discussions").

6. Richman & Macher, *supra* note 2, at 4.

7. *See* Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 ADMIN. SCI. Q. 269, 271–76 (1991); *see also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 90 (1989); D. Gordon Smith & Brayden G. King, *Contracts As Organizations*, 51 ARIZ. L. REV. 1, 16 (2009). *But see* Lipshaw, *supra* note 5, at 227 (doubting the extent to which contract actually limits opportunism).

8. *See* Ian Macneil, *Company Law Rules: An Assessment from the Perspective of Incomplete Contract Theory*, 1 J. CORP. L. STUD. 107, 116 (2001); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 545–46 (2003); Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISC. L.J. 389, 390 (1993); *see also* Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 523–25 (1981).

9. *See* Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* 3–7 (Harv. Pub. L., Working Paper No. 15-13, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617413 (discussing the development of the "equitable safety valve" as a protection against opportunism).

10. *See, e.g.,* Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233 (1979) (assessing the extent to which basic governance structures produce or address problems arising from transaction costs and opportunism); *see also* George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 1016

Self-interest seeking with guile comes in many flavors; every one presupposes a covertness without which the opportunistic gambit would go nowhere. Consider the following anecdotes:

> *Anecdote 1*. A bank has an agreement with a client to provide checking account services in exchange for a fee and/or minimum deposits. The bank adds additional services to the client account without notice or permission, and deducts the corresponding fees from the client's checking account.[11]

> *Anecdote 2*. A customer pays a down payment to a builder. The builder skips town with the down payment.[12]

Anecdote 1 is modeled on the recent Wells Fargo scandal. This "too big to fail" bank,[13] between 2009 and 2016, drew funds from the millions of fake accounts its agents opened, without the request of its unsuspecting customers, *because* the customers were unsuspecting.[14] By the same token, the builder in Anecdote 2 who converts the down payment gets to take the cash *because* the client did not suspect the scheme afoot.[15] These two examples epitomize the forward-looking

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(1992); Muris, *supra* note 8; Smith, *supra* note 9.

11. This example is based on the recent Wells Fargo scandal. *See generally* Merric Kaufman, *"Lions Hunting Zebras": The Wells Fargo Fake Accounts Scandal and its Aftermath*, 36 REV. BANKING & FIN. L. 434 (2017).

12. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 93 (6th ed. 2003). The opportunistic acts in these examples are morally objectionable in a blatant and uncontroversial way. Moreover, detection of the opportunism is unmistakable once the damages (viz., bogus fees/lost deposits) are traced to the opportunist's plot.

13. Catherine Gallagher Fauver, *The Long Journey to "Adequate": Wells Fargo's Resolution Plan*, 36 REV. BANKING & FIN. L. 647, 647–48 (2017) (noting that Wells Fargo is among the banks deemed "too big to fail" under the Dodd-Frank Act that are, therefore, subject to "living will" requirements).

14. Michael Corkery, *Wells Fargo Fined $185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html.

15. To be certain, opportunism may also manifest subtly so as to obscure detection, sometimes making linkage to the willful breach of the agent who seeks to extract, rather than infuse, value all but impossible to establish conclusively. There is nevertheless a categorical, even if forgivable, wrong effected by the person who intentionally shirks effort in the discharge of contract terms that,

dissembling which is the hallmark of the blatant form of opportunism that Williamson's first book, *Markets and Hierarchies: Analysis and Antitrust Implications,*[16] helped make central to theorizing in contract law.[17]

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suppose, pay by the hour. The difference with the Wells Fargo breach and the take-the-money-and-run case is that the inherent covertness of shirking (shirking declared in advance ceases to be shirking) masks the damages too, making detection, if any, contested if not constructive, unless confessed. *See* WILLIAMSON, *supra* note 4, at 47.

16. *See generally* WILLIAMSON, *supra* note 1. The fundamental research inquiry motivating Williamson's field-changing contributions with transaction cost economics is making sense of why human productive activity—the way we pursue economic transactions—should be governed in different ways. The puzzle framed in his breakthrough book is understanding why economic activity gets organized within hierarchical governance structures that employ workers (corporations) rather than through open market exchange.

This dichotomy is based on Ronald Coase's seminal 1937 article, *The Nature of the Firm*, and its core insight that the existence of "firms" (hierarchies) not built on the "price mechanism" (markets) is explained by the transaction cost implications of repeatedly transacting through the price mechanism. *See generally* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). For example, Coase points out "the difficulty of forecasting" as a key consideration that funnels economic activity towards the open-ended realm of master-servant relations: "the longer the period of the contract is for . . . the less possible, and indeed, the less desirable it is for the person purchasing to specify what the other contracting party is expected to do." *Id.* at 391. Williamson chooses to build upon Coase's project of "assign[ing] of transactions to one mode or another," sharing the view that human rationality is inherently bounded (as in the difficulty of forecasting), and also finding it "to be intrinsically interesting." WILLIAMSON, *supra* note 1, at 8–9.

Williamson's main argument in *Markets and Hierarchies* is that while markets with large numbers of participants serve as a check on the opportunistic tendencies of humans in business, this cleansing of opportunism eludes "small-numbers" bargaining contexts, as with parties who transact repeatedly with each other. *Id.* at 9–10 (observing that "a small-numbers supply condition effectively obtains at the contract renewal interval"). Internal organization displaces the risk of opportunism that obtains in the small-numbers bargaining context by replacing the contract intervals that become sites for opportunism with the institution of ongoing employment. *See id.* at 10, 25–26.

17. *See, e.g.,* Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 YALE L.J. 1143, 1150 n.32 (1979) (citing *Markets and Hierarchies*, inter alia, for its "general concept of opportunism"); Paul L. Joskow, *Commercial Impossibility, The Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 155 & n.80 (1977) (citing *Markets and Hierarchies* for what "might lead to an increase in opportunistic behavior"); Benjamin Klein, et al., *Vertical Integration, Appropriable Rents, and the*

In the voluminous literature that has ensued—not only in law[18] but also in economics,[19] management,[20] and organization theory[21]—scholars have plumbed the many-sided depths of opportunism conceptualized as self-interest

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Competitive Contracting Process, 21 J.L. & ECON. 297, 297 & n.2 (1978) (citing *Markets and Hierarchies* for its discussion of "opportunistic behavior"); *see also* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, VA. L. REV. 1089, 1101 (1981) (quoting Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979) for his definition of opportunism).

18. *See, e.g.*, Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 119 (2017); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1747 (2014); Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 672 (2010); *see also* Juliet P. Kostritsky, *Bargaining with Uncertainty, Moral Hazard, and Sunk Costs: A Default Rule for Precontractual Negotiations*, 44 HASTINGS L.J. 621, 632 (1993) (providing business-related analysis); Lipshaw, *supra* note 5, at 230.

19. *See, e.g.*, POSNER, *supra* note 12, at 93 (providing economic analysis); *see also* Avner Ben-Ner & Louis Putterman, *Trust, Communication and Contracts: An Experiment*, 70 J. ECON. BEHAV. & ORG., 106 (2009).

20. *See, e.g.,* Ranjay Gulati & Harbir Singh, *The Architecture of Cooperation: Managing Coordination Costs and Appropriation Concerns in Strategic Alliances*, 43 ADMIN. SCI. Q. 781 (1998); Derek J. Harmon, et. al., *Breaking the Letter vs. Spirit of the Law: How the Interpretation of Contract Violations Affects Trust and the Management of Relationships*, 36 STRAT. MGMT. J. 497 (2015); Fabrice Lumineau & James E. Henderson, *The Influence of Relational Experience and Contractual Governance on the Negotiation Strategy in Buyer-Supplier Disputes,* 30 J. OPERATION MGMT. 382 (2012); Deepak K. Malhotra & Fabrice Lumineau, *Trust and Collaboration in the Aftermath of Conflict: The Effects of Contract Structure* 54 ACAD. MGMT. J. 981 (2011); Jeffrey J. Reuer & Africa Ariño, *Strategic Alliance Contracts: Dimensions and Determinants of Contractual Complexity*, 28 STRAT. MGMT. J. 313 (2007); Libby Weber & Kyle J. Mayer, *Designing Effective Contracts: Exploring the Influence of Framing and Expectations*, 36 ACAD. MGMT. REV. 53 (2011); Libby Weber & Kyle J. Mayer, *Transaction Cost Economics and the Cognitive Perspective: Investigating the Sources and Governance of Interpretive Uncertainty*, 39 ACAD. MGMT. REV. 344 (2014); Valery Pavlov & Elena Katok, *Fairness and Supply Chain Coordination Failures* (March 16, 2016) (unpublished manuscript) (available at https://www.researchgate.net /publication/292374227_Fairness_and_supply_chain_coordination_failures_on_the_optimality_of_a_pooling_contract).

21. *See, e.g.*, Deepak Malhotra & J. Keith Murnighan, *The Effects of Contracts on Interpersonal Trust*, 47ADMIN. SCI. Q. 534 (2002); Deepak Malhotra & Francesca Gino, *The Pursuit of Power Corrupts: How Investing in Outside Options Motivates Opportunism in Relationships*, 56 ADMIN. SCI. Q. 559 (2011).

seeking with guile (henceforth, "blatant" opportunism).[22] What theorists (of all fields) have nevertheless overlooked, and contract law scholarship has yet to expressly incorporate into its conceptual canon, is the novel species of "lawful" opportunism that Williamson identified as part of his 1991 revamping of transaction cost economics.[23]

Lawful opportunism is the chief transaction cost concern that Williamson highlights in accounting for a third "mode" of governance to complement the markets and hierarchies that titled his first book.[24] "Hybrid" governance, as termed

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22. The "blatant" versus "lawful" distinction owes to marketing scholars the one published article known to the authors that expands upon Williamson's account of lawful opportunism. Kenneth H. Wathne & Jan B. Heide, *Opportunism in Interfirm Relationships: Forms, Outcomes, and Solutions*, 64 J. MARKETING 36, 37–38 (2000). Wathne and Heide propose to categorize lawful opportunism as hold-up generally, ignoring the case of a highly consequential disturbance under literal enforcement that sets forth Williamson's account. *Id.* at 38–40; *compare id.*, *with* Williamson, *supra* note 7, at 271–73; *see also* WILLIAMSON, *supra* note 4, at 47; Richman & Macher, *supra* note 2.

23. *See* Williamson, *supra* note 7, at 269 (defining hybrid governance); *id.* at 271–73 (discussing contract law and lawful opportunism). While Williamson did not define "hybrid governance" as the third basic mode of governance until 1991, his earlier work contains variant versions of the trichotomy of modes and reflects his abiding concern with relational contracting. *See* Williamson, *supra* note 10, at 248–50 (distinguishing "market governance," "trilateral governance," and "transaction-specific governance"). New to *Discrete Structural Alternatives* is Williamson's articulation of literal enforcement and excuse doctrine as the contingent doctrinal representations of the institutions of off-market, arms-length governance. *See* Williamson, *supra* note 7, at 273, 290–91; *see also infra* Section I.C. It is this perspective that reveals the transaction costs of lawful opportunism, whose mitigation motivates the Article's research question.

24. *See* Williamson, *supra* note 7, at 281 tbl.1; Rudolf Richter, *The Role of Law in the New Institutional Economics*, 26 WASH. U. J. L. & POL'Y 13, 26–27 (2008) (reviewing Williamson's three-mode conception of governance)*; see also* discussion *supra* note 23. This analysis was part of Williamson's effort to formalize the "discrete structural analysis" that distinguishes the institutional logic of transaction cost economics.

