Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer

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Given the high cost of litigation,[1] it is not surprising that most lawsuits settle out of court prior to adjudication. But the rate of settlement is extraordinarily high—approximately ninety to ninety-five percent or more of civil lawsuits not dismissed by courts in the early stages of litigation settle short of trial.[2]

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1. Financial costs include both out-of-pocket expenses—legal fees and expert witness fees, among other costs—and the "monetary value of the time clients spend on cases." David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91 (1983). Generally speaking, the further a case progresses through the system, the higher the costs incurred—increased legal fees (at least if attorneys charge on an hourly basis), trial fees (including expert witness fees, stenographic costs, and travel expenses), and client time away from work. *See id.* at 104-06; *cf. id.* at 91 (listing the average amount of time lawyers spent on each step of the litigation process). Trials cost so much more than settlement that some theorists comparing the two assume the costs of settling to be equal to zero. *See, e.g.*, Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1075 (1989).

The psychic costs of trials are also notoriously high. *See, e.g.*, Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 9 (1986) ("For plaintiffs and defendants alike, litigation proves a miserable, disruptive, painful experience. Few litigants have a good time or bask in the esteem of their fellows—indeed, they may be stigmatized. Even those who prevail may find the process very costly." (footnotes omitted)); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2621 (1995) ("Learned Hand once wrote, 'I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death.' This is conventional wisdom. Lawsuits are expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming.").

2. Estimates of the precise rate of settlement vary according to methodology and types of disputes analyzed, but virtually no one seriously doubts that, as one author has put it, "Settlement is where the action is." Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation*

The traditional law and economics model of litigation suggests that this is readily predictable.[3] This model assumes that litigants seek to maximize their wealth through the legal system, and that they pursue this goal in a consistent, "rational"[4] way. In what has become the classic statement of this model, Priest and Klein predicted that litigants will compare the financial value of a settlement offer to the expected financial value of trial and select the course of action with the highest expected value.[5] The model predicts that trials will occur between risk-neutral parties only when the difference between the parties' projected risk-adjusted outcome of trial exceeds their joint costs of staging a trial.[6] If at least one party is risk

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System—And Why Not?, 140 U. PA. L. REV. 1147, 1212 (1992); *see, e.g.*, H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 179 (2d ed. 1980) (finding that less than 1% of automobile accident claims led to a trial); Patricia Munch Danzon & Lee A. Lillard, *Settlement Out of Court: The Disposition of Medical Malpractice Claims*, 12 J. LEGAL STUD. 345, 365 (1983) (reporting that fewer than 10% of medical malpractice claims are resolved by verdict); Donald G. Gifford & David J. Nye, *Litigation Trends in Florida: Saga of a Growth State*, 39 U. FLA. L. REV. 829, 855 (1987) (finding an even lower trial rate—ranging from 1.0% to 1.6%—in Florida between 1979 and 1985); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996) ("Of the hundreds of thousands of civil lawsuits that are filed each year in America, the great majority are settled; of those that are not settled, most are ultimately dismissed by the plaintiffs or by the courts; only a few percent are tried to a jury or a judge."); George Lowenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 135 (1993) (estimating that 95% of civil suits settle prior to trial); Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 838-39 n.15 (1990) (extrapolating from data to determine that only 5.3% of federal civil suits that terminated in 1988 were maintained through trial); Trubek et al., *supra* note 1, at 89 (finding that approximately 8% of civil suits filed in state and federal courts went to trial).

3. *See, e.g.*, John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 285-88 (1973) (modeling the economics of risky conflicts); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66-69 (1971) (exploring settlement patterns in criminal cases); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417-29 (1973) (examining the impact of procedural rules on settlement); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4, 12-17 (1984) (discussing the economic implications of settlement and litigation).

4. There is no single definition of what constitutes "rational" decisionmaking, but most accounts implicitly or explicitly presume rational individuals abide by the following principles: (1) *Ordering of Alternatives*: rational individuals can compare alternatives and decide either that they prefer one to another or are indifferent between the two; (2) *Dominance*: they should never prefer a decision that yields outcomes equivalent to or worse than an alternative on every dimension; (3) *Cancellation*: in choosing between two options, outcomes that will be the same under either choice should not affect the choice; (4) *Transitivity*: if choice *A* is preferred to choice *B*, and choice *B* is preferred to choice *C*, choice *A* is preferred to choice *C*; (5) *Continuity*: a gamble between a good outcome and bad outcome should be preferred over a certain intermediate outcome if the likelihood of the bad outcome occurring is sufficiently low; and (6) *Invariance*: the way in which two options are presented should not affect the decisionmaker's choice between them. *See* SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 81-82 (1993). We will assume that the term rational embodies these factors.

5. *See* Priest & Klein, *supra* note 3, at 12-13.

6. *See id.* at 12.

averse, even many disputes that fit this description will settle.[7] Because trial involves high fixed costs for both litigants, it follows from the basic law and economics model that trials will occur only when one or both parties greatly overestimate the quality of his or her case.[8]

Given this model's assumptions, its predictions are sensible. From the perspective of expected value analysis, trial costs avoided through settlement are "gains in trade" that can be divided between the parties, leaving both better off than they would have been had they invested resources in formal adjudication. But the model's basic assumptions of wealth maximization and completely rational behavior ring hollow in the ears of lawyers who have observed the behavior of litigants. The model's assumptions are also undermined by a growing body of empirical evidence demonstrating that litigants often make decisions in ways that depart from these paradigms.[9] The list of reasons litigants might not behave in accordance with the model's predictions is impressively long: Litigants litigate not just for money, but to attain vindication;[10] to establish precedent;[11] "to

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7. Risk aversion, usually thought to characterize individuals, may also be significant in commercial entities, which often face higher costs in the capital markets when large contingent liabilities are looming. *See* RICHARD LEMPERT & JOSEPH SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE 147 (1986).

8. Of course, the magnitude of the overestimation necessary to cause a trial to occur will vary inversely to the stakes of the lawsuit. Thus, a smaller overestimation is necessary if a very large sum of money is at stake relative to the cost of staging a trial.

9. *See, e.g.*, Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 116-18 (1996) (reporting empirical studies of human decisionmaking which suggest that current economic models do not accurately describe litigants' behavior).

10. *See, e.g.*, Randall P. Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789, 799 (1986) (noting that libel plaintiffs sue not for economic gain but because "litigation is the only effective means of achieving a remedy for their reputational, as distinguished from economic, harm"); Gross & Syverud, *supra* note 2, at 58 ("[D]octors are insisting on trial in some medical malpractice cases in which they expect to obtain public vindication. This is most likely to happen when the doctor is convinced that she acted in a professionally responsible manner, but has nonetheless been wounded in her self-esteem . . . ."); Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153 (1984) (arguing that "the grievant wants vindication, protection of his or her rights (as he or she perceives them), an advocate to help in the battle, or a third party who will uncover the 'truth' and declare the other party wrong"); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 63 (1985) ("[A] defendant may desire to complete the process of litigation even if victory is unlikely, because victory in court may be the only way to obtain public vindication."); *see also* David A. Rammelt, Note, *"Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?*, 65 IND. L.J. 965, 1001 (1990) ("[T]here are some disputes in which the litigants' primary motivation for filing suit does not involve monetary compensation or redress, but rather involves an overwhelming element of personal vindication." (citation omitted)). *But see* LEMPERT & SANDERS, *supra* note 7, at 175 (concluding from a series of studies that only plaintiffs in discrimination suits were likely to pursue litigation for the sake of justice rather than economic well-being); Gross & Syverud, *supra* note 2, at 58 (finding that relatively few disputes, other than some medical malpractice disputes, went to trial because of either party's desire for vindication).

11. *See, e.g.*, Luban, *supra* note 1, at 2623 ("[A]djudication may often prove superior to settlement for securing peace because the former, unlike the latter, creates rules and precedents."); Simon, *supra* note 10, at 63 ("A corporate defendant may refuse settlements to demonstrate that future

express their feelings";[12] to obtain a hearing;[13] and to satisfy a sense of entitlement regarding use of the courts,[14] all of which can easily preclude out of court settlement. Moreover, their decisions to settle or litigate may be affected by the context of the choice,[15] the frame in which it is presented,[16] the identity of the person describing the choice,[17] whether the litigants have faced similar choices before,[18] the litigants' self-serving

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litigants should not file suit unless they are prepared to go to trial, because settlement dollars will not be forthcoming even if the settlement demands are reasonable.").

12. Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 L. & SOC'Y REV. 339, 346 (1976) (describing a frequent motivation of plaintiffs in small claims courts who filed suit but did not make appearances to pursue their claims).

13. *See, e.g.*, JANE W. ADLER ET AL., SIMPLE JUSTICE: HOW LITIGANTS FARE IN THE PITTSBURGH COURT ARBITRATION PROGRAM 65 (1983) (noting that litigants want "an opportunity to have their case heard" and that they "take[ ] it for granted that they ha[ve] a right to appear in person, to be heard fully, and to be treated even-handedly"); Gross & Syverud, *supra* note 2, at 57 n.87 (citing "[s]everal scholars [who] have discussed the importance of one particular non-economic motive: the desire to have a day in court to obtain formal justice"); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 99 ("[T]he most frequently cited objective of lay litigants in adjudicatory proceedings was to 'tell my side of the story' . . . ."); Simon, *supra* note 10, at 63 ("[A] plaintiff . . . may want to complete the process of litigation in order to feel that she has had her day in court. Settlement may not satisfy this litigant even if the settlement would be more favorable than the outcome at trial . . . .").

14. *See* SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 179 (1990) ("The [working-class] people who go to court in these communities do so not out of an eagerness to use the court but out of a sense of entitlement, a sense that the courts are a resource which they, as citizens, have a right to use.").

15. *See, e.g.*, Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 297-300 (1996) (demonstrating experimentally that the choice between two settlement offers can be affected by the presence or absence of a third choice).

16. *See, e.g.*, Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 11-21 (1994) [hereinafter Korobkin & Guthrie, *Opening Offers*] (demonstrating the effects of anchors and dissonance avoidance on settlement decisionmaking); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 129-42 (1994) [hereinafter Korobkin & Guthrie, *Psychological Barriers*] (demonstrating the effects of frames and anchors on settlement decisionmaking); Rachlinski, *supra* note 9, at 118 (demonstrating through laboratory experiments that whether a given settlement offer is framed as a "gain" or a "loss" can affect the desirability of the offer, and claiming that this leads to "decisions that are suboptimal, from the perspective of a rational model").

17. *See, e.g.*, CONSTANCE A. STILLINGER ET AL., THE "REACTIVE DEVALUATION" BARRIER TO CONFLICT RESOLUTION (Stanford Ctr. on Conflict and Negotiation Working Paper No. 3, 1988) (identifying "the tendency for disputants to devalue each other's concessions as a direct *consequence* of the fact that it's their *adversary* who has offered them" (emphasis in original)); Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 400 (1991) (noting that a mediator "may help to redefine or reframe the adversaries' perceptions of a proposed settlement . . . in a way that facilitates concession-making"); *see also* Korobkin & Guthrie, *Psychological Barriers*, *supra* note 16, at 150-60 (suggesting that reactive devaluation might be a version of spiteful behavior, rather than a separate phenomenon).