Discrete structural analysis is distinguished with the mainstream of economics and "its central core of price theory, and its central concern with quantities of commodities and money." Williamson, *supra* note 7, at 270 (quoting Herbert A. Simon, *Rationality as Process and as Product of Thought*, 68 AM. ECON. REV. 1, 6–7 (1978)); *see also* Lipshaw, *supra* note 5, at 230 ("Oliver Williamson and others[] were dissatisfied with how little the classical focus on price and output decisions explained the origin and function of markets and

by Williamson, comprises the off-the-market, customized, negotiated, and yet arms-length transactions that organizations and people pursue jointly without the advantages of a price mechanism[25] to standardize terms over large numbers of participants.[26] This is the realm of freely negotiated relations and dealings, and the contract law that provides its institutional foundation is the common law of contracts from a typical first-year Contracts course. These deals are not the sales contracts governed by the Uniform

structures within them—employment relationship, make or buy decisions, corporate horizontal and vertical integrations, and so on."). The mainstream approach to economics leads to "a highly quantitative analysis, in which equilibration at the margin plays a central role," Williamson, *supra* note 7, at 270, an approach frequently adopted by law and economics scholars who pose research questions as optimization problems (e.g., what is the optimal level of corporate liability given the limited ability of corporations to penalize their employees?, *see* Steven Shavell, *The Optimal Level of Corporate Liability Given the Limited Ability of Corporations to Penalize Their Employees*, 17 INT. REV. L. & ECON. 203 (1997)). Professor Shavell's scholarship is illustrative in being broadly framed thus. *See, e.g.*, Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J. L. & ECON. 255 (1993); Steven Shavell, *Optimal Discretion in the Application of Rules*, 9 AM. L. & ECON. REV. 175 (2007); A. Mitchell Polinsky & Steven Shavell, *Enforcement Costs and the Optimal Magnitude and Probability of Fines*, 35 J. L. & ECON. 133 (1992). In contrast to optimization problems, discrete structural analysis inquires after the variant institutional means—the distinctive modes of governance and their contingent institutional underpinnings—through which economic transactions may be pursued by conceptualizing their characteristic virtues and vices "in the 'main case,' which is not to be confused with the only case." Williamson, *supra* note 7, at 286. In addition, "each viable form of governance . . . is defined by a syndrome of attributes that bear a supporting relation to one another. Many hypothetical forms of organization never arise, or quickly die out, because they combine inconsistent features." *Id.* at 271. This Article drills down to probe the syndrome of lawful opportunism that, according to Williamson, contract law engenders in hybrid governance.

25. *Cf.* Friedrich August von Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (discussing the decentralized nature of economic decision making based on dispersed information).

26. Williamson's ensuing analysis focuses on hybrid governance executed through long-term governance forms. For the reasons discussed *infra* in notes 42 and 44, this Article looks to examples of off-market transactions that are one-shot deals because these structures are highly vulnerable to the lawful opportunism that Williamson characterizes with his eyes on ongoing forms of joint venture.

Commercial Code,[27] the contractual relations covered by employment law,[28] or the boilerplate that causes so many conceptual difficulties in consumer law.[29] Rather, this is the domain of free contract, where "the principle of private autonomy"[30] continues to hold sway.

In Williamson's treatment, contracts become susceptible to lawful opportunism "[a]s disturbances become highly consequential . . . [and] the 'lawful' gains to be had by insistence upon literal enforcement exceed the discounted value of continuing the exchange relationship."[31] Beyond this cost-benefit tipping point, the worry—for Williamson as a theorist and for entrepreneurs and managers as contracting parties—is that "strict enforcement would have truly punitive consequences . . . resulting [in] 'injustice' . . . supported by (lawful) opportunism."[32]

To appreciate the difference between guileful opportunism (Anecdotes 1 and 2) and its lawful kin,[33] consider the following anecdotes featuring strict enforcement with arguably punishing judgments of enforcement:

> *Anecdote 3*. A tenant leases land from a landlord for four years, without addressing obligations if the tenant cannot occupy the land. After the first annual payment, the tenant is driven from the land by an occupying army during a civil war and ceases payments. The

27. *See, e.g.*, U.C.C. § 2-201 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (requiring certain sales of goods valued at $500 or more be in writing).

28. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 153–55 (5th ed. 2014).

29. *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2012).

30. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941).

31. Williamson, *supra* note 7, at 273.

32. *Id.*

33. There is a strong family resemblance between Williamson's lawful opportunism and the "lexical opportunism" discussed by Professor Lipshaw. *See* Lipshaw, *supra* note 5, at 219 (defining lexical opportunism as cases where the "interpretation [of the written terms of the deal] creates a potential for staggering liability beyond all common sense").

landlord sues the tenant for the missing lease payments.[34]

Anecdote 4. A concert promoter and a theater owner agree that the promoter will pay $100 per night to rent the venue for four nights, without addressing what happens if the owner cannot provide the theater. The theater burns down, and both parties suffer economic losses. The promoter sues to recover its specific investments (promotional expenses), claiming breach of contract.[35]

Anecdote 5. A-Corp is building a power plant and requires environmental emissions credits. A-Corp enters into a deal to purchase the required credits from B-Corp, without addressing what happens if B-Corp cannot deliver the credits. B-Corp's credits are revoked by the regulator, and the trading price for the needed credits more than doubles. A-Corp sues B-Corp for the increase in price.[36]

The actions taken by the plaintiff-parties to realize damage awards in these examples are not defined by (and do not require) trickery or deception, as with the first set of anecdotes. On the contrary, since the conduct amounts to the pressing of legal entitlements to recover a damage award—whether through oral demands or the filing of a complaint—the counterparty's express awareness is a precondition to the efficacy of the exercise.

What drives parties to act in lawfully opportunistic ways?[37] Williamson's high-level sketch demarcates the

34. This example is based on *Paradine v. Jane* (1647) 82 Eng. Rep. 897 (K.B.).

35. This example is based on *Taylor v. Caldwell* (1863) 122 Eng. Rep. 309 (K.B.).

36. This example is based on *Tractebel Energy Marketing, Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60 (Tex. App. 2003).

37. The reader may not be convinced that these are instances properly fitting the genus "opportunism." Three replies are offered. The first may be unsatisfying: to rigorously defend the proposition that lawful opportunism constitutes a wrong requires another article (in process). Second, so long as the reader admits that enforcement after calamity is sometimes (if not typically) opportunistic, this Article endeavors to provide insight into that phenomenon. Finally, whether one agrees that it is opportunistic or otherwise wrongful for a plaintiff to shift to one's counterparty all losses from the calamity to the extent legally permitted, it is uncontroversial to observe that no one likes to be on the vulnerable side of that equation. Worrying about potentially painful vulnerability in a transaction is a real cost that reduces the transactions parties pursue at arms-length, and the underlying phenomenon remains to be studied, as this Article does. Why does

economic cost-benefit tipping point that makes legal enforcement attractive next to relationship-preserving alternatives in a specific context: contractual calamity beyond the bounds of the bargain.[38] In addition, the account specifies the institutional fault line at the root of lawful opportunism to be the willingness of courts to hear claims for "the 'lawful' gains to be had by insistence upon literal enforcement" where a highly consequential disturbance has undercut the spirit of the deal that was bargained.[39]

Beyond this economic and institutional analysis, Williamson does not explore the individual characteristics that tend to give rise to lawful opportunism, his focus being the institutional (macro-level) implications for governance.[40] If the willingness to act with guile stokes blatant forms of opportunism (like Wells Fargo's swindling), what characteristic animates lawful opportunism? Absent a micro-level conceptualization (like the character of guile provides blatant opportunism), organizational theorists and behavioral legal scholars have little foothold to break ground with empirical research that elucidates when and why parties experience lawful opportunism and, consequently, how to forestall its costs.[41]

To fill this conceptual gap, this Article develops and extends Williamson's diagnosis that literal enforcement provokes the institutional fault line that foments lawful opportunism in Part I.[42] This Article's further contribution

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contract law make parties so vulnerable after calamity? What drives parties to take advantage of this vulnerability?

38. Williamson, *supra* note 7, at 272–73.

39. *Id.* at 273.

40. *See generally id.* at 269–96.

41. For an example of the theoretical utility of guile for organizational theory, see Keith G. Provan & Steven J. Skinner, *Interorganizational Dependence and Control as Predictors of Opportunism in Dealer-Supplier Relations*, 32 ACAD. MGMT. J. 202 (1989) (relying on Williamson's definition of "self-interest seeking with guile" as basis for theorizing empirical study of blatant opportunism).

42. Williamson focuses on hybrid governance carried out through what he

in Part II is to build upon the analysis set forth in Part I with an empirical study designed to examine factors that predict variance in the propensity to press one's legal entitlements in conditions ripe for lawful opportunism. Participants were presented with a vignette that put them in the position of a contracting party who has to respond to a highly consequential disturbance that made the counterparty's performance as per the terms of the agreement impossible. Participants then selected among a range of options that were alternatively cooperative (hence tending to preserve the relationship), blatantly opportunistic (i.e., actions to appropriate value guilefully), or lawfully opportunistic in character (i.e., actions to appropriate value by enforcing, or threatening to enforce, legal entitlements). The findings concerning the propensity of participants to select lawfully opportunistic responses reinforce the conceptual conclusion that entitlement is to lawful opportunism as guile is to the blatant opportunism so well understood by scholars.

Why does all this matter for public policy and law? The fear of becoming victim to lawful opportunism—for entrepreneurs, for managers of business organizations, and for citizens at large—presents a transaction cost[43] that dampens the potential for arms-length contracting to serve as a vehicle for ingenuity and productivity. Responding to this challenge and potential, the overarching aim of this Article is to promote the mitigation of the transaction costs of lawful opportunism through theoretical and empirical extensions of Williamson's sparse sketch of the concept.

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labels neoclassical contracting devices, such as co-governance through committees and reliance upon arbitration. Williamson, *supra* note 7, at 271–73. However, the doctrinal foundations of neoclassical contracting that give rise to lawful opportunism also underpin one-shot deals that are negotiated off the market by the parties. These transactions are especially "hazardous," Williamson, *supra* note 10, at 250, precisely for want of the co-governance devices that define joint ventures and alliances and the standardization of terms achieved by thick markets. Moreover, for the same reasons, litigation over excuse doctrine tends to result from one-shot deals like the cases featured in this Article as Anecdotes 2–5. *See supra* notes 12, 34–36 and accompanying text.

43. Williamson, *supra* note 7, at 269.

The discussion of results is presented in Part III, and Part IV concludes.

I. CALAMITY, NAÏVETÉ, AND ENOUGH ENTITLEMENT YIELD LAWFUL OPPORTUNISM

Until there is an exchange of consideration between parties, there is no contract to anchor lawfully opportunistic enforcement. Section A begins, therefore, from the bargaining and exchange that give birth to the negotiated contracts of hybrid governance,[44] and then zeroes in on the naïveté that so often limits the bounds of bargaining and exchange to the "fair-weather" case—without giving a thought to the complications of pricing and risk that highly consequential disturbances tend to force upon deals.[45]

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44. In *Discrete Structural Alternatives*, Williamson devotes the discussion of hybrid governance to the case of long-term contracts that include "neoclassical" contracting devices, such as committees and recourse to arbitration. *Id.* at 271–73. In an early work before introducing the mode of hybrid governance, Williamson acknowledges the category of transactions that are hybrid insomuch as they are "nonstandardized" by thick markets but are nevertheless carried out through one-shot deals in the form of "market governance," describing them as "hazardous." Williamson, *supra* note 10, at 250. His study of transaction cost economics does not feature nonstandardized transactions that must be concocted by the parties in one-shot deals that have no off-the-rack market. Nevertheless, in *Discrete Structural Alternatives*, Williamson identifies excuse doctrine as a check on literal enforcement. Williamson, *supra* note 7, at 271. The leading cases of excuse are illustrative of the hazards of nonstandardized one-shot deals. *See* Taylor v. Caldwell (1863) 122 Eng. Rep. 309 (K.B.) (four-performance deal); Krell v. Henry, [1903] 2 K.B. 740 (one-day flat rental to view royal procession). This Article's focus is on the hazard of lawful opportunism, as theorized by Williamson and as it afflicts nonstandardized one-shot deals.

45. Or one or both of the parties might think of a risk and yet leave the deal terms unaffected. *See, e.g., Krell*, 2 K.B. at 755 (Romer, L.J.) (expressing "[t]he doubt . . . whether the parties to the contract now before us could be said, under the circumstances, not to have had at all in their contemplation the risk that for some reason or other the coronation processions might not take place on the days fixed"); Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1644 (2003) (explaining why "parties write deliberately incomplete agreements in the shadow of a robust indefiniteness doctrine" partly based on variance between "a significant fraction of individuals [who] behave as if reciprocity were an important motivation (even in isolated interactions with strangers), [and] a comparable fraction [who] react as if motivated entirely by self-interest").

Section B introduces the specter of highly consequential disturbances that expose the naïveté of the parties. Section C examines how literal enforcement comes to spawn lawful opportunism. Section D arrives at the conclusion that the human linchpin of the phenomenon—and the immediate source of the troublesome transaction costs—is the complaining party's strong enough sense of entitlement to so lean on the legal entitlement to claim damages.

A. *Bargains, Commitment, and Consideration*

To Karl Llewellyn, principal drafter of the Uniform Commercial Code, the bargaining that gives rise to contracts is the heart of what distinguishes the prevailing liberal economic system from those organized by tradition (e.g., feudalism, castes) or fiat (e.g., totalitarianism).[46] A bargain requires a set of agreeable terms concerning the parties' present and future commitments to each other.[47] However, no matter how much the parties think them through and work them out, deal terms do not provide the will to get a deal off the ground. What turns an agreement, as a set of

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46. "Bargain is then the social and legal machinery appropriate to arranging affairs in any specialized economy which relies on exchange rather than tradition (the manor) or authority (the army, the U. S. S. R.) for apportionment of productive energy and of product." Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 717 (1931); *see also* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 553 (1932) (noting that the "dictum that the progress of the law has been from status to contract . . . . has generally been understood as stating not only a historical generalization but also a judgment of sound policy—that a legal system wherein rights and duties are determined by the agreement of the parties is preferable to a system wherein they are determined by 'status'").

47. An exchange that occurs entirely in the present would be "better described as a barter or an exchange of goods" because it "creates no contractual duty." Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 171–72 (1917). This bringing of the future into the present is called "presentiation" by Ian Macneil. Ian R. Macneil, *Restatement (Second) of Contracts and Presentiation*, 60 VA. L. REV. 589, 589 (1974) ("Presentiation is thus a recognition that the course of the future is bound by present events, *and* that by those events the future has for many purposes been brought effectively into the present.").

agreeable terms, into a living deal that inspires each side to invest time, money, or energy is enough commitment from all parties concerned to execute the exchange.[48]

There are numerous sources of commitment that parties might draw upon to unlock their mutual willingness to consummate the bargain—from secured collateral to down payments to reputation.[49] How much commitment is required of each party depends on many factors, including the stakes of the deal,[50] the relationship between the parties,[51] and the availability of other disciplining feedback, such as reputation in a shared community.[52] Nevertheless, as the formal gatekeeper to enforceability in the common law, the doctrine of consideration does not require courts to assess any reasonable proportionality in the commitments entailed by, and exchanged through, contract.[53] Rather, the

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48. *See* Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 83 AM. ECON. REV. 519, 520–22 (1983) (expressing skepticism about the sufficiency and robustness of the commitment undergirded by contract law and discussing the important role of hostages in backing credible commitments).

49. In commercial transactions, collateral is often secured, in part, through contracts. Historically, humans were not infrequently delivered as hostages to back commitments. Oliver Wendell Holmes, Jr., references this practice in recounting that "the surety of ancient law was the hostage, and the giving of hostages was by no means confined to international dealings." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 248 (1881). The human hostage as a contractual security seems to be uncommon today, certainly outside the realm of organized crime and terrorism. Still, the use of hostages is prevalent and typically takes the form of forfeit or property as collateral. *See* Williamson, *supra* note 48, at 522.

50. *See* Williamson, *supra* note 48, at 522 (addressing the demands for commitment presented by "[c]osts that are highly specific to a transaction").

51. Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 485 (recognizing "that discrete exchange [without relationship] . . . can play only a very limited and specialized function in any economy").

52. *See* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 157 (1992) (providing "explanations of why the diamond industry has long relied on the extralegal enforcement of its business norms").

53. "[S]o long as the requirement of a bargained-for benefit or detriment is satisfied, the fact that the relative value or worth of the exchange is unequal is

threshold inquiry to establish contract formation looks to the *mutual exchange* of commitment, *as of a moment in time*.[54]

The willingness of common law courts to enforce contracts—with nothing more than evidence of exchange[55]—lubricates the economy with commitment "when reputational or self-enforcement sanctions will not avail."[56] The enforceability of contracts thus works a feat of alchemy: A deal that might have started with no collateral at all (beyond each party's words) yields, in its breakdown, a judgment that may be backed by the state.[57] Contracts are, therefore, attractive—if not unavoidable[58]—sources of commitment in arms-length contracting, as they empower

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irrelevant so that anything which fulfills the requirement of consideration will support a promise, regardless of the comparative value of the consideration and of the thing promised. The rule is almost as old as the doctrine of consideration itself." 3 RICHARD A. LORD, WILLISTON ON CONTRACTS § 7:21 (4th ed. 2018) (footnotes omitted).

54. "[C]lassical contract law draws clear lines between being in and not being in a transaction; *e.g.*, rigorous and precise rules of offer and acceptance prevail with no half-way houses where only some contract interests are protected or where losses are shared." Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 864 (1978).

55. According to Professor Corbin, "[t]here seems to be no serious doubt that a mutual agreement to trade a horse for a cow would be an enforceable contract, even though it is made by two ignorant persons who never heard of a legal relation and who do not know that society offers any kind of a remedy for the enforcement of such an agreement." 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 34, at 135 (1st ed. 1950) (as quoted by Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1754 (2008)).

56. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 562 (2003).

57. *See* Randy E. Barnett, *Contract is Not Promise; Contract is Consent*, 45 SUFFOLK U. L. REV. 647, 662 (2012) ("[T]here [is] not one, but two 'promises' [that give rise to contract]: the promise to perform, and the promise to be bound by the default rules supplied by the law of contract.").

58. Contracts are unavoidable in the sense that no formality, or even an exchange of words, is required beyond the fact of exchange. *See* CORBIN, *supra* note 55. *But see* Barnett, *supra* note 57, at 652 (proposing that "the *presence* of a bargain in the *commercial* context could be negated by evidence that the parties did *not* intend to be legally bound").

parties with a legitimate process for making state-backed demands upon a counterparty who has allegedly breached.

B. *Naiveté, Calamity, and the Speechless Deal*

One of the cardinal rules of contract law is that "[c]ourts cannot make agreements for persons who are competent to make them for themselves."[59] Because competence means legal competence—rather than some requirement of professional competence to incur obligations—courts enforce contracts without differentiating between doctrine governing agreements drawn up by parties who are savvy in their planning for potential disruption, and naïve parties who are not. If performance never gets complicated by contingency, then naïveté in the bargain remains immaterial as the parties at the time of performance will be bolstered by economic terms that hew with their bargain.

Sometimes, though, naïveté in the bargain comes back to haunt the parties.[60] Consider the leading case of *Taylor v. Caldwell*—the inspiration behind Anecdote 4 and the empirical study reported in Part II. Taylor and Lewis agreed with Caldwell and Bishop that the latter two would provide the Surrey Gardens and Music Hall for four performance days over the summer, at a per diem rate, with sundry entertainments included in the fee.[61] There is no evidence

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59. Wheeling Steel & Iron Co. v. Evans, 55 A. 373, 376 (Md. 1903). The court adds, "when attempts to enter into obligations fail because of the obscurity of the terms employed it is far better that the parties be left where they have placed themselves than for the judicial tribunals by forced interpretations to construct agreements for them." *Id.*; *see also* Arthur L. Corbin, Book, *The Effect of War on Contracts*, 55 YALE L.J. 848, 849 (1946) (book review).

60. Whereas the naïve bargain may yield a contract that is "obligationally" complete (assuming literal enforcement), economists would call it "insufficiently state contingent." *See* Ian Ayres, *Default Rules for Incomplete Contracts*, *in* 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 585, 585–589 (Peter Newman ed., 1998).

61. Taylor v. Caldwell (1863) 122 Eng. Rep. 309, 310 (K.B.). The agreement spells out in impressive detail the array of entertainments that Caldwell and Bishop committed to provide. For example, along with "an efficient and organised military and quadrille band," there would also be "fireworks and full

whatsoever that the parties had a shared understanding about what should happen in case the Music Hall and grounds could not be made available, as in the case of the fire that occurred in June before the first show.[62] What deal had the parties made? Was each side to suffer its own expenses at the time of the fire, was the deal something else, or was there no deal at all on the question?[63] According to Justice Blackburn in the lead opinion, "[t]he parties when framing their agreement evidently had not present to their minds the possibility of such a disaster."[64]

How could these parties fail to strike a deal covering the risk of fire? Humans are optimistic,[65] talk of risks quells the excitement of bargains, and parties who do not know any better are wont to get carried away by the fair-weather case apparently in view.[66] When this happens, the bargained deal is *bounded* in its scope by fair-weather conditions insomuch as the parties did not price and allocate risks otherwise. In *Taylor v. Caldwell*, the parties' naïveté was failing to plan for the possibility that the Music Hall might not be available as promised. Perhaps the most compelling evidence that the parties failed to consider this contingency is that they were

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illuminations; a ballet or divertissement, if permitted; a wizard and Grecian statues; tight rope performances; rifle galleries; air gun shooting; Chinese and Parisian games; [and] boats on the lake." *Id.* at 311.

62. *Id.* at 311–12.

63. *Cf.* Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1, 5 (1991). ("Our hypothesis is that the characteristic and traditional response of our legal system to cases of mistaken and frustrated contracts is neither to relieve the disadvantaged party nor to assign the loss to the superior risk bearer, but to leave things alone.").

64. *Taylor*, 122 Eng. Rep. at 312.

65. *See* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 204 (2006) (discussing the "[o]ptimism bias[, which] refers to the tendency of people to believe that their own probability of facing a bad outcome is lower than it actually is").