18. *See, e.g.*, Korobkin & Guthrie, *Opening Offers*, *supra* note 16, at 20-21 (suggesting that the psychological need to avoid dissonance might lead litigants to disfavor settlement offers solely because they disfavored them in the past, even when circumstances have changed).

biases concerning the fairness of their position,[19] habit, unyielding conceptions of justice,[20] and myriad other factors.[21]

All of this raises a puzzling question: How does the economic model accurately predict the high rate of settlement if disputant behavior systematically departs from the assumptions of the model in ways that suggest lower rates of settlement? One likely answer, we submit, is the role of lawyers in the litigation system. Although most accounts of lawsuit settlement—including our own prior work[22]—share the simplifying assumption that litigation is a two-party activity carried out by a plaintiff and a defendant,[23] the feature of litigation bargaining that most differentiates it from other types of negotiation is the presence of lawyers.[24] In this article, we provide experimental evidence supportive of the hypothesis that lawyers as a class share an analytical orientation to decisionmaking that can facilitate a higher rate of settlement than behavioral scientists would expect litigants to negotiate on their own.[25]

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19. *See, e.g.*, Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1337 (1995) (proposing that failure to settle can reflect the parties' overconfident predictions of trial outcomes based on their self-serving conceptions of what adjudicated result would be fair).

20. *See, e.g.*, Merry & Silbey, *supra* note 10, at 158 ("Our data suggest that much dispute behavior continues to be governed by affect, habit, and conceptions of right, appropriateness, or fittingness that are not subject to rational evaluation but are part of the taken-for-granted quality of daily life in particular communities.").

21. *See generally* BARRIERS TO CONFLICT RESOLUTION (Kenneth J. Arrow et al. eds., 1995) [hereinafter BARRIERS] (describing institutional, strategic, and psychological barriers to conflict resolution).

22. *See* Korobkin & Guthrie, *Opening Offers*, *supra* note 16; Korobkin & Guthrie, *Psychological Barriers*, *supra* note 16.

23. A notable exception to this pattern is the literature on the impact that fee arrangements may have on attorney and client incentives in litigation. *See infra* notes 147-51.

24. *See* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 510 (1994) (deeming the attorney's role as agent in the dispute-resolution process to be the central institutional characteristic of the legal system).

25. In a recent article, Gilson and Mnookin used a game-theoretic perspective to argue that lawyers, as repeat players in litigation, might be able to establish reputations for cooperative behavior and thus solve collective-action problems faced by litigants who would otherwise be encouraged to litigate acrimoniously. *See* Gilson & Mnookin, *supra* note 24, at 512-13, 522-27. Although Gilson and Mnookin analyzed behavior during the discovery phase of litigation, *see id.* at 514, their theory suggests that lawyers with a reputation for cooperativeness might enable litigants to reach more (and faster) settlements when continuing litigation would be a wasteful course of action. *See id.* at 564. Gilson and Mnookin's theory, which assumes rational behavior on the part of actors in the litigation system, *see id.* at 515, provides an explanation of how lawyers can promote settlement that fits well within the boundaries of economic theory. *Cf.* Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 FORDHAM L. REV. 149, 149-50 (1996) (employing a similar game-theoretic approach to argue that lawyers representing regulated firms and government regulators can cooperate and thereby improve the efficiency of the regulatory process). Our account, while different from Gilson and Mnookin's, is complementary to it. The combination of our stories might provide an even stronger explanation of the high rate of settlement than either one alone.

Our argument has three major components: First, relying on the results of a series of controlled experiments, we conclude that lawyers and litigants, on average, are likely to evaluate litigation options differently. Specifically, we contend that lawyers are more likely than litigants to apply an expected financial value analysis to the settlement-versus-trial decision, whereas certain cognitive and social-psychological phenomena that can distract from expected value analysis are more likely to influence litigants. In any given situation, this disparity could cause lawyers to be more *or* less inclined toward settlement than litigants. Given the high costs of trial, however, we submit that an analysis more exclusively focused on financial considerations is likely to yield support for settlement more often than alternative decisionmaking approaches.[26]

Second, although litigants, not lawyers, must ultimately decide whether to accept a settlement offer or to demand adjudication,[27] our experiments provide some illustrative support for the belief that lawyers have the ability—at least under some circumstances—to persuade litigants to approach the settlement-versus-trial decision from the lawyer's preferred analytical perspective.[28] This leads to the conclusion that lawyers *can* facilitate settlement in cases when litigants would probably not reach agreement on their own.[29] Given the lack of other convincing explanations for the high rate of settlement, we believe that lawyers probably *do* what they *can* do—namely, promote more settlement than would otherwise occur.

Third, we believe that lawyers can promote *efficiency* in dispute resolution, but that they do not do so necessarily or automatically. When disputants wish to maximize wealth through litigation but are not sure how to do so, the lawyer employing expected financial value analysis can promote efficiency. But disputants do not necessarily attempt to maximize dollar wealth through the litigation process. When a client favors other goals, the lawyer who fails to understand the client's values can promote settlements that give the client an optimal financial return but are nonetheless inefficient because they fail to maximize the client's expected *utility*.

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26. See *infra* Part I for a description of our research methodology, and *infra* Part II for our experimental results.

27. The Model Rules of Professional Conduct (Model Rules) provide that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995). The Model Rules were adopted by the American Bar Association (ABA) in 1983 "to serve as a national framework for implementation of standards of professional conduct." Robert W. Meserve, *Chairperson's Introduction* to MODEL RULES OF PROFESSIONAL CONDUCT 2 (1995). The ABA's Model Code of Professional Responsibility, which preceded the Model Rules, made the same point, albeit less directly: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client . . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

28. *See infra* Part III.

29. *See infra* Part IV.

To promote efficient dispute resolution as well as to best serve the interests of their clients, we suggest lawyers follow what we term the "cognitive error approach" to client counseling. This approach requires that, when the lawyer and client evaluate litigation options differently, the lawyer analyze the basis for the difference and attempt to persuade the client to reorient his analysis only in certain prescribed circumstances.

The Article proceeds as follows: Part I describes the research methodology employed in our experiments to measure whether lawyers and litigants evaluate litigation decisions in systematically different ways. Part II describes the results of the experiments, which suggest such a systematic difference. Part III describes and reviews a second series of experiments designed to test the extent to which litigants are likely to revisit their initial evaluations of litigation options after a lawyer attempts to influence them to do so. Part IV considers whether the observed differences between lawyers and clients promote or impede the efficient resolution of disputes and then describes the cognitive error approach to client counseling, which is designed to promote efficient settlement. Part V concludes with a brief exploration of how, in light of our experimental evidence, lawyers' obligations to the greater public interest might affect their role as advisors and counselors to individual litigants.

I. The Research Design

A. Introduction

The literature on litigation bargaining—dominated by law and economics analysis—assumes disputants decide whether to settle a legal dispute or to demand adjudication solely on the basis of which option is likely to yield the greatest financial[30] reward.[31] In fact, however, litigants'

30. Although economic analysis, generally, is based on the assumption that individuals maximize utility, not wealth, much of law and economics analysis assumes the wealth-maximization norm for either practical (*i.e.*, wealth is more readily measured than utility) or ideological reasons (*i.e.*, wealth maximization is normatively superior to utility). *See, e.g.*, DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY 19 (1994) (generalizing that much of the law and economics literature employs the wealth-maximization assumption, which conceivably presents fewer problems in empirical testing); Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815, 835 (1990) ("Those who espouse Chicago-style law & economics have traded away a broad concept of 'well-being' based in the social sciences for a narrow concept—wealth maximization—based on market preferences."); Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981) (explaining that wealth maximization underlies both the positive and normative versions of the "efficiency theory" of law); Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 243 (1980) (noting that "economic analysts of law have argued that efficiency in this sense [*i.e.*, wealth maximization] provides a good explanation of many common law rules and principles"); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 103 (1979) (arguing that "'wealth maximization' provides a firmer basis for a normative theory of law than does utilitarianism").

31. This account of settlement is advanced in RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 554-56 (4th ed. 1992); Cooter & Rubinfeld, *supra* note 1, at 1069-70; Gould, *supra* note 3, at 296-97;

decisionmaking processes depart systematically from the law and economics account.[32]

In two previous articles,[33] we demonstrated experimentally that some litigants are likely to decline settlement offers that appear to serve their financial interests because they rely on decisionmaking heuristics—mental strategies that allow people to more simply solve problems[34]—to make decisions.[35] We showed, for instance, that experimental subjects playing the role of litigants will often respond differently to the choice between a specific settlement offer and a risky trial if the two options appear to represent gains as opposed to losses from some reference point.[36] Similarly, we demonstrated that our subjects would make the settlement-versus-trial decision differently depending on whether they felt the opposing litigant had treated them equitably or inequitably.[37]

For these reasons alone (not to mention the plethora of barriers to settlement suggested by others),[38] it is difficult to explain why more than ninety percent of lawsuits settle short of trial.[39] One possible explanation

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Landes, *supra* note 3, at 61; Posner, *supra* note 3, at 417-20; and Priest & Klein, *supra* note 3, at 4-5. For empirical tests of this hypothesis, see Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161 (1988); Samuel R. Gross & Kent D. Syverud, *Getting To No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); Loewenstein et al., *supra* note 2; and Linda R. Stanley & Don L. Coursey, *Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle*, 19 J. LEGAL STUD. 145 (1990).

The same principles that are generally used to evaluate civil litigation can be applied to criminal litigation, with plea bargains constituting settlements. *See, e.g.*, Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 L. & SOC'Y REV. 247, 255 (1979) (reporting that most criminal cases since the turn of the century have been resolved through pleas and plea bargaining rather than adjudication); Landes, *supra* note 3, at 61 (providing an economic analysis of what determines whether criminal cases settle with a plea bargain or go to trial).

32. *See generally* Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 235 (1993) (noting that many resolutions fail to achieve Pareto efficiency); Ross & Stillinger, *supra* note 17, at 389-90 (discussing the barriers to resolving conflicts through negotiation).

33. *See* Korobkin & Guthrie, *Opening Offers*, *supra* note 16, at 16-21 (testing the anchoring-and-adjustment phenomenon and dissonance-reducing behavior); Korobkin & Guthrie, *Psychological Barriers*, *supra* note 16, at 117 (testing framing effects, personal animus and equity seeking, and reactive devaluation of adversarial offers).

34. *See* MASSIMO PIATTELLI-PALMARINI, INEVITABLE ILLUSIONS: HOW MISTAKES OF REASON RULE OUR MINDS 19-20 (1994) (explaining that heuristics are simple and approximate rules used in analyzing certain situations, such as the assumption that objects appearing dense and compact are heavy).

35. *See* Robert H. Mnookin & Lee Ross, *Introduction* to BARRIERS, *supra* note 21, at 3, 10-19 (identifying cognitive and motivational processes, including those that we tested, that cause the rejection of agreements which "seemingly meet the requirements of rational self-interest"). Whether actions resulting from these psychological processes actually are in conflict with the actors' rational self-interest is discussed *infra* Part IV.