66. *Cf.* Alan Schwartz, *Incomplete Contracts*, *in* 2 NEW PALGRAVE DICTIONARY 277, 278 (Peter Newman ed., 1998) ("Incomplete contracts sometimes will not condition on payoff-relevant information—here the nature and probabilities of future states of the world—even when both parties know it.").

savvy about, and expressly attended to, other contingencies of comparatively trivial import: the commitment to provide "aquatic sports" at the Gardens was "weather permitting," and the presentation of "ballet or divertissement" depended on obtaining the requisite permits.[67]

We know that as of closing (i.e., offer and acceptance),[68] the *Taylor v. Caldwell* parties had contemplated a number of details, including the precise number of players required in musical bands (35 to 40) and how many wizards would entertain (1), *because* they provided for a relevant commitment in the agreement.[69] However, the agreement does not evidence that they gave any attention to terms for fire. Therefore, the court's conclusion seems the only reasonable assumption: the risk of fire was not priced into the deal, because the parties apparently never bargained to allocate the resulting risks.[70] The problem is not that they once knew the answer but forgot to write it down.[71] The problem is that they were naïve about the risk of fire that materialized, and the complexities of that class of contingencies did not figure into the deal at all.[72] When the

67. *Taylor*, 122 Eng. Rep. at 311.

68. *See supra* note 54 and accompanying text.

69. *Taylor*, 122 Eng. Rep. at 311.

70. *Id.* at 312.

71. *See* Derek J. Harmon et al., *Breaking the Letter vs. Spirit of the Law: How the Interpretation of Contract Violations Affects Trust and the Management of Relationships*, 36 STRATEGIC MGMT J. 497, 498 (2015) (defining "*spirit [of the contract] violations* as the failure to fulfill an undocumented, yet still presumably tacitly agreed upon, expectation").

72. Parties are not prescient but rather limited by bounded rationality, WILLIAMSON, *supra* note 1, at 21–23, and yet the fault lines of the deal are known in advance. In a supply agreement, where one party pays the other for a good or service, the seller may be unable to perform, tracking impossibility doctrine, *see Taylor*, 122 Eng. Rep. at 312, or may lose reason to perform due to commercial impracticability, *see* RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981), and the buyer may lose reason to buy due to frustration of purpose, *see* Krell v. Henry, [1903] 2 K.B. 740, 740. There is also the possibility that the buyer is unable to pay when due, and this also represents an important fault line that complicates contracting. In legal terms, however, this last case presents no

parties most needed clarity, the deal was rendered speechless to say anything of substance.

The naïveté that left the *Taylor v. Caldwell* deal so vulnerable to fire presupposed no guile at all. Honesty and candor at the bargaining stage will not immunize a contract from this vulnerability. The objective of the next Section (Section C) is to demonstrate how literal enforcement converts this vulnerability into contractual cracks liable to host lawful opportunism.

C. *Literal Enforcement Hardens Naïveté into Cracks*

Justice Blackburn, in the leading opinion for the Queen's Bench in *Taylor v. Caldwell*, begins his legal analysis with the assessment, already previewed, that "[t]he parties when framing their agreement evidently had not present to their minds the possibility of such a disaster [as the burning down of the Music Hall], and have made no express stipulation with reference to it."[73] Given their naïveté towards fire risk, what the *Taylor v. Caldwell* parties owe each other after the fire is a question beyond the bounds of the actual bargain they expressed. The motive of the litigation was precisely that "the answer to the question must depend upon the general rules of law applicable to such a contract."[74]

The first general rule of law that Justice Blackburn formulates is the doctrine of literal enforcement undergirding Williamson's characterization of lawful opportunism: "There seems no doubt that where there is a

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doctrinal or conceptual difficulties: If performance was tendered, the buyer's payment obligation survives non-payment, and if the buyer repudiates for inability to pay before performance is tendered, the seller's obligation is discharged under the doctrine of bilateral contracts. *See* Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565, 609 (2001) (noting that "[t]he [first] *Restatement* provided that a promisor [who] committed an anticipatory breach of a bilateral contract, excus[ed] the promisee from performing any condition precedent or any return promise" (footnote omitted)).

73. *Taylor*, 122 Eng. Rep. at 312.

74. *Id.*

positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible."[75] The doctrine of literal enforcement, in the stringent form here articulated, says that in the first instance courts do not condition performance on account of "unforeseen accidents" that render performance "unexpectedly burthensome," unless the accident was somehow expressly accounted for. This expresses the default rule in the common law that "promises must be kept though the heavens fall."[76] The "*de rigeur* citation" for this proposition is the 1647 case, *Paradine v. Jane* (Anecdote 3),[77] in which the court required the defendant-tenant, forcibly expropriated from years of tenancy by civil war, to pay damages for back rent.[78] The cited holding is that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, *because he might have provided against it by his contract*."[79]

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75. *Id.*

76. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 13.1, at 495 (4th ed. 1998); *see also* 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1 (1963) (observing "the long tradition that 'justice' is absolute").

77. Clayton P. Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521, 521 n.4 (1985); *see also* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1535 & n.36 (2016) (attributing to *Paradine v. Jane* the rule that "the risks associated with performance of an obligation assumed by contract are assigned by default to the promisor"); *Execution of a Contract Impossible*, 10 AM. JUR. 250, 251–52 (1833) (same).

78. Paradine v. Jane (1647) 82 Eng. Rep. 897, 897–98 (K.B.).

79. *Id.* at 897; *see also* FRIEDRICH KESSLER & GRANT GILMORE, CONTRACTS, CASES AND MATERIALS 758 (2d ed. 1970) (observing that *Paradine v. Jane* is typically cited as the "leading case for the proposition" that the law traditionally did not recognize an impossibility excuse). *But see id.* ("*Paradine v. Jane* does not appear to have been a particularly famous case in its day or for a hundred and fifty years thereafter."). As soon as it joined the canon in the 19th century, *Paradine v. Jane* was criticized in the *American Jurist*: "I do not hesitate to say

When calamity strikes a contract in naïveté's blind spot (e.g., the Music Hall fire),[80] literal enforcement turns the boundedness of the deal into a sharp "crack" in the contract. This crack invites a breach claim based on appeal to the premise of literal enforcement. The metaphor of the crack alludes to the wedge that calamity drives between the economic expectations embedded in the naïve deal that was bargained and the economic implications of a breach claim based on literal enforcement of the contract post-disruption. The hope that energized the original deal is now bygone, and yet the colorable breach of contract claim provides the party disappointed by non-performance a vehicle to offset the costs of calamity. According to Williamson, "[t]he general proposition here is that when the 'lawful' gains to be had by insistence upon literal enforcement exceed the discounted value of continuing the exchange relationship, defection from the spirit of the contract can be anticipated."[81] The empirical question this Article sets out to elucidate is what else, *other than* the raw economic incentive to do so, drives contracting parties to choose a lawfully opportunistic response to calamity. What remains, therefore, is to characterize the trait that activates lawful opportunism the way guile activates blatant forms of opportunism.[82]

D. *The Sense of Entitlement Behind Lawful Opportunism*

The legal entitlement of the potential plaintiff to push

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that the doctrine that it lays down is in direct opposition to common sense and common justice." *Execution of a Contract Impossible*, *supra* note 77, at 251.

80. The contract would be vulnerable even without literal enforcement because there is an actual crisis to respond to that puts new demands on the parties and their relationship.

81. Williamson, *supra* note 7, at 273.

82. Arguably, the idea of guile is inherent in the forms of blatant opportunism (i.e., *What is lying or stealing without guile?*) so that the idea that guile gives rise to blatant opportunism may be better interpreted as conclusory rather than causal. Just the same, the concept of lawful opportunism as introduced by Williamson remains so inchoate that the character trait in which it inheres remains to be named and elucidated.

for the hard bargain in a lawfully opportunistic way lies dormant until activated. Whereas blatant forms of opportunism require guile for the agent to surreptitiously get away with the benefits of, say, stealing, the visibility of the activities involved in lawful opportunism requires the agent to openly embrace the stratagem adopted. The analytical approach in this section will be to probe the negative repercussions of lawful opportunism in light of its necessary transparency and openness.

Williamson's transaction cost concern for hybrid governance is focused on those cases where "strict enforcement would have truly punitive consequences, . . . especially if the resulting 'injustice' is supported by (lawful) opportunism."[83] The punishing form of justice that is the hallmark of literal enforcement has been noted by commentators for centuries.[84] An early student note in the *Harvard Law Review* succinctly summarizes this Part and why injustice results:

> It is usually to the interest of both parties that a contract be carried out. Where performance is prevented by an event, against the occurrence of which neither can reasonably be held to have warranted, both suffer a loss for which neither is responsible. In such circumstances it seems highly unjust to throw all the loss on the one whose performance may happen to have been interfered with.[85]

Scholars continue to debate how best to handle these cases given that literal enforcement is a blunt instrument

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83. Williamson, *supra* note 7, at 273 (stating, "the state realization in question was unforeseen and unforeseeable (different in degree and/or especially in kind from the range of normal business experience)[, even] if strict enforcement would have truly punitive consequences").

84. *Execution of a Contract Impossible*, *supra* note 77, at 251; *see also* Maxine MacKay, *The Merchant of Venice: A Reflection of the Early Conflict between Courts of Law and Courts of Equity*, 15 SHAKESPEARE Q. 371, 373 (1964) (discussing Portia's plea that mercy is mightier than the literal enforcement of the contract that would exact a pound of flesh).

85. Note, *Impossibility of Performing Contracts as a Defense*, 15 HARV. L. REV. 63, 64 (1901).

when calamity strikes at the naïveté of a contract.[86] As the law stands, the potential for literal enforcement represents an invitation to press legal entitlements, where accepting the invitation requires one to overlook or otherwise accede to the relationship-destroying injustice that may result from enforcing the crack in the contract for one's cash interest or the disciplining leverage thereby derived.

The human tendency to overlook the potential injustice that results from claiming legal entitlements was identified by Aristotle as the vice that the virtue of *epieikeia*, or decency, corrects or avoids.[87] The discussion of *epieikeia* in the *Nicomachean Ethics* comes as Aristotle confronts the implications of the inherent limitations in legislated law that, though bound to fail in its application to specific cases, nevertheless gets interpreted to reach all cases that fit the text.[88] To display the virtue of decency is to rely on discernment to "to rectify the deficiency" that is inevitable in the application of legislation to facts.[89] Aristotle's

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86. *See*, *e.g.*, Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration*, 1 J. LEGAL ANALYSIS 207 (2009) (proposing various tests for providing relief in cases of unexpected occurrences); Victor P. Goldberg, *Excuse Doctrine: The Eisenberg Uncertainty Principle*, 2 J. LEGAL ANALYSIS 359 (2010) (criticizing Eisenberg's 2009 article); Melvin A. Eisenberg, *Impossibility, Impracticability, and Frustration—Professor Goldberg Constructs an Imaginary Article, Attributes it to Me, and then Criticizes It*, 2 J. LEGAL ANALYSIS 383 (2010) (responding to Goldberg's criticism).

87. In Aristotle's framework, virtues represent the "golden mean" between too little and too much of some character trait. ARISTOTLE, NICOMACHEAN ETHICS 44–45 (trans. Terence Irwin) (1985). The courageous person, for example, strikes at the balance between cowardliness and brashness. *Id.* at 49. In his discussion of decency, reviewed *infra*, Aristotle only discusses the "stickler" who has too much entitlement. The other vice, not mentioned, would display too little sense of entitlement, i.e., being a pushover who lets others override their entitlements willy nilly.