36. *See* Korobkin & Guthrie, *Psychological Barriers*, *supra* note 16, at 130-38, 139-42.

37. *See id.* at 144-47.

38. *See, e.g.*, BARRIERS, *supra* note 21.

39. *See supra* notes 10-21 and accompanying text.

is the role that lawyers play in the litigation settlement process. But this is a plausible explanation only if two conditions are met. First, lawyers must be less affected by cognitive and social-psychological factors than their clients. Second, lawyers must be able to influence their clients' settlement decisionmaking behavior.[40]

As to the former, the experimental psychology literature is not encouraging; by and large, the literature suggests that experts in a given field (such as lawyers) are as likely as nonexperts to rely on heuristics that cause them to deviate from expected value analysis.[41] In one experiment, for example, Neale and Northcraft asked a group of professional negotiators and a group of students to negotiate the price of a refrigerator. They found that a cognitive heuristic known as "framing" affected both groups.[42] Similarly, McNeil, Pauker, Sox, and Tversky found that both physicians and nonphysicians were systematically influenced by the framing of prospective treatment outcomes when asked to recommend treatment for lung cancer.[43] The researchers found, for instance, that both sets of subjects were more likely to select radiation treatment over surgery when the possible outcomes of surgery were explained in terms of death rates rather than survival rates.[44]

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40. *See* Lowenstein et al., *supra* note 2, at 157 (noting that lawyer behavior is relevant to settlement decisionmaking only if lawyers learn from experience to moderate their behavior and can convince principals to modify theirs as well, and speculating that it is "questionable" whether either condition is met).

41. *See* MARGARET A. NEALE & MAX H. BAZERMAN, COGNITION AND RATIONALITY IN NEGOTIATION 81-96 (1991) (summarizing experimental data on the impact of experience in negotiation success); PIATTELLI-PALMARINI, *supra* note 34, at 66-67 (summarizing experiments demonstrating that "doctors, generals, politicians, and engineers" are as likely as others to believe that two often-related conditions are more likely to appear together than either separately, even when making judgments in their area of expertise); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 343 (1984) [hereinafter Kahneman & Tversky, *Choices*] (describing the cognitive phenomenon of framing and concluding that the failure of invariance which framing represents "is both pervasive and robust. It is as common among sophisticated respondents as among naive ones . . . ."); *see also* William J. Qualls & Christopher P. Puto, *Organizational Climate and Decision Framing: An Integrated Approach to Analyzing Industrial Buying Decisions*, 26 J. MARKETING RES. 179 (1989) (studying the purchasing decisions of managers); Michael J. Roszkowski & Glenn E. Snelbecker, *Effects of "Framing" on Measures of Risk Tolerance: Financial Planners are Not Immune*, 19 J. BEHAV. ECON. 237 (1990) (studying the effect of framing on financial planners); Joel E. Urbany & Peter R. Dickson, *Prospect Theory and Pricing Decisions*, 19 J. BEHAV. ECON. 69 (1990) (studying the pricing decisions of retailers).

42. *See* Margaret A. Neale & Gregory B. Northcraft, *Experts, Amateurs, and Refrigerators: Comparing Expert and Amateur Negotiators in a Novel Task*, 38 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 305 (1986). For a discussion of framing, see *infra* subpart II(A).

43. *See* Barbara J. McNeil et al., *On the Elicitation of Preferences for Alternative Therapies*, 306 NEW ENG. J. MED. 1259, 1262 (1982).

44. *See id.*; *see also* Rachael F. Heller et al., *Heuristics in Medical and Non-medical Decision-making*, 44A Q.J. EXPERIMENTAL PSYCHOL. 211, 226 (1992) (observing that the occurrence of heuristic-based biases in pediatric residents can increase with the level of training).

Psychologists contend that experts are often as susceptible as non-experts to so-called psychological "biases"[45] because decisionmaking experience alone is not a reliable means of learning decisionmaking skills.[46] These psychologists explain that experience is only as useful as the feedback that accompanies it,[47] and often useful feedback is unavailable to even experienced decisionmakers in a given field. Lawyers who recommend settlement, for example, seldom have information after the fact about the consequences that would have ensued had different decisions been made.[48] If there are no objective methods to evaluate the quality of decisions retrospectively, it is doubtful that the mere repetition of a decisionmaking exercise will improve ability.[49]

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45. The negative connotation of the term "bias" reflects the dominant view in psychology that decisionmaking behavior is deviant when it departs from the normative standard of expected utility theory. *See* Gerd Gigerenzer & Daniel G. Goldstein, *Reasoning the Fast and Frugal Way: Models of Bounded Rationality*, 103 PSYCHOL. REV. 650, 650 (1996) (stressing that although psychological models of decisionmaking behavior have replaced the "classical rationality of the Enlightenment" with the "heuristics and biases program," they have retained the "laws of probability and statistics as normative" criteria). In section V(C)(2), *infra*, we question whether using heuristics in a way that violates the predictions of expected value theory always constitutes a reasoning error.

46. *See, e.g.*, FRANK J. LANDY & JAMES L. FARR, THE MEASUREMENT OF WORK PERFORMANCE 238 (1983) (suggesting that even experienced decisionmakers must exert considerable effort to avoid using heuristic-based biases); Robyn M. Dawes, *Experience and Validity of Clinical Judgment: The Illusory Correlation*, 7 BEHAV. SCI. & L. 457, 465 (1989) (discussing the tenuous correlation between the experience of clinical psychologists and the validity of their judgments); Howard N. Garb, *Clinical Judgment, Clinical Training, and Professional Experience*, 105 PSYCHOL. BULL. 387, 387-91 (1989) (reviewing studies of the effects of training and experience on clinical psychological-assessment accuracy); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S274-75 (1986) [hereinafter Tversky & Kahneman, *Rational Choice*] (arguing that decisionmaking experience without the proper feedback results in ineffective learning).

47. *See* Richard H. Thaler, *The Psychology and Economics Conference Handbook: Comments on Simon, on Einhorn and Hogarth, and on Tversky and Kahneman*, *in* RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY 95, 96 (1987) ("Accurate learning takes place only when the individual receives timely and organized feedback.").

48. *See* Tversky & Kahneman, *Rational Choice*, *supra* note 46, at S274-75 (listing the lack of information about alternative outcomes as a typical failure of feedback that prevents learning from experience). In addition to the lack of information about alternative choices, Tversky and Kahneman noted that useful feedback is rarely available because (1) outcomes are delayed and difficult to attribute to a particular action, (2) variability in the environment reduces the reliability of feedback, and (3) important decisions are often unique, such that their results rarely are of use in making subsequent decisions. *See id.*; *see also* Dawes, *supra* note 46, at 465-66 (discussing clinical psychologists' need to know the hypothetical outcomes of decisions not taken in order to determine the validity of their decisions). For speculation that lawyers, like other experts, lack the feedback necessary to use experience to their advantage in decisionmaking, see Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. (forthcoming Oct. 1997) (manuscript at 63-64 & n.97, on file with the *Texas Law Review*).

49. *See* Gregory B. Northcraft & Margaret A. Neale, *Experts, Amateurs, and Real Estate: An Anchoring-and-Adjustment Perspective on Property Pricing Decisions*, 39 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 95-96 (1987) [hereinafter Northcraft & Neale, *Property Pricing*]. Northcraft and Neale found that real estate agents fell prey to the same cognitive biases that amateurs did when estimating real estate prices, and they suggested that when there is no clear objective standard

Despite these pessimistic findings, there are reasons to suspect that lawyers might be less susceptible than other experts to psychological biases. Lawyers are known for their analytical skills.[50] To gain admission to law school, an applicant must demonstrate a higher-than-average ability to think analytically.[51] Once in law school, legal training reinforces analytical problem-solving. By persistently emphasizing the careful reading of appellate cases, legal training teaches lawyers to analyze legal conflicts carefully and unemotionally rather than to react to them viscerally.[52] Once on the job, this analytical training serves as a lens through which lawyers view and evaluate their experiences. Perhaps, then,

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on which to evaluate a decision, feedback may simply refine the description of the judgment process rather than the quality of the judgment. *See id.*

50. *See, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed., Anchor Books 1969) (1835) ("Mcn who have made a special study of the laws . . . have derived therefrom habits of order, something of a taste for formalities, and an instinctive love for a regular concatenation of ideas . . . ."); DAVID RIESMAN, INDIVIDUALISM RECONSIDERED 463 (1954) ("[T]he [legal] profession operates . . . to drain off some of the culture's more adept and avid reasoners, who might find themselves deviants if these careers were not open to them as external defenses and internal sublimations. . . . [The lawyer] stands at once for reason and for an excess of it."); GERALD L. WILSON & HARRY H. HARKINS, JR., PRE-LAW HANDBOOK FOR DUKE STUDENTS, *quoted in* RICHARD W. MOLL, THE LURE OF THE LAW 27 (1990) ("Lawyers tend to see themselves as technicians more than anything else. . . . The uninitiated may be distressed to find that the personal side of a case, the emotions of the people involved, may be of little concern to the attorney . . . .").

51. According to the Law School Admission Council, the two most important factors for admission to law school are generally "prior academic performance and the Law School Admission Test score." LAW SCHOOL ADMISSION COUNCIL, INC., THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 7 (1996). The Law School Admission Test "is designed to measure skills that are considered essential for success in law school: the reading and comprehension of complex texts with accuracy and insight; the organization and management of information and the ability to draw reasonable inferences from it; the ability to reason critically; and the analysis and evaluation of the reasoning and argument of others." *Id.*; *see also* Barry D. Boyer & Roger C. Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 248 (1974) (reporting that law students whose decisions are based on analysis and logic outnumber law students whose decisions are motivated by appreciation, sympathy, and concern for the rights of others).

52. *See, e.g.*, C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS at vi (1871) ("Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer . . . ."); LAW SCHOOL ADMISSION COUNCIL, *supra* note 51, at 3 ("The case method involves the detailed examination of a number of related judicial opinions that describe an area of law. . . . [The professor will] ask questions designed to explore the facts presented, to determine the legal principles applied in reaching a decision, and to analyze the method of reasoning used."); JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS 24 (1914) ("[T]he real purpose of scientific instruction in law is not to impart the content of the law, not to teach the law, but rather to arouse, to strengthen, to carry to the highest possible pitch of perfection a specifically legal manner of thinking."); Melissa L. Nelkin, *Negotiation and Psychoanalysis: If I'd Wanted to Learn About Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 420, 422 (1996) ("In law school, students are taught that how they feel about the cases they read is irrelevant; what matters is the soundness of their logic. Unlike medicine, for example, law is still taught largely as an exercise in abstraction, based on case reports and analysis of judicial opinions.").

lawyers approach decisions from a different perspective than most other people or are better able to learn from their experiences than other professionals, or both.[53]

B. Methodology

To gain insight into whether lawyers and their clients are likely to evaluate litigation settlement options differently, we constructed a series of written, hypothetical litigation scenarios that we presented to two pools of subjects: potential litigants and practicing attorneys.

Our potential litigant pool consisted of 445 Stanford University undergraduate students recruited at dormitories across campus. We instructed these subjects to place themselves in the role of the plaintiff in one or more litigation scenarios.[54] Our second pool of subjects consisted of ninety practicing attorneys from the San Francisco and Palo Alto offices of San Francisco-based law firms.[55] We instructed the attorneys to place themselves in the role of the attorney for the plaintiff in the litigation scenarios. We made no attempt to control the number of subjects in either pool on the basis of race, gender, year in college, major, year in practice, or substantive specialty. Because the hypothetical scenarios tested decision-making in litigation, we did consider whether attorney subjects identified themselves as "primarily litigators," "primarily transactional attorneys," or "primarily other" (with an explanation), but there were no significant differences in responses between these subgroups of attorneys.

We told the litigant subjects that the experiments were part of a study of how people involved in lawsuits respond to settlement offers. Those who participated received a "Mrs. Field's" cookie. The attorney subjects were advised in a memorandum signed by a senior litigation partner that their firm had agreed to participate in an academic study of how lawyers respond to settlement offers and that their individual participation was requested (but, due to the anonymous nature of the study, obviously not required). Participating lawyers received no compensation. Slightly fewer than one-third of the lawyers asked to participate did so. We estimate that the litigant response rate was roughly the same, although we have no way of measuring precisely what percentage of the students who were aware of

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53. *But see* Linda Babcock et al., *Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 296-97 (1995) (finding that lawyer subjects were as affected by framing biases in a negotiating experiment as were student subjects).

54. The complete results of this study are described in detail in Korobkin & Guthrie, *Psychological Barriers*, *supra* note 16. Here, we discuss only those results that we compare directly to the results obtained from the practicing attorneys we surveyed for this study.

55. In return for their cooperation in the study, lawyer subjects were promised complete confidentiality, as were their law firms. The complete survey results, including the participants' names, law firms, and demographic information, are on file with the authors.

our request for subjects participated. Although the subjects were self-selected and therefore potentially subject to sampling biases,[56] there is no obvious reason to think that the students who agreed to participate in the study differed on average from the larger pool of Stanford undergraduates or that the lawyers who participated differed on average from other lawyers in their firms—at least in any way that would be likely to affect responses to the questions asked.[57]

Litigant and lawyer subjects each received a one-page instruction sheet attached to a multi-page survey. The only substantive difference in the instructions was that litigants were told they would "play the role of a participant" in hypothetical lawsuit scenarios and be asked to answer questions about whether they would accept proposed settlement offers, while lawyers were told they would "play the role of the lawyer" in hypothetical lawsuits and be asked to answer questions about whether they would "advise their client" to accept proposed settlement offers. The instructions asked the participants to read all information given to them "slowly and carefully" and not to discuss the survey with anyone else before completing it. Litigant subjects completed the surveys in the presence of the experimenters and returned them immediately upon completion. Lawyer subjects completed the surveys at their convenience and returned them by mail.

For each hypothetical lawsuit scenario, we randomly assigned approximately half of the litigants and half of the lawyers to either "Group A" or "Group B."[58] Regardless of the group to which they were assigned, subjects received hypothetical litigation scenarios that were identical in all

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56. *See* DAVID W. MARTIN, DOING PSYCHOLOGY EXPERIMENTS 196 (4th ed. 1996) ("*Selection* can be a threat [to internal validity] whenever participants are assigned nonrandomly, particularly when they are self-selected." (emphasis in original)); Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, LAW & CONTEMP. PROBS., Autumn 1988, at 13, 19-20 (noting that voluntary participation for remuneration by members of a pool in a similarly designed set of experiments could "conceivably have introduced some self-selection bias of uncertain direction in the samples"). *See generally* Robert Rosenthal, *The Volunteer Subject*, *in* THE SCIENCE OF PSYCHOLOGY: CRITICAL REFLECTIONS 162, 177-79 (Duane P. Schultz ed., 1970) (comparing volunteer and nonvolunteer subjects and concluding that volunteers pose a greater risk of nonrepresentativeness and inferential errors in experimental outcomes).

57. Of course, Stanford undergraduates might differ in important ways from the average potential litigant, and lawyers practicing in the law firms sampled might differ in relevant ways from the general population of lawyers. This problem of "external validity" is discussed *infra* text accompanying notes 67-71.

58. Each subject was randomly assigned to Group A or Group B independently for each scenario that he or she received. Thus, whether subjects were assigned to Group A or Group B in one scenario did not affect whether they were assigned to Group A or Group B in another scenario.

All the lawyer subjects participated in all three of the experimental scenarios discussed in this section. The psychological phenomena tested in each scenario were different, as were the fact patterns, so we have no reason to believe that exposure to one scenario would bias responses to others. All litigant subjects also participated in three different experimental scenarios, but not necessarily all three of the scenarios discussed in this Article.

respects but one. That is, both Group A and Group B subjects received the same facts regarding the incidents at issue, the same information regarding possible trial outcomes, and the same final settlement offer from the defendant. The only difference between scenarios given to subjects assigned to Groups A and B was the independent variable—one of a variety of psychological constructs that we wished to study.[59]

After reading the hypothetical fact patterns and learning of a settlement offer proposed by the defendant, subjects were asked to indicate how likely they were to accept the offer (or advise their client to accept the offer) by selecting one of five answer choices, from which we constructed a five-point scale:

[5] Definitely accept _____
[4] Probably accept _____
[3] Undecided _____
[2] Probably reject _____
[1] Definitely reject _____

We drew conclusions regarding the effect of the independent variable on the litigant subjects by comparing the responses of Group A and B litigants, and we drew conclusions regarding the effect of the same independent variable on the lawyer subjects by comparing the responses of Group A and B lawyers.[60] We used an analysis of variance (ANOVA) test to measure the interaction between the subject pools and independent variables[61]—that is, to compare the *difference* between the responses of litigants randomly assigned to Groups A and B to the *difference* between the responses of lawyers assigned to Groups A and B.

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59. For example, in "The Broken Heater" scenario, described in detail below, all subjects received a written description of a situation in which a landlord failed to heat a tenant's apartment, and the tenant subsequently brought suit. The only difference between the scenarios presented to Group A and Group B subjects was the explanation for the landlord's behavior: members of the latter group learned that the landlord had a sympathetic, if not legally valid, explanation for his failure to provide heat to the tenant's apartment; the former group of subjects did not. *See infra* note 113 and accompanying text.

60. Our standard initial comparison between groups within the same subject pools was a t-statistic test comparing the mean responses given by each group. As is the social science convention, we label the difference between two means as "statistically significant" if $p < .05$, meaning that the probability that observed differences are due to chance is less than 5%. In reality, though, the difference between a statistical test with a p-value of slightly less than .05 and one with a p-value of slightly greater than .05 is one of degree, not of kind, so we report differences between groups that fail to reach the .05 level of confidence but are still extremely likely to be due to differences between survey groups rather than chance as "approaching significance."

61. A multi-factor analysis of variance (ANOVA) test with a test for interaction effects is used to determine whether the effect of one variable on outcomes (here, the psychological phenomenon manipulated) depends on the level of another variable (here, the subject pool tested). *See* IRWIN P. LEVIN & JAMES V. HINDRICHS, EXPERIMENTAL PSYCHOLOGY: CONTEMPORARY METHODS AND APPLICATIONS 64 (1995).

Three methodological points regarding the design of the scenarios bear mentioning. First, when presented with a settlement offer by the defendant, all litigant and lawyer subjects were informed that the offers were final, that there would be no time before trial for further negotiations or counteroffers,[62] and that they were required to choose between accepting the offer and proceeding to trial (or advising their client to select between those two choices). With this contrivance, we sought to prevent subjects from rejecting an offer simply because they believed that by holding out for a better offer they might force the adversary to make additional concessions.[63] In other words, the experimental design sought to measure the subjects' true preference between the specific settlement and trial options presented and to discourage strategic behavior that might obscure this preference.

Second, all subjects responding to a given scenario possessed identical legal entitlements, regardless of the group to which they were randomly assigned. Although subjects placed in Group A for a given experiment received a scenario with a slightly different fact pattern than those in Group B, the difference did not affect either their likelihood of prevailing at trial or the amount of damages they were likely to recover in a successful trial. The equivalence of legal rights across experimental groups is obviously critical; without it, observable differences between the settlement behavior of Group A and B subjects might be due solely to differences in legal entitlements.[64] It would be uninteresting, to say the least, to demonstrate

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62. Negotiation scholars have hypothesized that the imposition of a deadline can mitigate against psychological barriers to conflict resolution. Because the deadline provides the offeree with a causal explanation for why the offeror extends the offer, the offeree is likely to be less skeptical of the offeror's motives and more likely to be receptive to an offer. *See, e.g.*, Ross & Stillinger, *supra* note 17, at 398-400 (arguing that deadlines may encourage settlement by satisfying the offeree's need to identify "causal attributions" for the offeror's behavior and by allowing the parties to anticipate the dissonance they will feel if the deadline expires without settlement). Critics of our research design might challenge the validity of our results on the ground that we imposed a deadline on our subjects. We believe this criticism is misplaced. First, it is not clear that deadlines actually do promote settlement. More importantly, if deadlines do promote settlement, this would make all our subjects slightly more likely to accept settlement offers than they would be absent the deadline. Because our results are based on between-subject comparisons, the impact of the deadline, assuming it exists, probably would affect all our subjects equally and thus would not affect the comparative results.

63. *See generally* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) (formally demonstrating that trials may result even when both parties would prefer settlement because one or both parties strategically holds out for the lion's share of the gains of trade to be made from settling); Mnookin & Ross, *supra* note 35, at 3, 9-10 (pointing out that even when there is a bargaining surplus and both parties know the other's reservation price, there will still be no deal if the parties cannot reach agreement on how to divide the surplus).

64. In negotiation theory, a subject's "BATNA" is its "best alternative to a negotiated agreement." In our experiments, a subject's BATNA is a trial. The quality of a subject's BATNA, and thus how favorably it compares to a given settlement offer, will, of course, depend on his trial prospects. A subject with a strong BATNA has relatively more power in settlement than one with a weak BATNA.

that litigants and attorneys with weak cases are more likely to accept a given settlement offer than those with strong cases!

Finally, we told all litigants that their attorneys were representing them free of charge, and we told all lawyers that they were representing their clients on a *pro bono* basis. As all our observations are based on the extent to which Group A and B subjects differ from each other, rather than on the absolute responses provided by any group, the "no legal fees" instruction was not strictly necessary to the successful measurement of the effect caused by the independent variables tested.[65] Nevertheless, we used this contrivance in the belief that if subjects did not have to consider the tangential issue of attorneys' fees, they would be able to devote more attention to analyzing and responding to the substance of the defendant's settlement offer.[66]

C. *External Validity*

Our results shed light on the decisionmaking processes of experimental subjects operating in the controlled environment we constructed. We believe the results also raise strong inferences about the decisionmaking processes of litigants and lawyers engaged in real-world dispute resolution. Because it is often difficult to generalize from experimental results, however, our experiments do not necessarily demonstrate how litigants and lawyers assess actual legal disputes.[67] It is possible that our results are not generalizable—*i.e.*, that they lack "external validity"—because of either the composition of our subject pools or certain experimental conditions we created.