88. ARISTOTLE, *supra* note 87, at 144 (reasoning that "all law is universal, but in some areas no universal rule can be correct; and so where a universal rule has to be made, but cannot be correct, the law chooses the [universal rule] that is usually [correct], well aware of the error being made" (alterations in original)). Aristotle emphasizes that "the source of the error is not the law or the legislator, but the nature of the object itself." *Id.*

89. *Id.* at 145.

characterization of the way the decent person acts and, more specifically, *does not* act provides the missing insight to complete the basic account of lawful opportunism. The decent person is "not an exact stickler for law in the bad way,"[90] whereas Williamson's lawful opportunist is indeed a stickler for the letter of the contract in a potentially punishing way.[91] How does decency rectify the (legislated or contractual) law? Aristotle's answer is that the decent person "tak[es] less than he might even though he has the law on his side."[92]

What decency regulates is precisely the agent's sense of entitlement to claim legal entitlements. To choose lawfully opportunistic enforcement of the breach of contract claim, one's sense of entitlement must be strong enough, or blind enough, under the circumstances to overshadow the potentially punishing consequences of literal enforcement.

The conceptual significance of this conclusion becomes salient in juxtaposition with blatant opportunism. The blatant opportunist may desire the spoils of fraud or deceit without necessarily embodying a robust enough sense of entitlement to claim like value openly. Conversely, the lawful opportunist may flinch at the prospect of bending or breaking rules guilefully. Hence, while both strategies may serve to appropriate value, each taps into, and arises from, distinctive character traits.

II. EMPIRICAL STUDY

This Article's research motivation is not only to better understand lawful opportunism as a concept, but also to begin to make sense of lawful opportunism as an empirical

90. *Id.*

91. Williamson, *supra* note 7, at 273.

92. ARISTOTLE, *supra* note 87, at 145. In the *Nicomachean Ethics*, Aristotle does not address the question of whether decency is ever consistent with taking *more* than one's legal entitlements, as suggested by cases of justifiable civil disobedience.

phenomenon. Supposing literal enforcement (with or without excuse doctrine[93]), what are the sources of variance in the likelihood that a contract will break apart due to lawfully opportunistic contracting behaviors?

To break ground on this question, we pursued an empirical study designed to explore the individual-level factors that motivate participants to access lawful opportunism as a contracting behavior distinct from behaviors that are cooperative or blatantly opportunistic. While actual contracts and contracting contexts would provide an ideal setting for the study of these phenomena in terms of ecological validity, natural and field experiments are problematic for research into a novel construct given the lack of control over extraneous variables. We therefore test the theoretical construct of lawful opportunism through a contracting experimental survey.

In designing this study, this Article draws insights and methodological precedents from recent scholarship in organization theory that examine contracting parties' contingent dispositions toward deals and their propensity to engage in blatantly opportunistic violations of trust.[94] These studies point to the relevance of three relational dispositions that are especially plausible moderators of an agent's willingness to abandon the contracting relationship for the monetization of the breach of contract claim. These relational

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93. This Article has sought to make clear that the risk of lawful opportunism is not obviated by the possibility of excuse. Excuse mitigates the degree of punishment caused by lawful opportunism—instead of paying for litigation defense and damages, only paying for litigation defense. Moreover, the case behind Anecdote 5 is a reminder that excuse is a fickle doctrine, not to be counted on, even after a favorable verdict. *See* Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co., 118 S.W.3d 60 (Tex. App. 2003) (reversing a verdict of commercial impracticability at the trial court finding no evidence that the buyer—and not only the seller—understood at the time of exchange that the environmental credits the seller was committing to sell were the credits owned by the buyer that the state department of environmental protection cancelled unexpectedly before delivery).

94. *See, e.g.,* Malhotra & Gino, *supra* note 21, at 559, 561–62; Malhotra & Murnighan, *supra* note 21, at 534, 553, 557.

dispositions are the agent's (1) sense of entitlement (as indicated by Part I's analysis) and the agent's sense of the exchange as being predominantly either (2) economic or (3) relational.[95] The latter two may influence perceptions of the trade-off involved in either cooperating with the counterparty or defecting from the deal for the lawful gains available, and there is the further question of their influence upon the predilection to choose the blatantly opportunistic alternatives presented to participants in the study.

A. *The Study*

1. Subjects

Participants were 1,300 U.S. adults recruited through Amazon's Mechanical Turk. Respondents received $1.30 for participating. Fifty-seven percent of the subjects were male and the average age category was 25–34 years old with 35% over 35 years old. The participants were randomly assigned a contracting scenario, which varied based on the specificity of the contracting statement and the type of disruption. See Table 1 for descriptive statistics of the sample.

TABLE 1. Descriptive Statistics of Sample.

Index	Variable	mean	SD	1	2	3	4	5	6	7	8
1	Cooperate Factor	6.1	1.3	1							
2	Lawful Opp Factor	9.0	3.1	0.07	1						
3	With Guile Factor	3.5	2.8	-0.19*	0.37*	1					
4	Intended Honesty	75.3	32.8	0.14*	-0.13*	-0.46*	1				
5	Entitlement	4.0	0.9	0.08*	0.33*	-0.03	0.10*	1			
6	Economic Exchange	4.2	0.8	0.14*	0.05	-0.28*	0.25*	0.18*	1		
7	Relationship Exchange	3.3	1.0	0.17*	-0.18*	-0.23*	0.29*	0.06	0.11*	1	
8	Trust Disposition	48	46.0	0.07*	-0.07*	-0.19*	0.30*	0.01	-0.02	0.27*	1

95. *See* Malhotra & Gino, *supra* note 21 at 566 (discussing how parties may view exchange partners in "instrumental (e.g., 'money-making')" or "relational" terms).

B. *Methods*

1. Design

To answer our research questions, we used controlled contracting surveys with a variety of contracting scenarios included as a vignette. Respondents were then asked the likelihood they would take a series of actions.

2. Contracting Conditions

The base contracting scenario was seen by all respondents, and is based on the case of *Taylor v. Caldwell* (Anecdote 1), involving the renting of a theater for a performance. The base scenario starts with a hypothetical agreement. The respondents read the following:

> *You produce concerts through your business, and you focus on festivals. For this year's Memorial Day Festival, you have reserved a venue close to the ocean. The Ocean View—an Inn with large grounds—has offered its grounds in exchange for $6,000: $1,500 as a deposit and $4,500 one month before the event.*
>
> *With the venue secured, you then book the infrastructure needed—security, portable toilets, food vendors, etc.—as well as booking the acts and you begin to sell tickets.*

This scenario is designed to create the potential for real damages, specifically, the loss of deposits paid to subcontractors and potential loss of revenue. In order to capture intended contracting behavior over a range of contracting contexts, we varied two aspects of the contracting scenario in the survey: (1) whether there was a clause in the contract that addresses the potential for disruption and, if so, whether it addresses disruption in a generic or a specific way; and (2) the type of disruption. The respondents were assigned one of three possible conditions: a generic condition that addresses the potential for disruption generically, a null condition (with no qualifying language in the agreement), and a specific condition that addresses the potential for a specific kind of disruption. After reading the scenario and then responding to a question about

their intention to act honestly,[96] one of two disruption conditions is introduced to respondents—one concerning a natural disaster (a hurricane) and one concerning a regulatory change (environmental regulation)—both of which would render the event impossible to host as agreed. In both cases of disruption, the participant was told that an alternative venue is available at an extra cost. See Appendix B for specific clauses included.

3. Dependent Variables—Contracting Behavior

To capture the intention to act cooperatively, in a lawfully opportunistic fashion, or in a blatantly opportunistic fashion, the participants were asked to assess the likelihood they would take different actions, having been confronted with a highly consequential disturbance that prevented performance as expected. The respondents were asked "How likely would you take the following action?" and given a 6-point scale of definitely, very probably, probably, possibly, probably not, and definitely not. The options included actions categorized as lawful opportunism (such as making demands and threatening suit), blatant opportunism (such as shirking and fraud), or cooperation (such as making requests and problem solving). Four sub-types for each type of contracting behavior were included, as shown in Table 2 below.

96. *See id.* (using a questionnaire to assess "willingness to behave opportunistically, sense of entitlement, and level of aspiration").

TABLE 2. Intended Actions.

Contracting Behavior	**Sub-type**	**Operationalized in Survey Options**
Cooperative Actions: Fair play, honest dealing, complying with agreements, commitment.[97] Information exchange and coordination.[98]	Honest dealing	Call back the *The Ocean View* to find out what the owner has in mind
	Information exchange	Suggest to the owner of *The Ocean View* that you should discuss the consequences of the change in circumstances to figure out the best way to share the burdens
	Coordination	Suggest to the owner of *The Ocean View* that you should invite a third-party to help you figure out how to deal with the burdens of the change in circumstances
	Request for refund	Request that *The Ocean View* refund you the $6,000 you paid in advance
Lawful Opportunism: Demands, Threat of law suit, Law suit	Demand for refund	Demand that *The Ocean View* refund you the $6,000 you paid in advance
	Demand to cover increased costs	Demand that *The Ocean View* pay the additional $2,000 you will have to pay the state college to put on the festival at the stadium (the state college charges $6,000 and the Inn charged only $4,000)
	Demand to cover out of pocket losses	Demand that *The Ocean View* compensate you for the $1,000 you will lose from the portable toilets
	Threat of law suit for non-payment of demand	Be prepared to tell the owner of *The Ocean View* that if you do not get what you demand, you will file a complaint [with the town to report a zoning violation that you noticed the last time you were at the property][99]

97. *See* T.K. Das & Bing-Sheng Teng, *Between Trust and Control: Developing Confidence in Partner Cooperation in Alliances*, 23 ACAD. MGMT. REV. 491, 492 (1998) ("[P]artner cooperation is characterized by honest dealing, commitment, fair play, and complying with agreements.").

98. *See* Malhotra & Lumineau, *supra* note 20, at 983–84 (discussing information exchange and coordination provisions).

99. The bracketed language tracks the cheat act for blatant opportunism, but this was an error in the instrument and represents a limitation in the exploratory study. The kind of complaint that is consistent with the species of lawful opportunism identified by Williamson is one alleging breach of contract. *See* Williamson, *supra*, note 7, at 273.