1. Subjects.—Our sample of litigant and lawyer subjects is not necessarily representative of the general population of litigants and lawyers. While the student litigant subjects are all potential litigants, they do not constitute a random sample of that population. Stanford undergraduates as a group differ from the nationwide class of litigants in terms of age, life experience, education level, and socio-economic status. Thus, they might

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See ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 102-03 (Bruce Patton ed., 2d ed. 1991) (arguing that a party's superior strength or wealth does not translate into negotiating power unless that party uses its strength to determine the attractiveness of its BATNA).

65. For a discussion of external validity concerns, see *infra* notes 67-71 and accompanying text.

66. *See* Korobkin & Guthrie, *Psychological Barriers*, *supra* note 16, at 124-25 (eliminating all consideration of legal fees from that study because "the high cost of pursuing a claim to trial can provide a strong incentive for out-of-court settlement").

67. *See, e.g.*, Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC'Y REV. 655, 667 (1980-1981) ("It is often difficult to generalize from results obtained under such [experimental] conditions to more realistic injurious experiences and disputes.").

analyze legal disputes in a systematically different way, on average, than members of the larger potential litigant population.[68]

Similarly, our lawyer subjects do not constitute a random sample of the population of lawyers. All of our lawyer subjects practice at relatively large law firms[69] in the San Francisco Bay Area. Moreover, they practice primarily, if not exclusively, civil law. They tend to represent institutional clients, and the litigators among them are primarily defense lawyers. Their thought processes, on average, might not mirror those of the average lawyer engaged in litigation settlement negotiations.

Despite these factors, there are reasons to believe our subjects might be representative of actual litigants and lawyers. Research has demonstrated, at least in cognitive psychology experiments similar in design to our own, that responses of college students often do not vary systematically from those of others.[70] Thus, our population of undergraduate students may represent the population of potential litigants fairly well. Our lawyer subjects, while not perfectly representative of lawyers generally, are representative of the general population of lawyers in ways that we hypothesize are most likely to cause lawyers to analyze litigation settlement offers differently than nonlawyers—they have chosen to join the legal profession, they have been trained in the legal academy, and their daily work involves advocating on behalf of others.

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68. For thoughtful critiques of the use of undergraduate students in psychology research, see David O. Sears, *College Sophomores in the Laboratory: Influences of a Narrow Data Base on Psychology's View of Human Nature*, 51 J. PERSONALITY & SOC. PSYCHOL. 515 (1986) and Reginald Smart, *Subject Selection Bias in Psychological Research*, *in* THE SCIENCE OF PSYCHOLOGY: CRITICAL REFLECTIONS 155-61 (Duane P. Schultz ed., 1970).

69. One-third of all attorneys in private practice in 1991 worked in firms employing more than 50 lawyers. *See* BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S, at 8 (1994). Moreover, the number of lawyers working for larger firms rose significantly from 1980 to 1991. *See id.* In 1980, 7% of private practitioners worked for firms employing 51 to 100 attorneys, and another 7% worked in firms employing more than 100 attorneys. *See id.* By 1991, 10% of private practitioners worked in firms employing 51 to 100 lawyers, and 23% worked in firms employing more than 100 lawyers. *See id.*; *see also* MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 46 (1991) (tracing the growth in large law firms from the 1950s to the 1990s); ROBERT GRANFIELD, MAKING ELITE LAWYERS 5 (1992) (reporting that half of UCLA Law School graduates in 1986 entered law firms employing more than 50 lawyers and that 14% of law school graduates entering private practice in 1987 did so with firms of 100 or more attorneys).

70. *See, e.g.*, Neale & Northcraft, *supra* note 42, at 309, 316 (concluding that students and professional negotiators responded similarly during experiments on the effects of framing); Northcraft & Neale, *Property Pricing*, *supra* note 49, at 85-95 (finding that both experts and amateurs "were significantly biased" by "an arbitrarily chosen reference point" and concluding that "(1) experts are susceptible to decision bias, even in the confines of their 'home' decision setting, and (2) experts are less likely than amateurs to admit to (or perhaps understand) their use of heuristics in producing biased judgments"); James F. Smith & Thomas Kida, *Heuristics and Biases: Expertise and Task Realism in Auditing*, 109 PSYCHOL. BULL. 472, 483 (1991) (finding that cognitive biases and heuristics affect both expert auditors and students, though the effects on auditors "performing familiar, job-related tasks" are less pronounced).

Even if our subjects differ systematically from the broad classes of potential litigants and attorneys in how they analyze litigation decision options, our subjects are almost certainly representative of a significant subsection of litigants and lawyers. At worst then, we believe our results provide a valuable snapshot of part of the litigation bargaining world.

2. *Experimental conditions*.—Our second external validity concern is that subjects asked to "play a role" in our survey might not analyze options in the same way that they would in an actual dispute. This could be the case for any of a number of reasons: subjects are not likely to be as committed to participating in an experiment as they are when their personal interests are at stake;[71] the hypothetical scenarios are necessarily less factually and legally complex than most real world disputes; and the experiments do not replicate the time element existent in actual settlement negotiations, but rather require subjects to digest the facts of a case, consider a settlement offer, and respond in a compressed time frame.

Again, though, we believe these potential drawbacks are far from fatal. Because of our between-subject experimental design, differences between experimental and real-world conditions are troubling only if they have a differential effect on Group A and Group B subjects. Although more commitment, more complexity, and more time could cause subjects to react to decision options differently, there is no reason to believe that any group of subjects selected at random from the litigant pool (or the lawyer pool) would be more affected by these factors than any other group randomly selected from the same pool. It is conceivable that the experimental setting could have skewed the responses of litigants more than lawyers (or vice versa), which, if true, would be troubling, but it is not obvious to us why this would be the case.

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71. A number of studies suggests that subjects are just as susceptible to psychological decisionmaking biases when they have more at stake. *See, e.g.*, David M. Grether & Charles R. Plott, *Economic Theory of Choice and the Preference Reversal Phenomenon*, 69 AM. ECON. REV. 623, 623 (1979) (noting that although subjects prefer those lotteries that promise a greater chance of winning, they will place a higher value on a riskier lottery that has a larger reward); Steven J. Kachelmeier & Mohamed Shehata, *Examining Risk Preferences Under High Monetary Incentives: Experimental Evidence from the People's Republic of China*, 82 AM. ECON. REV. 1120, 1137 (1992) (finding a pattern of strong "risk-seeking preferences for low-probability gain prospects" in their subjects). Professor Thaler has discussed this phenomenon:

> 1. *If the stakes are large enough, people will get it right.* This comment is usually offered to rebut a demonstration of embarrassing incousistency on the part of a group of undergraduate students participating in an experiment at one of our leading universities. Many such demonstrations have offered the subjects little or no incentive to think hard or to get the "right" answer . . . . Do people tend to make better decisions when the stakes are high? There is little evidence that they do.

Thaler, *supra* note 47, at 96 (emphasis in original).

II. Observed Lawyer-Client Differences

A. *Decisionmaking and the Impact of Reference Points*

1. The Effect of "Frames" on Risk Preference.—Before deciding whether to accept (or advise a client to accept) a settlement offer, the litigant (or lawyer) must evaluate the offer relative to alternative options. As is true in any decisionmaking process, lawyers and clients making litigation decisions can be expected to use cognitive heuristics, or rules of thnmb, to guide them through this process.[72]

Psychologists have demonstrated that one tool people commonly employ when making decisions of this kind is a "reference point" heuristic.[73] People often evaluate options not only on the basis of their absolute values, but also on the basis of the direction the options deviate from a baseline reference point. The reference point separates potential changes from that point into desirable outcomes ("gains") and undesirable outcomes ("losses"). Researchers have demonstrated that whether potential outcomes are coded as gains or losses can be an important determinant of behavior in two related ways, which together underlie the well-known descriptive model of decisionmaking called "prospect theory."[74]

The first consequence of reference point coding is "loss aversion."[75] Loss aversion refers to the observation that people tend to disfavor a loss from a reference point more than they favor an equivalent gain.[76] Psychologists have shown, for instance, that people will demand a much greater amount of money to sell an item they own (*i.e.*, absorb a loss) than they will spend to buy the item if they do not already own it (*i.e.*, achieve a gain).[77] Consider, for example, a woman who purchases a relatively

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72. *See* Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237, 237-38 (1973); *cf.* JOHN R. ANDERSON, COGNITIVE PSYCHOLOGY AND ITS IMPLICATIONS 156, 341 (4th ed. 1995) (identifying the tendency of real-world decisionmakers to rely on rules in assessing particular situations rather than using more formal modes of deductive and inductive reasoning).

73. *See generally* Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 296 (1992) (reviewing analyses and evidence on the role of reference points and applying these data to the negotiation context).

74. For the first complete description of prospect theory, see Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979) [hereinafter Kahneman & Tversky, *Prospect Theory*].

75. Kahneman, *supra* note 73, at 298 ("The general principle is straightforward: when an option is compared to the reference point, the comparison is coded in terms of the advantages and disadvantages of that option.").

76. *See* Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, *in* BARRIERS, *supra* note 21, at 54 ("Loss aversion refers to the observation that losses generally loom larger than the corresponding gains.").

77. *See* Russell Korobkin, Note, *Policymaking and the Offer/Asking Price Gap: Toward a Theory of Efficient Entitlement Allocation*, 46 STAN. L. REV. 663, 667-69 (1994) (describing the empirical evidence of the gap between what people are willing to pay for an item and the price at which they demand to sell the same item).

inexpensive bottle of wine that appreciates in value to $100. Although she declines to sell it for $100, she would refuse to buy it for $100 if she did not already own it.[78] On one hand, she would rather forego $100 than *lose* the wine; on the other, *acquiring* the wine would not be worth $100.

A second consequence of reference point coding is termed the "framing effect."[79] Research indicates that people who are risk averse when choosing among gains are often risk seeking when they face potential losses. In other words, people often will take risks to avoid a certain loss when they would refuse to take equivalent risks in pursuit of a gain of the same magnitude. The results of a simple experiment illustrate the impressive power of the framing effect. Researchers asked subjects to choose between a certain gain of $240 and a 25% chance of gaining $1000; 84% of the subjects preferred the certain gain, even though the other option has an expected value that is $10 higher (25% chance × $1000 = $250). Conversely, when subjects were given a choice between a certain loss of $750 and a 75% chance of losing $1000, 87% of subjects preferred the gamble, even though the expected value of the sure loss ($750) and the gamble (75% × $1000 = $750) is the same.[80]

Because litigants and lawyers often must choose between a certain settlement offer and the uncertain prospects of trial, we hypothesized that the framing effect might influence decisionmaking in litigation bargaining. We predicted that disputants would be more likely to favor the certainty of settlement over the risk of trial if the settlement is coded as a gain, rather than a loss, from a reference point. To test this hypothesis, we designed a scenario based on the most common of all torts—an automobile collision—which we then gave to our litigant and lawyer subjects. We provided subjects assigned to Group A the following set of facts concerning "The Automobile Accident," a dispute between them (or their client) and an automobile insurance company:

> *Description of the Facts of the Case:*
>
> Your [Your client's] new $14,000 Toyota Corolla was recently totaled in an automobile accident that was clearly the other driver's fault. You [Your client] sustained some injuries that required medical treatment, but fortunately none of them were permanent and you have [your client has] completely recovered. Your [Your client's] $14,000 in medical bills were paid by your [a] health

78. The wine example is borrowed from Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. ORG. 39, 43 (1980).

79. *See* Kahneman, *supra* note 73, at 297-98 (applying the framing effect to negotiation settings); *see also* Kahneman & Tversky, *Prospect Theory*, *supra* note 74, at 268-69 (discovering that subjects were more risk-averse when faced with the possibility of loss than when faced with the possibility of gain).