Blatant Opportunism: Lie, Cheat, Steal. Calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse	Cheat	Be prepared to tell the owner of *The Ocean View* that if you do not get what you demand, you will report a zoning violation that you noticed the last time you were at the property to the town. You expect this could cost The Ocean View $5,000 or more to address
	Threaten to Libel	Be prepared to tell the owner of *The Ocean View* that if you do not get what you demand**,** you will ask your friend, who is a reporter with the local newspaper, to write (undeservedly) negative reviews about The Ocean View
	Lie	Lie to *The Ocean View's* owner and say that your exposure to losses from the portable toilets is actually $1,500 (and not $1,000) and that you have to pay the state college an extra $3,000 (not $2,000) so that if you have to negotiate at least you start from a higher level
	Steal	If *The Ocean View* does not give you what you demand, you will compensate yourself by letting yourself into the Inn and walking away with several valuable paintings you noticed in the hallways the last time you were there

4. Independent Variables

To capture the respondent's perception of entitlement, participants rated the degree to which they agreed with the statement "*I deserve a good deal in this agreement"* using a slider ranging from -100 to +100 (values were hidden).[100] In addition, to capture the participant's perception of the nature of the exchange, we asked participants to answer a series of four questions using a 5-point Likert-type scale (ranging from 1 = not at all, to 5 = extremely likely): *To what extent do you see your relationship with The Ocean View as being . . . (1) an economic relationship . . . (2) as about money . . . (3) as being about trust . . . (4) as being about working well together.* Two exchange constructs were created with an economic exchange as the combination of (1) and (2)

100. *See* Malhotra & Gino, *supra* note 21, at 567; Emily M. Zitek, et al., *Victim Entitlement to Behave Selfishly*, 98 J. PERSONALITY & SOC. PSYCHOL. 245, 247–48 (2010).

and a relationship exchange as the combination of (3) and (4).[101]

5. Control Variables

After reading the scenario and being informed of the disruption, the participants answered a series of questions relating to their intention to act honestly and their trust disposition. To capture the respondent's intention to act honestly, the participant rated the degree to which they agreed with the following statement: *How obligated do you feel to act in a completely trustworthy and honest manner in your dealings with The Ocean View?*[102] This question serves to capture the presence of a propensity of the participant to act in a blatantly opportunistic versus honest fashion. To capture the respondent's trust disposition, the participant rated the degree to which they agree with the following statement: *In general, I give people the benefit of the doubt until shown otherwise.*

C. Results

1. Initial Analysis: Lawful Opportunism as a Distinct Construct

Since lawful opportunism, as a contracting behavior, has been theorized but not measured, we conducted an exploratory factor analysis in order to identify the degree to which the outcomes of lawful opportunism, blatant opportunism, and cooperation are distinct factors.[103]

This analysis is exploratory: exploratory factor analysis is designed to explore a data set and not to test hypotheses or theories.[104] Exploratory factor analysis is well suited to

101. *See* Malhotra & Gino, *supra* note 21, at 567.

102. Adopted from *id.* at 566.

103. *See* Chao C. Chen et al., *Guanxi Practices and Trust in Management: A Procedural Justice Perspective*, 15 ORG. SCI. 200, 203–04 (2004) (use of exploratory factor analysis to develop a theoretical construct).

104. Anna B. Costello & Jason Osborne, *Best Practices in Exploratory Factor*

identify if outcomes are related but distinct, as the technique is designed to explore untested concepts.[105] We used an iterated principal axis factoring with a promax rotation so as to allow for the possibility the factors could be correlated.[106]

In order to identify the appropriate number of factors to retain, we followed the approach recommended by Costello and Osborne,[107] using the scree plot of the eigenvalues and identifying the natural bend in the data where the curve flattens. We used the number of data points above the break. The results are in Table 3. We then examined the variable loadings (Table 3) to identify the cleanest structure with variable loadings above 0.30, few item cross-loadings, and factors excluded if fewer than three variables.[108]

The promax rotation allows the factors to correlate and does not impose orthogonal assumption on the data.[109] Table 3 shows one factor—the first outcome of cooperation (CO1) to load on more than one factor—but in opposite directions. Similarly, BO1 loads on both blatant opportunism (Factor 1)

Analysis: Four Recommendations for Getting the Most From Your Analysis, 10 PRAC. ASSESSMENT, RES. & EVALUATION, no. 7, July 2005, at 1, 8.

105. *See, e.g.*, Bradley L. Kirkman & Debra L. Shapiro, *The Impact of Cultural Values on Job Satisfaction and Organizational Commitment in Self-Managing Work Teams: The Mediating Role of Employee Resistance*, 44 ACAD. MGMT. J. 557, 558, 561 (2001).

106. *See* Costello & Osborne, *supra* note 104, at 3 (classifying promax rotation as an "oblique" method and arguing that "oblique rotation should theoretically render a more accurate, and perhaps more reproducible, solution" because it "allow[s] the factors to correlate").

107. *Id.* at 3.

108. *Id.* One of the factors combines two acts that were distinguished only by the substitution of the word "request" in the cooperative version and "demand" in the lawfully opportunistic rendition: "[Request][Demand] that The Ocean View refund you the $6,000 you paid in advance." We observe that even the demand-version of the act is truly at, and arguably does not cross, the threshold of lawful opportunism. The legal argument for this proposition would be that the demand is for restitution (return of money) rather than contract performance. Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J 52, 54 (1936). For these reasons, the one factor with only two factors is not a surprise.

109. *See* Costello & Osborne*, supra* note 104, at 3.

as well as lawful opportunism (Factor 2).

TABLE 3. Exploratory Factor Analysis Results—All Data with only loadings > 0.3 shown.

	With Guile	**Pushing Boundaries**	**Demand Money**	**Cooperate**	
Variable	*Factor1*	*Factor 2*	*Factor 3*	*Factor 4*	*Uniqueness*
CO1	-0.3655			0.3768	0.6521
CO2				0.7044	0.5111
CO3				0.3259	0.8596
CO4			0.8571		0.2543
LO1			0.9129		0.1875
LO2		0.8388			0.3279
LO3		0.6474			0.4812
LO4		0.8328			0.3195
BO1	0.4690	0.3741			0.5321
BO2	0.7623				0.3979
BO3	0.6712				0.555
BO4	0.7103				0.4961

The factors are then calculated for each respondent as follows based on Table 3:

$$\textit{WithGuileFactor} = -0.3655*CO1 + 0.469*BO1 + 0.7623*BO2 + 0.6712*BO3 + 0.7103*BO4$$

$$\textit{PushingBoundariesFactor} = 0.8388*LO2 + 0.6474*LO3 + 0.8328*LO4 + 0.3741*BO1$$

$$\textit{CooperateFactor} = 0.3768*CO1 + 0.7044*CO2 + 0.3259*CO3$$

While three separate outcome types were anticipated, the analysis resulted in four factors encapsulating types of contracting orientations. We also ran the exploratory factor analysis separately by type of contract and disruption across the surveys. The results, found in Appendix B, illustrate equivalence in the number of factors as well as in the items and weights included in each factor. In other words, exploratory factor analysis was resilient across different types of contracting scenarios and types of contracts.

D. *Individual Dispositions Impacting Intended Contracting Behavior*

We turn now to the primary empirical question: *Who is more likely to intend to act with lawful opportunism?* To answer our research question, the intended action scores calculated above from the exploratory factor analysis were broken into 25th percentile blocks, with "high" being in the top 25% of each factor score. This allowed the analysis to capture the likelihood of being in the top 25th percentile of acting "with guile" (for example). A logistic analysis is summarized in Table 4 for each intended action type (with guile, pushing boundaries, and cooperation), where the designation of "high" intended action is regressed onto the independent and control variables. In order to conduct a logistic regression, the independent variables were also converted into flag for "high" scores (top 25%) for entitlement as well as for the perception of being an economic or relationship exchange.

The results show that respondents who view themselves as more entitled (in top 25% of all respondents) are three times more likely to act with lawful opportunism ($p < 0.01$). Thus, we find that *a contractor's sense of entitlement impacts their intention to act with lawful opportunism*; respondents with more entitlement are three times more likely to intend to act with lawful opportunism.

We turn again to Table 4 to test the impact of a contractor's perception of the agreement in economic or relationship terms. We evaluate the significance of (1) high economic exchange on the propensity to act with lawful opportunism, as well as the significance of (2) high relational exchange on the propensity to act with lawful opportunism. The results are presented in Table 4. Respondents who perceive the exchange in economic terms are 64% *more* likely to intend to act with lawful opportunism whereas respondents who perceive the exchange in relationship terms are 29% *less likely* to intend to act with lawful opportunism.

In short, respondents' perception of the exchange in relational versus economic terms positively impacts the intention to act with lawful opportunism whereas respondents' perception of the exchange in relational term negatively impacts the intention to act with lawful opportunism.

Table 4 also illustrates how blatant opportunism differs from lawful opportunism in the individual traits that drive intended behavior. For example, men are nearly 1.5 times more likely to intend to act with guile (blatant opportunism); younger respondents (less than 35 years old) are almost 2.3 times more likely to intend to act with guile. However, age and gender are not significant factors for lawful opportunism.

TABLE 4. Likelihood of being in top quartile for each action type.

	Coefficient (*SE*)[a]		
	High With Guile Factor	**High Pushing Boundaries Factor**	**High Cooperate Factor**
High Entitled	0.92 (0.14)	2.94** (0.55)	1.42* (0.22)
High Economic Exchange	0.46** (0.07)	1.64** (0.22)	1.18 (0.15)
High Relationship Exchange	0.54** (0.09)	0.71* (0.10)	1.90** (0.25)
High Intended Honesty	0.36** (0.07)	1.05 (0.15)	1.23 (0.17)
High Trust Disposition	0.55** (0.10)	1.01 (0.15)	1.02 (0.15)
Male	1.46* (0.21)	1.17 (0.15)	0.89 (0.11)
Age Over 35	0.44** (0.07)	1.03 (0.14)	0.98 (0.13)
X^2	192.74	64.18	43.60
Prob > X^2 [b]	<0.001	<0.001	<0.001

[a]Outcome represents the result of the logistical analysis and is presented as coefficient (*SE*); for all, $N = 1{,}370$; statistical significance is reported by the presence of asterisks (*) where * indicates $p < 0.05$ and ** $p < 0.01$.

[b]Prob > X^2 represents the probability of obtaining the reported chi-square statistic given that the null hypothesis is true (i.e. traditional "p-value" for the model, establishing the effect of the independent variables, taken together, on the dependent variable)

Further, respondents who view the exchange in more economic terms (i.e., about money; an economic exchange) are 40% less likely to act with guile. Put another way, respondents who do *not* view the exchange in more economic terms are two times more likely *not* to choose to act with guile. Respondents who view the exchange as an economic one are less likely to act with blatant opportunism, but more likely to act with lawful opportunism.

In sum, the exploratory factor analysis we conducted supports Williamson's theoretical suggestion that lawful opportunism represents a distinct construct to characterize contracting behavior. This study illustrates how lawful opportunism is distinct not only as evidenced by the exploratory factor analysis, but also that it differs in the behavioral profile of individual-level dispositions likely to yield lawfully opportunistic rather than blatantly opportunistic acts. More work should be done to understand how and under what conditions lawful opportunism manifests in contracting, and how it can be prevented.

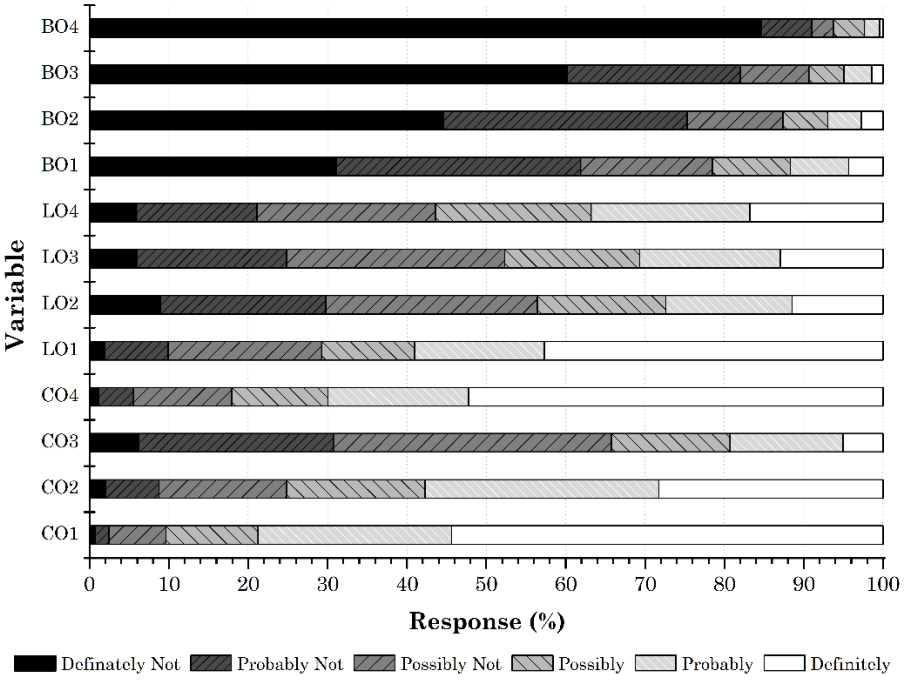
TABLE 5. Percent of Respondents in the HIGH Intended Lawful Opportunism Factor.