80. *See* Tversky & Kahneman, *Rational Choice*, *supra* note 46, at S255.

insurance company, but you have [your client has] no automobile insurance coverage that will pay to replace your [the] car.

The other driver has no money and is unemployed, so you [your client] will not be able to collect any money directly from him. However, he does have automobile insurance. You and your lawyer have [After agreeing to represent this client, you] filed a lawsuit against the insurance company, National Mutual, for $28,000—$14,000 for the car, and $14,000 for the medical bills. You are not asking for any pain and suffering damages. If you are able to recover the $14,000 for the [your client's] medical bills, that will be extra cash in your [your client's] pocket since your [the] health insurance company has already paid your [your client's] doctors and the hospital—it will be a windfall of $14,000.

National Mutual is not disputing that you [your client] suffered $28,000 in damages, but it claims that the other driver's policy has a maximum coverage value of $10,000 for accidents that occur while driving a rental car. Since the other driver was driving a rental car at the time of the accident, National Mutual has refused to pay more than $10,000. Your lawyer has advised you [After conducting legal and factual research, you have discovered] that the only issue in the case is whether or not there is in fact a $10,000 limit on the policy for this type of accident. If the case goes to trial, a judge will review the policy and interpret its language. If a judge decides that there is a limit, you [your client] will recover $10,000 at trial. If the judge decides there is no such limit, you [your client] will recover the full $28,000. Your lawyer has [You have] reviewed the policy carefully and advised you [you have found] that the language is extremely unclear—not unusual for the fine print in insurance policies. He [You] cannot predict whether you are [your client is] more likely to win or lose if the case goes to trial.

Question:

Following some discussions with your attorney [Following some discussions], National Mutual has made you a total settlement offer of $21,000—they will pay you [your client] that amount if you [your client] will drop the lawsuit and agree not to make any other claims against them. The company has told you this is its final offer and, given the impracticality of any further meetings or discussions, you have no reason to doubt that this is the case. Therefore, you must [Therefore, you must advise your client to] either accept the offer or reject it and go to trial. Your attorney [Your client] is a family friend who is representing you for free [whom you are representing for free], so legal fees should not affect your decision [recommendation].

Will you [Will you advise your client to]:
Definitely accept the offer _____
Probably accept the offer _____
Undecided _____
Probably reject the offer _____
Definitely reject the offer _____

We presented this same scenario to Group B litigants and lawyers, but we altered a single variable for the Group B respondents. In version B of the experiment, the plaintiff learned that he had been driving a $24,000 BMW rather than a $14,000 Toyota Corolla at the time of the accident. Both Group A and B plaintiffs incurred the same amount of damages—$28,000—but the damage breakdown was different: The BMW Drivers in Group B suffered $24,000 in damage to the car and $4000 in reimbursed medical expenses, while the Toyota Drivers in Group A suffered $14,000 in damage to the car and $14,000 in reimbursed medical expenses.

In absolute terms, Group A and B subjects faced precisely the same choice. Both sets of subjects were required to choose either a certain recovery of $21,000 or the chance to recover $28,000 at trial, coupled with the risk of recovering only $10,000 at trial. The attorney's inability to predict which trial outcome was more likely suggests that the trial option could be described as a fifty percent chance of recovering $28,000 coupled with a fifty percent chance of recovering $10,000; that is, an option with a $19,000 expected value (50% × $28,000 + 50% × $10,000 = $19,000).[81] Thus, for subjects in both Group A and Group B, the expected (and indeed, the actual) value of the $21,000 settlement offer was $2000 greater than the expected value of trial.

Although Group A and B subjects faced the same choice from an expected financial value perspective, they might have perceived that choice differently if they evaluated the options from a pre-accident (rather than a post-accident) reference point. Group A subjects—Toyota Drivers—were reimbursed $14,000 by the health insurance company for medical costs associated with the accident. The $21,000 settlement offer promised to leave them $7000 better off than they were before the accident; that is, they could replace their lost automobile, if they so chose, and still have $7000 remaining (-$28,000 + $14,000 + $21,000 = $7000). Thus, settlement could be coded as a gain relative to the pre-accident reference point. The $19,000 expected value of a trial is superior to their pre-accident position (-$28,000 + $14,000 + $19,000 = $5000), but with

81. Subjects need not have inferred from the attorney's analysis that their chances of prevailing at trial were exactly 50%. Whether individual subjects made different assumptions about their trial chances does not affect the validity of the experimental results as long as Group A and Group B subjects did not draw systematically different inferences from the same analysis.

potential actual awards of $10,000 or $28,000, a trial could leave them better or worse off than they were prior to the accident.

Subjects in Group B—BMW Drivers—were also reimbursed for their medical expenses, but these totaled only $4000. Thus, the $21,000 settlement offer, if accepted, would leave them $3000 worse off than they were prior to the accident; that is, it would not enable them to replace the lost $24,000 automobile (-$28,000 + $4000 + $21,000 = -$3000). Consequently, these subjects could have coded settlement as a loss relative to the pre-accident reference point. Although the $19,000 expected value of a trial is inferior to settlement, a trial, with its possibility of a $28,000 award, provided the only chance of avoiding a result that could be perceived as a loss.[82]

The wealth-maximizing choice for Toyota and BMW Drivers (and their lawyers) was to accept the settlement offer: for all subjects, the actual value of settlement was $2000 higher than the expected value of trial. Risk-seeking subjects in either group might have preferred trial. Nevertheless, because the BMW Drivers could code the settlement offer as a loss from their pre-accident position, while trial allowed for the possibility of avoiding such a loss, we hypothesized that more BMW Drivers than Toyota Drivers would opt for the risky option of trial.

Our results strongly support this hypothesis for litigants, but *not* for lawyers. Litigant subjects in both experimental groups favored settlement over trial, but that preference was much weaker for the BMW Drivers. The mean response given by Toyota Drivers was 4.43, midway between "definitely accept" and "probably accept,"while the mean response given by BMW Drivers was only 3.64, somewhat below "probably accept."[83] The difference between the two groups is statistically significant.[84] Perhaps more telling, only one Toyota Driver out of forty-two subjects said he or she would "probably reject" or "definitely reject" the offer, in contrast to nine of forty-four BMW drivers who would "probably reject" or "definitely reject" the offer, with an additional seven undecided. The difference between the groups strongly suggests that a significant number of BMW Drivers framed settlement as a certain loss and selected a risky trial with a lower expected value in an effort to avoid accepting that loss.[85]

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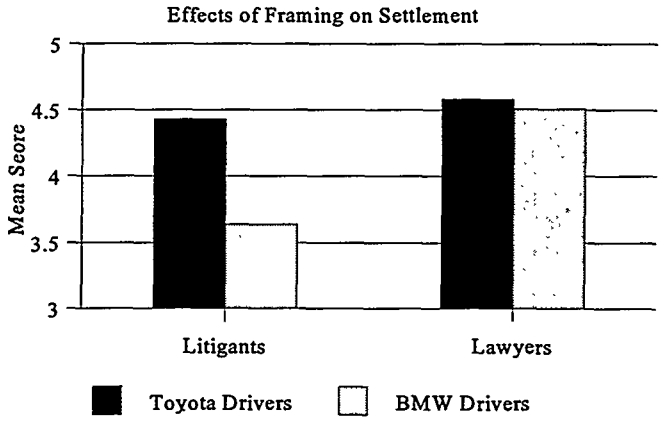
82. Note that if subjects evaluated their options from the reference point of their *post-accident* position, both Toyota and BMW Drivers would view the settlement offer, the expected value of trial, and the possible actual values of trial as gains of various magnitudes.

83. *See infra* Figure 1.

84. $t(77) = 3.65, p < .01$.

85. The litigant responses could conceivably result from risk aversion. Although the subjects were randomly assigned to be BMW or Toyota Drivers, they might have taken cues from the group to which they were assigned. The BMW Drivers might have imagined that they were wealthy and thus less concerned with the possibility of losing at trial than were the Toyota Drivers. Although we cannot definitively refute this explanation, we can think of no reason why, if litigant subjects were so affected, the lawyer subjects were not similarly affected. In other words, if this explanation were correct, we

Figure 1—The Automobile Accident



By contrast, our experimental manipulation had virtually no effect on the lawyer subjects. Lawyers for the Toyota Drivers strongly favored the settlement offer: forty-five subjects provided a mean response of 4.58 on the five-point scale. Lawyers for BMW Drivers provided almost identical responses: the forty-five subjects in that group gave a mean response of 4.51, statistically indistinguishable from the average score of the Toyota Driver lawyers.[86] Only one BMW Driver lawyer recommended rejecting the settlement offer (as did one Toyota Driver lawyer).[87] Most importantly, the interaction between the subject pools (litigant versus lawyer) and the condition (BMW versus Toyota) was statistically significant, suggesting it is highly unlikely that the different responses of the lawyers and litigants to the experimental stimulus was coincidental.[88] In

would have expected the lawyers also to assume their BMW Driver subjects were wealthier and therefore less risk averse than their Toyota Driver subjects.

86. $t(88) = .49, p = .62$.

87. The lawyer responses could possibly be explained by self-interest. Because lawyer subjects were told that they were representing their client free of charge, they might have favored settlement—regardless of the value of trial and, therefore, regardless of the experimental group to which they were randomly assigned—to avoid the opportunity cost of devoting further time and energy to a case generating no revenue. Such a desire conceivably could be strong enough to swamp any effects that the frame might otherwise have had, producing an overwhelming preference for settlement among members of both experimental groups. Without taking a position on how often lawyers are apt to put their own financial interests above their clients' interests, we strongly believe that few would do so in our experimental setting as there was no cost associated with ethical behavior. This prediction is borne out by the third experiment that we discuss in this Article, in which lawyers who were advised that they were representing their clients free of charge *preferred* trial to settlement, on average. This experiment is discussed in subpart II(B), *infra*. If financial self-interest explains the lawyers' responses to the automobile accident scenario, it should explain their responses to all of the experimental scenarios.

88. $F(1, 172) = 8.1, p < .01$.

other words, the litigants as a class appeared to take into account whether the settlement offer appeared to be a gain or loss from a pre-accident reference point, even when doing so caused them to reject the option that would maximize their expected financial return from litigation, while the lawyers apparently did not.