High Lawful Opportunism

		Entitlement	
		Low	**Very High**
Economic Exchange	**Hi**	20% N = 284	48% N = 214
	Low	14% N = 660	43% N = 212
		Low	**Very High**
Relationship Exchange	**Hi**	12% N= 310	40% N= 168
	Low	17% N= 634	50% N= 258

Figure 1 shows the distribution of responses for each intended action and illustrates that blatant opportunism has a high proportion of "definitely not" (black/dark gray), whereas most of the cooperation actions have a high degree of "definitely" and "probably" (light gray/white). The lawful opportunism options are noticeably more attractive to contractors than blatant opportunism, underscoring the practical importance of understanding and overcoming this transaction cost.

FIGURE 1. Distribution of Responses for Each Intended Action.[a]



[a]*Aggregated Data Across Surveys.* Variables are abbreviated as follows: *BO* (blatant opportunism), *LO* (Lawful opportunism), and *CO* (Cooperation).

III. DISCUSSION

This Article's findings support Williamson's specification of lawful opportunism as a contracting behavior that is distinct from the blatant and guileful forms of opportunism,

and also from cooperative behaviors that are relationship preserving. Crucially, the empirical study reinforces the construct validity of entitlement as the wellspring of lawful opportunism.[110] This was the conclusion of the effort in Part I to develop Williamson's account to address the character trait that unlocks this form of opportunism, the way guile opens the door to blatant opportunism. Far and away, the key factor that emerged as a predictor of an intention to act with lawful opportunism, from among those studied, is a strong sense of entitlement. Respondents who rated highest (top quartile) for a strong sense of entitlement were three times more likely than all other respondents to act with lawful opportunism. What turns the cracks in contracts into lawful opportunism is a strong enough sense of entitlement, not only conceptually (as set forth in Part I), but also in our study as a predictor of what makes one person more or less likely to choose to so act.

In addition to the sense of entitlement and demographic factors, we also studied the influence of the mindset that participants brought to the deal vignette—categorized as economic or relational. With respect to the influence on lawful opportunism, the results support common sense: a more economic mindset was more likely (by 64%) to choose enforcement strategies in the aftermath of calamity, whereas a more relational mindset was less likely (by 29%) to do so. Less intuitive was the influence of the economic mindset on blatant opportunism. Why were respondents who reported an economic mindset so much less likely to act with blatant opportunism? One possible explanation is that these respondents' increased attraction to lawful opportunism crowded out and displaced the blatantly opportunistic alternatives for capturing value post-calamity. What did increase the likelihood of intending to act with guile (blatant

110. *See* Melenie J. Lankau & Terri A. Scandura, *An Investigation of Personal Learning in Mentoring Relationships: Content, Antecedents, and Consequences*, 45 ACAD. MGMT. J. 779, 783 (2002) ("Results of the . . . exploratory factor analysis pilot study provide preliminary construct validity evidence.").

opportunism) were demographic factors, specifically age and gender. Men were approximately 1.5 times more likely to intend to act with guile (blatant opportunism), and younger respondents (less than 35 years old) were approximately 2.3 times more likely to intend to act with guile. However, age and gender were not significant factors for lawful opportunism.

A. *Limitations*

We have stressed that the empirical analysis reported in this Article is exploratory in nature. Further study is required to confirm the robustness of the tripartite conceptualization of contracting strategies (blatant opportunism, lawful opportunism, and cooperation) as distinctive categories of intended behaviors.[111] Analytically, these categories are distinct for the reasons set forth in the Introduction and Part I. However, in the world of contracting, do parties decide how to confront calamity based on a predisposition towards one strategy (e.g., tends to act guilefully, rather than publicly and lawfully expressing their strong sense of entitlement), or by considering the array of discrete options, as listed in Table 3, and ranking them according to relevant metrics (e.g., out-of-pocket and opportunity costs, or reputation effects)?[112] Put differently, how and in what ways are our study's findings sensitive to the specific array of intended actions presented to participants? Regardless, this analysis suggests the importance of imagination[113] and open-mindedness in

111. *See supra* note 99 (addressing a limitation with the instrument).

112. *See supra* Table 2 (detailing intended actions presented to respondents). For example, "Demand that The Ocean View pay the additional $2,000 you will have to pay the state college to put on the festival at the stadium" versus "Be prepared to tell the owner of The Ocean View that if you do not get what you demand, you will ask your friend, who is a reporter with the local newspaper, to write (undeservedly) negative reviews about The Ocean View."

113. *See* Patricia H. Werhane, *Moral Imagination and the Search for Ethical Decision-Making in Management*, BUS. ETHICS Q. (SPECIAL ISSUE) 75, 76 (1998) (arguing that unethical actors in business need "moral imagination . . . . [because

casting for a broad net of potential next steps as an antidote to lawful opportunism. Indeed, one way to think about a high tendency to act in a lawfully opportunistic way is fixation on one's sense of entitlement towards the expected value of the contract to the exclusion of other ways out of the mess: blinkered blindness does the work.[114]

In addition, the measurement of cooperation, lawful opportunism, and blatant opportunism is driven by theory. Further confirmatory analysis should be performed in conjunction with the development of instruments to test for different contracting contexts and outcomes.

B. *Further Research*

Our exploratory study discloses a number of important directions for further empirical and conceptual inquiry. From a behavioral and organizational perspective, a key set of questions concerns the variety of antecedents that influence a contractor's sense of entitlement in a deal—at the moment of choice. There are influences on two levels: (1) the individual's personal predispositions and (2) the history and circumstances of the deal and relationship. How do these factors interact to underpin choice? With respect to the mindset of the participant towards the deal—economic or relational—what determines whether a party relates to a deal primarily on economic or relational terms? And with respect to all these variables, to what extent do individuals acting on behalf of organizations rely on their personal predispositions and mindsets—for example, when they receive a phone call from their counterparty's agent relaying the bad news about the disruption—and to what extent do they channel an organizational ethos in those moments of truth?

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t]hey lack a sense of the variety of possibilities and moral consequences of their decisions").

114. *Cf. id.* at 79 ("Now and again, however, our perspectives become narrow, microscopic or even fantasy driven, or a particular point of view becomes ingrained so that one begins adopt only that perspective.").

The heartiest conceptual question set aside to accomplish this Article's objectives[115] is explicating why Williamson was right to lump lawful opportunism with blatant opportunism as two species in the same genus. What is actually wrong with pressing the legal entitlements that one happens to have in contract?[116] Put differently, can one draw a clean line to separate warranted legal enforcement (for example, suits against Wells Fargo by defrauded customers (Anecdote 1)), from assertedly opportunistic forms of enforcement (for example, Anecdotes 4 to 6)? So far as the principles of governance are concerned,[117] the matter is semantic to the extent the transaction costs are real and people get pushed away from deals they would otherwise contemplate and pursue.[118] Nevertheless, philosophically speaking, is it fair to call this opportunism? If so, why?

A final set of critical questions concern prophylaxis—both at the institutional and managerial levels. What can courts (or legislatures) do to undercut the grip of lawful opportunism? Williamson—and the contracts literature

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115. *See supra* note 37.

116. For example, "contract is consent" theorist Randy Barnett might argue that the parties' economic bargain indicates that they intend to be legally bound by the contract's terms, however courts will enforce them, regardless the scope of the bargain. *See* Barnett, *supra* note 57, at 655.

117. According to Williamson, "Lon Fuller's definition of 'eunomics' as 'the science, theory or study of good order and workable arrangements' is very much in the spirit of what I refer to as governance." Oliver E. Williamson, *Revisiting Legal Realism: The Law, Economics, and Organization Perspective*, 5 INDUS. AND CORP. CHANGE 383, 397 (1996) (quoting Lon L. Fuller, *American Legal Philosophy at Mid-Century: A Review of Edwin W. Patterson's* Jurisprudence, Men and Ideas of the Law, 6 J. LEGAL EDUC. 457, 477 (1953)). Fuller understood the insights of eunomics to consist in those natural laws that constrain and guide the mechanisms of what will actually work to realize ends given the way humans are and how they interact institutionally. In this prism, the propensity to lawful opportunism poses a limit to the promise of literal enforcement to serve as fitting institutional means to economic ends. *See* Lon L. Fuller, *American Legal Philosophy at Mid-Century: A Review of Edwin W. Patterson's* Jurisprudence, Men and Ideas of the Law, 6 J. LEGAL EDUC. 457, 447–78 (1953).

118. Compare with the unqualified interest in dissuading, for example, con artists from entering into contracts by virtue of robust enforcement of breach of contract claims.

generally[119]—looks to the fine tuning of excuse doctrine—more or less strict—though he sees no way around the problem entirely.[120] Another kind of solution that has been suggested is to grant courts the authority to tailor the outcome to the facts on behalf of the parties,[121] with the discretion of the chancellors to craft a fitting remedy.[122] If radical alternatives are on the table,[123] are there any other doctrinal strategies available to address the problems created by literal enforcement? Switching to the standpoint of contracting parties—who must take the law as it is—are there generic ways to insulate against the hazards of naïveté?[124] An exciting line of inquiry is to synthesize the learning from the shared economy and the strategies and algorithms employed for contracting and trust that diminish the cracks for lawful opportunism to emerge in those

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119. The literature is vast. *E.g.*, Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029 (1992); Joskow, *supra* note 17; Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977); Richard E. Speidel, *Contract Excuse Doctrine and Retrospective Legislation: The Winstar Case*, 2001 WIS. L. REV. 795.

120. Williamson, *supra* note 7, at 273.

121. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 670 (1997) ("'[T]ailored' default rules require lawmakers—generally judges—to create default terms to govern a relationship between contracting parties based on the specific characteristics and circumstances of those parties.").

122. Russell Fowler, *A History of Chancery and Its Equity: From Medieval England to Today's Tennessee*, TENN. B.J., Feb. 2012, at 20, 21 ("The chancellor could also construct new remedies or 'extraordinary' solutions not offered by inflexible law court procedures and writs.").

123. For a contracts scholar dismissing views like Korobkin's proposal, *supra* note 121, see John P. Dawson, *Judicial Revision of Frustrated Contracts: The United States*, 64 B.U. L. REV. 1, 37 (1984) (urging that "judges . . . abstain from rewriting the contracts of other people [because] they are not qualified for such tasks").

124. The contracts literature has pursued this question primarily from the standpoint of the default rules that courts might introduce to *substitute* for contracting that the parties did not do (generally under the rubric of "majoritarian" default rules), or to induce contracting they should do ("penalty" default rules). For discussion of the categories of default rules, see generally Ayres, *supra* note 61.

spaces.[125]

IV. CONCLUSION

This Article was motivated by an inquiry into Williamson's provocative theorization of a form of opportunism that is lawful rather than guileful. To supplement Williamson's account, Part I looked to the agreement from *Taylor v. Caldwell* to trace the conditions that convert a good faith bargain into a recipe for lawful opportunism. The bargain must be naïve in a manner that gets exposed by a highly consequential disturbance, and the actor must feel entitled enough to press for performance, notwithstanding the circumstances. The empirical study confirms the salience of entitlement for lawful opportunism: entitlement is to lawful opportunism what guile is to blatant opportunism.

This research is intended to provide the foundation for further study of lawful opportunism. The higher ambition is to help pave the way for the design of interventions—at the institutional (courts and law) and contractor levels—to help dissolve the transaction costs of lawful opportunism to the extent possible. In terms of the law and courts, the obvious question is whether literal enforcement is a necessity or could be avoided. In behavioral and organizational terms, what makes principals and their agents feel entitled enough to squeeze the cash value from cracks in contracts? What techniques are available to contractors, at the front end—and on an ongoing basis—to deflate an overly strong sense of entitlement and motivate cooperation instead? These are questions with significant legal, ethical, and economic implications ripe for further behavioral and conceptual study.

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125. *E.g.*, Vanessa Katz, *Regulating the Sharing Economy*, 30 BERKELEY TECH. L.J. 1067, 1071 (2015) (noting that "[s]haring platforms exercise control over transactions by directing the form and content of listings, issuing minimum quality standards for providers, providing an electronic payment system, and charging a transaction fee for each exchange").

APPENDIX A

TABLE A1. Survey Design

	Question	Label	Values
1	**Gender** *What is your gender?*	Male Female	1 2
2	**Age** *How old are you?*	Under 18 18–24 25–34 35–44 45–54 55–64 65 +	1 2 3 4 5 6 7
3	**Contracting Scenario** Conditions: Generic, Null, Specific	**Intention to Act Opportunistically Rating** *How obligated do you feel to act in a completely trustworthy and honest manner in your dealings with Ocean View?*	Not at all ⋮ Extremely
4	**Entitlement (ENT)**	**Condition 1:** Matched Disruption OR **Condition 2:** Unmatched Disruption *How much do you agree or disagree with the following statement:* ***I deserve a good deal in this agreement***	Disagree ⋮ Agree
5–16	**Blatant Opportunity, Lawful Opportunity, or Cooperative Acts**	Read each option on its own and decide if it is a step you would be likely to choose. *Please assess the likelihood you would do the following:* ***e.g. Call back The Ocean View to find out what the owner has in mind***	Definitely ⋮ Definitely Not 1 ⋮ 6
17	**Relationship 1 (R1)** *To what extent do you see your relationship with Alex as being . . .* ***an economic relationship***.	Not at all . . . Slightly Somewhat Moderately Completely	1 ⋮ 5
18	**Relationship 2 (R2)** *To what extent do you see your relationship with Alex as being . . . a* ***relationship of trust.***	Not at all ⋮ Completely	1 ⋮ 5

19	**Relationship 3 (R3)** *To what extent do you see your relationship with Alex as being . . . **about money**.*	Not at all ⋮ Completely	1 ⋮ 5
20	**Relationship 4 (R4)** *To what extent do you see your relationship with Alex as being . . . **about working well together**.*	Not at all ⋮ Completely	1 ⋮ 5
21	**Trust Disposition (TD)** *How much do you agree or disagree with the following statement:*	***In general, I give people the benefit of the doubt until shown otherwise***	-100 ⋮ +100

APPENDIX B

Table B1 shows the correlation of the intended action with the grey boxes highlighting how each category of actions is correlated with actions of the same type. Aside from CO3, cooperative acts are correlated with each other as are blatant opportunist actions. Further, cooperative actions are *negatively* correlated with blatant opportunism—aside from CO3 which is positively correlated.

Lawful opportunism has greater correlation with blatant opportunism than with cooperation (e.g., LO2–4 are positively correlated with BO1–3); lawful opportunistic acts are correlated with other lawful opportunistic acts. The results suggest lawful opportunism is viewed as a form of opportunism and not as a form of cooperation.

TABLE B1. Correlation table of intended actions—reported if $p < 0.05$ and stared if $p < 0.01$.

	CO1	**CO2**	**CO3**	**CO4**	**LO1**	**LO2**	**LO3**	**LO4**	**BO1**	**BO2**	**BO3**	**BO4**
CO1	1											
CO2	0.3173*	1										
CO3			1									
CO4	0.1897*			1								
LO1	0.1596*		-0.0964*	0.7668*	1							
LO2						1						
LO3				0.1274	0.2196*	0.5592*	1					
LO4	0.0861*	0.0908*			0.0788*	0.6742*	0.5716*	1				
BO1	-0.1704*	-0.0541	0.0819*	-0.1105*		0.4275*	0.3770*	0.3991*	1			
BO2	-0.2474*	-0.0721*	0.1326*	-0.1121*		0.2281*	0.2856*	0.2490*	0.5300*	1		
BO3	-0.2658*		0.1302*	-0.1859*	-0.0989*	0.1674*	0.1985*	0.1390*	0.3830*	0.4906*	1	
BO4	-0.3484*	-0.1332*	0.1382*	-0.2247*	-0.1318*	0.1033*	0.0872*	0.0835*	0.3238*	0.5197*	0.4772*	1

TABLE B2. Comparative factor loadings for all variables considering various conditions.

a)

Unmatched Weather - Regulation

Variable	With Guile	Pushing Boundaries	Demand Money	Cooperate
CO1	-0.332			0.3811
CO2				0.749
CO3				0.3641
CO4			0.9357	
LO1			0.8517	
LO2		0.8658		
LO3		0.6105		
LO4		0.7802		
BO1	0.5083	0.3373		
BO2	0.8143			
BO3	0.6964			
BO4	0.673			

b)

Regulation Matched

Variable	With Guile	Pushing Boundaries	Demand Money	Cooperate
CO1				0.6258
CO2				0.5141
CO3				
CO4			0.8602	
LO1			0.9276	
LO2		0.7913		
LO3		0.6289		
LO4		0.8275		
BO1	0.4418	0.3538		
BO2	0.6541			
BO3	0.6406			
BO4	0.6720			

c)

Weather Matched

Variable	With Guile	Pushing Boundaries	Demand Money	Cooperate
CO1	-0.3842			0.3952
CO2				0.5699
CO3	0.4122			0.4365
CO4			0.8247	
LO1			0.9465	
LO2		0.7598		
LO3		0.6076		
LO4		0.9036		
BO1	0.5413	0.3457		
BO2	0.8664			
BO3	0.6602			
BO4	0.7009			

d)

Weather Unmatched (Reg-Weather)

Variable	With Guile	Pushing Boundaries	Demand Money	Cooperate
CO1	-0.6236			0.3286
CO2				0.6964
CO3				0.3390
CO4			0.7924	
LO1			0.9169	
LO2		0.9200		
LO3		0.6658		
LO4		0.7020		
BO1	0.4332	0.3201		
BO2	0.7807			
BO3	0.5205			
BO4	0.8455			

Impact of Opportunism Factors on Trust and Intended Honesty

Respondents with higher "with guile" intended action scores have a lower disposition to trust ($p < 0.001$) and lower intention to act honestly ($p < 0.001$). They are 6.5 times more likely to be in the lowest 25% of respondents in regards to intended honesty and nearly two times more likely to be in the lowest 25% of respondents in regards to trusting others. Individuals who act with guile self-report to not be honest

and not trust others.

However, respondents with the highest likelihood to push boundaries (factor 2) are not significantly different in their trust and only slightly less likely to be in the lowest category of intended honesty.

Where respondents who intend to act with guile do not trust others and admit to not be honest in their dealings, the same is not true of those who act with lawful opportunism.

TABLE B3. How outcome factors impact trust and honesty. Significant odds ratios are reported in bold.[a]

Factor	**High Trust Disposition**		**High Intended Honesty**		**Low Intended Honesty**		**Low Trust Disposition**	
	Odds Ratio	*P>z*	*Odds Ratio*	*P>z*	*Odds Ratio*	*P>z*	*Odds Ratio*	*P>z*
High With Guile	**0.45**	**0.00**	**0.31**	**0.00**	**6.67**	**0.00**	**1.90**	**0.00**
High Pushing Boundaries Factor	1.02	0.91	1.18	0.25	**0.64**	**0.01**	0.94	0.68
High Demand Money Factor	**1.67**	**0.00**	**1.60**	**0.00**	**0.50**	**0.00**	0.77	0.06
High Cooperate Factor	1.12	0.43	1.20	0.18	**0.71**	**0.05**	0.82	0.20
Male	**0.75**	**0.03**	0.98	0.90	1.18	0.26	**1.34**	**0.03**
AgeUnder35	**0.72**	**0.02**	**0.77**	**0.05**	2.06	0.00	0.97	0.81

[a]Aggregated data across surveys; Analysis of all factors.

APPENDIX C

The base contracting scenario will be seen by all respondents and is based on a classic contracting dilemma around renting a location for a performance. This is a hypothetical agreement. The respondents read the following:

> You produce concerts through your business, and you focus on festivals. For this year's Memorial Day Festival, you have reserved a venue close to the ocean. The Ocean View—an Inn with large grounds—has offered its grounds in exchange for $6,000: $1,500 as a deposit and $4,500 one month before the event.
>
> With the venue secured, you then book the infrastructure needed—security, portable toilets, food vendors, etc.—as well as booking the acts and you begin to sell tickets.

This scenario is designed to create the potential for real damages, specifically, the loss of deposits paid to subcontractors and potential loss of revenue. The respondents were assigned one of three possible conditions: a generic condition, null condition, and a specific condition as follows:

> **Generic Condition.** The following was included: The agreement provides that if The Ocean View is unable to provide the venue for any reason, your remedy will be a refund of all amounts paid.
>
> **Specific Condition**. The following was included: The agreement provides that in case of a weather event or natural disaster that makes the festival impossible to hold at the venue, your remedy will be a refund of all amounts paid.
>
> **Null Condition**. No condition included.

After reading the scenario and then responding to a question about their intention to act honestly, one of two disruption conditions is introduced to respondents—one concerning a natural disaster (a hurricane) and one concerning a regulatory change (environmental regulation)—which make the event impossible to continue.

> **Matched Disruption:**
> It is ten days before the event, and you have already paid the remaining $4,500, and you sold out the venue's capacity of 3,000

tickets. A devastating hurricane has destroyed the shore area around The Ocean View. You have just received an email from the owner of The Ocean View:

> I have terrible news. This hurricane is even worse than we had feared. Power lines and telephone lines are down, and water service has been interrupted. Trees have been downed around the venue area where the festival would have taken place. Initial reports from the town government indicate that the venue area is lowest priority, and as you know, there are enormous amounts of destruction to attend to. I am afraid there can be no Memorial Day festival at The Ocean View.

Unmatched Disruption:
It is ten days before the event, and you have already paid the remaining $4,500, and you sold out the venue's capacity of 3,000 tickets. You have just received an email from the owner of The Ocean View:

> I have terrible news. The town government has issued new regulations for wetlands. These regulations include a new map of town wetlands, and our grounds (along with much of the other land near the ocean) qualifies as "wetlands." Under these regulations no commercial activity whatsoever is permitted on wetlands. I am afraid there can be no Memorial Day festival at The Ocean View.

In case of either disruption, the participant will be told:

> There is an option available: the state college stadium. However, the rental fee is an extra $2,000, and you will have no use for the portable toilets you already paid $1,000 to rent.