The explanations that the lawyers provided for their recommendations further illuminate the statistical results.[89] By and large, lawyers indicated that they used expected value calculations to decide whether to recommend settlement or trial. That is, the vast majority of the lawyer subjects explained that they made recommendations based on a comparison of the $21,000 settlement offer to the $19,000 expected value of trial.[90] There was no noticeable difference in the considerations that motivated lawyers representing Toyota Drivers and those representing BMW Drivers.[91] Notably, no lawyer respondents mentioned either that the settlement offer was insufficient for the client to replace his lost BMW or, alternatively, that it was more than sufficient to replace the lost Toyota. On the few occasions that lawyers referred to considerations other than the expected monetary values of the settlement offer and potential trial verdicts, they mentioned the hidden financial and emotional costs of the litigation process.[92]

2. The Initial Settlement Offer as an Expectation Anchor.—The preceding section explains that decisionmakers often employ a reference point to classify potential outcomes as gains or losses and that decisions can be based, at least in part, on the different risk preferences that these classifications can create. Although, as demonstrated, this decisionmaking process can lead to choices that clearly deviate from wealth maximization, the process seems somewhat intuitive—at least in The Automobile Accident scenario. That is, a litigant's pre-accident situation in that scenario seems like a *relevant* referent for an accident victim to use.

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89. To better understand the decisionmaking processes of our lawyer subjects, we invited each lawyer subject to explain why he or she made various recommendations. Sixty-nine of the 90 lawyer participants (77%) accepted the invitation. We placed the request for explanation at the end of the survey materials in an attempt to minimize its impact on the subjects' responses, although we think this was probably unnecessary: we believe lawyers typically feel obligated to explain their recommendations to their clients.

90. For example, one subject wrote: "If win, receive $28K. If lose, receive $10K. Assuming 50/50 probability of winning or losing, I would take the $21K every time." Attorney Survey #37 (on file with authors).

91. One lawyer representing a BMW Driver recommended that his client "definitely accept" the settlement offer because "[t]he offer exceeds the expected value of the case (at 50% probability)." Attorney Survey #90 (on file with authors). Another recommended his client "definitely accept" the offer because of "[s]imple statistics. . . . If the case is 50/50, [the offer] is a deal." Attorney Survey #2 (on file with authors).

92. One trial lawyer wrote that accepting the offer was a "'no brainer' considering emotional and financial costs of litigation." Attorney Survey #9 (on file with authors).

More surprising is the extent to which an obviously *irrelevant* referent can influence decisionmaking. Cognitive psychologists have demonstrated that decisionmakers' choices are frequently affected by information anchors.[93] That is, people have a tendency to allow information to which they have previously been exposed to anchor their expectations—even when the information bears no relation to the choice faced—which can lead to discounting objectively relevant information when making decisions.[94]

In one study of this phenomenon, Joyce and Biddle divided professional auditors into two groups and exposed each to a different anchor.[95] The members of Group A were asked to indicate whether they thought management fraud occurred in *more than ten* of the one thousand companies audited by Big Eight accounting firms. Group B members were asked to indicate whether they thought management fraud occurred in *more than two hundred* of the one thousand companies audited by the Big Eight firms. The experimenters tested whether these numerical anchors—"ten" for Group A, "two hundred" for Group B—would influence responses to the second question they asked members of both groups: "What is your estimate of the number of Big Eight clients per 1,000 that have significant executive-level management fraud?" Group A subjects estimated an average of 16.52 incidents of fraud per thousand, while Group B subjects estimated an average of 43.11 incidents of fraud per thousand.[96] The anchors—which conveyed no meaningful information about the issue the subjects were asked to address—systematically influenced subjects' estimates.[97]

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93. *See* Kahneman, *supra* note 73, at 308, 307-10 ("Anchoring effects will be explained as cases in which a stimulus or message that is clearly designated as irrelevant and uninformative nevertheless increases the normality of a possible outcome.").

94. *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128-30 (1974) [hereinafter Tversky & Kahneman, *Judgment*]. Tversky and Kahneman explain:

> In many situations, people make estimates by starting from an initial value that is adjusted to yield the final answer. The initial value, or starting point, may be suggested by the formulation of the problem, or it may be the result of a partial computation. In either case, adjustments are typically insufficient. That is, different starting points yield different estimates, which are biased toward the initial values. We call this phenomenon anchoring.

Id. at 1128 (footnote omitted).

95. *See* Edward J. Joyce & Gary C. Biddle, *Anchoring and Adjustment in Probabilistic Inference in Auditing*, 19 J. ACCT. RES. 120, 123 (1981).

96. *See id.* at 125.

97. In another study illustrating the same decisionmaking bias, Tversky and Kahneman asked subjects to estimate the percentage of African countries in the United Nations. Before asking the subjects for their final estimates, the researchers asked them to spin a random number wheel. The number wheel was fixed to land on 1 of 2 anchors: 10 or 65. Subjects were then asked to estimate whether the number they received on the wheel was higher or lower than the percentage of African countries in the United Nations. Then, they were asked to give their best estimate of that percentage. Although the wheel-generated numbers were clearly unrelated to the task at hand, subjects allowed these

In some situations, of course, anchors provide useful shortcuts to expected value calculations, obviating the need to independently evaluate all decision options.[98] To the extent an anchor provides information *relevant* to the value of a decision option, reliance on it might lead to the same decision choice that an independent valuation would produce or, at least, might lead to an optimal balance between the quality of a decision and the time and effort invested in reaching it. But when an anchor does not represent a competent market valuation or when market valuations are irrelevant, reliance on that anchor can lead to suboptimal decisions.

We hypothesized that in litigation bargaining an opening settlement offer made by an adversary might anchor a party's expectations about the outcome of the litigation and thus affect his or her choice between litigation options. To test the differential effect that an opening settlement offer might have on our litigant and lawyer subjects, we gave two groups of each a hypothetical litigation scenario entitled "The Lemon." Litigants and lawyers assigned to Group A received the following information:

> *Description of the Facts of the Case*
>
> Recently, you [your client] purchased a brand new BMW 318 automobile from your [a] local dealer for $24,000. Much to your [your client's] disappointment, the car has one major problem that you were unable to detect when you test-drove it [that was undetected during the test-drive]: it occasionally stalls at stop lights and stop signs and is extremely difficult to start in the morning. While these problems do not make it dangerous to drive, they have cut down on your [your client's] enjoyment of the car. You have [She has] had BMW mechanics look at the car twice but BMW claims that the car is not defective and there is nothing that can be done to "fix" it. "Some cars just stall more often than others," they told you [her]. You [She] took the car to your [her] own mechanic, and he agreed with the dealer that the problem could not be improved. Due to what you perceive [your client perceives] as a defect, you have [she has] asked the dealer to take the car back and give you [her] a refund. At this point, you [she] would rather buy a different model of car. The dealer has refused to refund your [her] money.
>
> You have retained an attorney and [She retained you and you] filed a lawsuit against the dealer seeking a refund of your [your client's] money. Your lawyer has informed you [After conducting

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numbers to influence their responses. The median estimate of subjects who landed on 10 was 25%, while the median estimate of subjects who landed on 65 was 45%! *See* Tversky & Kahneman, *supra* note 94, at 1128; *see also* NEALE & BAZERMAN, *supra* note 41, at 48-50 (reviewing the results of anchoring experiments).

98. *See* Tversky & Kahneman, *supra* note 94, at 1131 (noting that anchoring and other heuristics "are highly economical and usually effective" even though they do "lead to systematic and predictable errors").

legal and factual research, you have learned] that the only legal issue is whether or not the car is, in fact, "defective," due to the problems you have [your client has] recognized. If the case goes to trial, this will be a question for a jury to decide. If a jury decides the car's problems amount to a "defect," the dealer will have to take the car back and give you [your client] a complete refund of your [her] money. If the jury decides the problems do not amount to a "defect," you [your client] will have to keep the car and will not be entitled to any refund at all. Your lawyer thinks [You think] this is a very close case, and could easily go either way.

Initially, the BMW dealer offered to refund $2000 of the purchase price if you [your client] would drop the lawsuit and keep the car. You rejected the offer [Following your advice, she rejected the offer]. Now, with the trial date approaching, the dealer has asked for another meeting with you and your attorney [your client] to discuss the possibility of settling the case out of court.

Question:

At the meeting with you and your lawyer [your client], the BMW dealer offered to settle the case by refunding $12,000 of the purchase price if you [your client would] agree to keep the car and drop your [the] lawsuit. The dealer told you that this is his final offer, and given the impracticality of further meetings or discussions prior to trial, you have no reason to doubt that this is the case. Therefore, you must [you must advise your client to] either accept the offer or reject it and proceed to trial. Your lawyer has agreed to represent you [You have agreed to represent this client] for free in this case, so considerations of legal fees should not affect your decision [recommendation] about accepting or rejecting the offer.

Will you [Will you advise your client to]:

Definitely accept the settlement offer _____
Probably accept the settlement offer _____
Undecided _____
Probably reject the settlement offer _____
Definitely reject the settlement offer _____

Group B subjects received the same scenario, but for one difference: they learned they had declined an initial $10,000 offer, rather than the $2000 initial offer Group A subjects learned they had declined.

Thus, after the final settlement offer was made, Group A and B subjects faced an identical choice: to accept a $12,000 settlement (plus the right to keep the defective car) or to proceed to trial, accepting a chance to recover $24,000 (and return the car) along with the risk of recovering nothing (but retaining the defective car). Thus, the expected (and actual) value of the settlement offer was $12,000 plus the value of the car. The

expected value of trial was approximately fifty percent of $24,000 (that is, $12,000) plus fifty percent of the value of the car.

As was the case in the Automobile Accident scenario, Group A and B subjects in the Lemon scenario would have evaluated the options identically, on average, if they based their evaluations only on the expected financial values of the two options.[99] Psychological research on anchoring, however, led us to hypothesize that the initial anchors to which subjects were exposed—a $2000 opening offer for Group A versus a $10,000 opening offer for Group B—would cause subjects to evaluate decisions differently depending on the version of the scenario they received.

As we found in the Automobile Accident scenario, litigants in the Lemon scenario were more likely than their lawyer counterparts to deviate from the result that an expected value calculation would dictate. The independent variable in the Lemon scenario—the opening offer—had a statistically significant effect on the likelihood that litigant subjects would accept the final settlement offer,[100] but it did not have a significant effect on the likelihood that lawyer subjects would advise their clients to accept the offer. Litigants receiving the $2000 initial offer favored accepting the final offer, providing a mean response of 3.54. Litigants receiving the $10,000 initial offer were more likely to reject the offer than accept it, providing a mean score of 2.97.[101] We believe the difference between the groups can be explained most plausibly as follows: the $10,000 initial offer anchored the expectations of Group B litigants so high that the small increase offered from $10,000 to $12,000 made the final offer seem unattractive relative to that expectation, whereas the $2000 initial offer anchored the expectations of Group A litigants so low that the increase to $12,000 seemed very attractive.[102]

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99. Due to the values provided in the hypothetical scenario, all risk-neutral subjects calculating the expected values of the choices should have opted for settlement if they placed a positive value on the car and for trial if they placed a negative value on it.

100. $t(68) = 1.96, p < .05$.

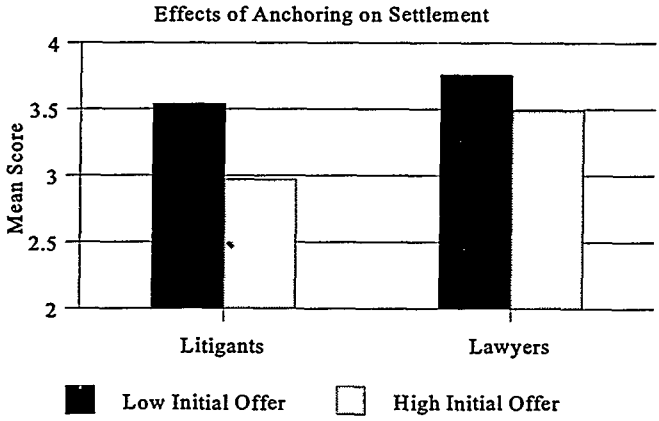
101. *See infra* Figure 2.

102. A related explanation is that the parties who received the $10,000 initial offer believed that the BMW Dealer acted arrogantly by making only a relatively small concession from his initial position. *Cf.* HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 48 (1982) (advising negotiators not to "embarrass your bargaining partner by forcing him or her to make all the concessions").

Proponents of the standard economic models of settlement might argue that these results are not inconsistent with expected value calculations. Specifically, proponents might suggest two other explanations for why the opening offers produced different response rates to final offers.

First, an opening offer might communicate information about the likelihood of possible trial outcomes. A high offer, for example, may indicate that the offeror possesses some evidence favorable to the offeree's position that he fears will come to light at trial. In a tort suit, for example, the defendant might have more information about whether he behaved negligently than the plaintiff has, and he may fear the repercussions of that material coming to light at trial. Alternatively, a high offer might indicate

Figure 2—The Lemon



By contrast, the value of the initial settlement offer did not have a significant effect on the lawyer subjects. Both Group A and B lawyers were inclined to recommend the settlement offer. The group that received the $2000 opening offer provided a mean response of 3.76, while the group that received the $10,000 opening offer provided a mean response

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that the offeror's attorney believes the offeree is more likely to win in court than the offeree's attorney does. In that same tort suit, regardless of private information, the defendant's lawyer might simply believe that the plaintiff has a better chance of winning at trial than the plaintiff's own attorney believes. This could, paradoxically, prompt plaintiffs and plaintiffs' attorneys to decline high settlement offers because they believe that they can win big at trial.

Second, a settlement offer might communicate information about the offeror's willingness to engage in extended pretrial procedures. A litigant unconcerned with the expense of pretrial maneuvering may attempt a form of price-discriminating behavior, beginning with a low offer followed by minimal increases in an effort to secure cheap settlements from adversaries financially unable or emotionally unwilling to engage in protracted litigation.

Neither of the rational actor accounts satisfactorily explains the differences between Group A and B litigants in our scenario. As to the first point, we eliminate the possibility that the initial settlement offer contained any informational content by providing subjects in both groups with an identical final settlement offer. Because a $12,000 final offer is made by the car dealership in both versions of the scenario, defendant's private information or trial predictions that might reasonably cause the plaintiff and plaintiff's attorney to reassess the value of a trial verdict should be reflected in that final offer. While a $2000 settlement offer standing alone could signal different information than a $10,000 settlement offer standing alone, a final settlement offer contains all relevant information concerning the expected value of a trial verdict.

Moreover, the finality of the $12,000 offer in our scenario eliminates any procedural posturing on the part of the defendant or plaintiff. While the $2000 offer might have, at one time, signaled a financial commitment to protracted litigation that might have, in turn, encouraged settlement, the extension of a "final offer" and the lack of time for further negotiation before trial indicate that such a screening strategy has failed to pressure the plaintiff into a quick settlement. The fact that the defendant who initially makes a low settlement offer might have an appetite for pretrial posturing is no longer relevant to the settlement decision.

of 3.49,[103] a slight but nonsignificant difference.[104] The contrast between the lawyer and litigant responses suggests the hypothesis for future testing that the evaluation of options by the lawyer subjects was less influenced by the opening-offer anchor.[105] Unlike the results of the Automobile Accident scenario, however, the interaction between the subject pools (litigants and lawyers) and the opening offers ($2000 and $10,000) was not statistically significant,[106] meaning that we cannot reject the possibility that the greater effect of the anchor on the litigant subjects was due to chance rather than a real difference in how the two pools of subjects responded to the presence of different anchors.

Although the statistical analysis is inconclusive, the anecdotal responses of the lawyer subjects support the hypothesis that the lawyer subjects were less affected by the opening offer anchor. As was true in the Automobile Accident scenario, the lawyers' written explanations for their recommendations—regardless of whether they represented clients that received the $2000 or $10,000 opening offer—did not discuss the independent variable. The explanations typically explicitly or implicitly focused on a comparison of the expected monetary values of the two options.[107] Many lawyers suggested that by accepting the $12,000 offer and selling the car the client could likely achieve a better financial result than even the best possible trial verdict ($24,000 with the dealer taking the car back) would provide.[108]

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103. *See supra* Figure 2.

104. $t(88) = 1.12, p = .27$. Because of the gap, albeit a statistically insignificant one, between the two lawyer groups, the two-way ANOVA test comparing the difference between the lawyer groups to the difference between the litigant groups failed to reach the level of statistical significance. Therefore, the difference between how lawyers and litigants responded to this experiment is less robust than the difference between how the two populations responded to the automobile accident scenario.

105. As is the case with the Automobile Accident scenario, responses from litigant subjects in the Lemon scenario could be explained by a different effect of the independent variable than we have hypothesized. Subjects that received the $10,000 initial offer might have considered, in true role-playing fashion, what kind of a person they must be to have rejected that offer. They might have then decided that if they were in fact a person who would reject $10,000, they would probably also reject $12,000. Subjects who received the $2000 initial offer might not have felt constrained from accepting the final offer. If this explanation were correct, however, we would have expected the lawyer subjects to respond in the same way. That they did not reinforces the explanatory power of the anchoring effect.

106. $F(1, 156) = 1.05, p = .3$.

107. Similar to the Automobile Accident explanations, a few lawyers explained their recommendations to settle by reference to hidden emotional or financial risks of trial. *See, e.g.*, Attorney Survey #35 (on file with authors) ("If she does not take the settlement, she has to go in front of a jury complaining that her BMW (luxury car for rich people) isn't as much fun as it should be. The settlement avoids that along with trial stress, and she is unlikely to end up worse off financially.").

108. *See, e.g.*, Attorney Survey #83 (on file with authors) ("Take $12K, [and] sell [the] car. Miles ahead! Someone would pay $12K plus for a new BMW which has these problems."); Attorney Survey #59 (on file with authors) ("Client gets $12,000 plus gets to keep the car—which she could sell. She may end up with more [than trial will yield], if she gets a good price for the car."). Interestingly,

B. *Equity Seeking*

The interpersonal relationship between the parties may also influence litigation decisionmaking even when those dynamics do not affect the expected value of competing decision choices.[109] According to equity theorists, who study the impact of interpersonal relationships on individual behavior, parties in relationships "attempt to maintain proportionality between inputs and outcomes to themselves [in] comparison [to] others."[110] Individuals in inequitable relationships tend to feel distressed, and they try to eliminate that distress by restoring equity to the relationship.[111] We hypothesized that the equity-seeking impulse might influence litigant and lawyer settlement behavior, enticing the subjects to stray from choices that would maximize expected wealth.

Our experimental results suggest, however, that just as lawyers are less likely than litigants to allow reference points and possibly anchors to affect their decisions, they are also less likely to permit interpersonal considerations to influence their evaluation of litigation options.[112] Consider the following scenario—"The Broken Heater." Group A litigants and lawyers were given the following information:

> *Description of the Facts of the Case*
>
> Late last summer, you [your client, a college student] began looking off-campus for an apartment for the upcoming school year. You [Your client] finally found a satisfactory apartment, but the

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though, none of the lawyer responses explicitly identified that the settlement offer had a higher expected value than trial so long as the car had *any* resale value.

109. *See* Mnookin & Ross, *supra* note 35, at 11 ("A proposed change in the status quo . . . may be rejected even when it offers indisputable advantages over maintenance of that status quo, and even when the future offers no realistic hope of more favorable terms, simply because the proposal violates one party's or both parties' sense of fairness or equity.").

110. George F. Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. PERSONALITY & SOC. PSYCHOL. 426, 426 (1989) (summarizing ELAINE WALSTER ET AL., EQUITY: THEORY AND RESEARCH (1978), which reviewed more than four hundred equity studies).

111. *See* Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151, 153-54 (1973).

112. Of course the personal relationship at issue in our scenario involved the *litigant* and a landlord rather than the *lawyer* and a landlord. Some might argue that the different results we obtained between litigants and lawyers say nothing about how equity-seeking influences the two groups, but it instead suggests that equity-seeking affects only those parties whose relationships have been directly affected by the other in the relationship. Thus, the argument goes, if the relationship at issue in the scenario involved the lawyer and his counterpart representing the landlord, perhaps the lawyers would have behaved just as the litigants behaved in our study, and perhaps the litigants would have behaved just as the lawyers in our study.

This is an astute observation, but we do have some data that call its accuracy into question. While it is true that our litigant subjects were influenced more by the landlord's good or bad behavior than the lawyers as a whole, a subgroup of the lawyers—the transactional attorneys—were just as affected by the landlord's behavior as the litigants. This suggests to us that lawyers in general, and litigators in particular, do respond differently than litigants when equity-seeking concerns arise in litigation.

landlord would agree only to a six-month lease. After careful deliberation, you [your client] signed a six-month lease and agreed to pay $1000 per month in rent. On September 1, you [your client] moved into your [the] new apartment.

Everything was fine for two months. Around Halloween, through no fault of your own [your client], the heater in your [the] apartment broke down. You [Your client] left a message with the landlord, requesting immediate repair due to the ensuing winter weather. You [Your client] did not hear anything from the landlord, so you [your client] called him again the next day. The landlord promised to fix your [the] heater, but he never did. A week later, you [your client] called him again. Again, he promised to fix it, but he never did. Over the next several weeks, you [your client] called him a half-dozen times, but he did not return your [any of the] calls. For four months (Nov., Dec., Jan., and Feb.), you [your client] lived without heat but continued to pay your [the] rent in full. Although you were [your client was] able to borrow a small space heater from a friend, it failed to keep the apartment from feeling cold and drafty throughout the winter. When your [the] lease expired, you [your client] moved out and found a new apartment.

After moving out, you [your client] told a friend what had happened to you [what had happened], and she advised you [your client] to seek legal advice through the ASSU[113] [the college's student government legal service, where you are working part time as a volunteer attorney]. You met with an ASSU attorney, who advised you [You met with your client, conducted legal and factual research, and discovered] that there was a good chance that you [your client] could recover a portion of the $4000 rent you [your client] paid during those four, cold months. Accordingly, with the attorney's assistance [with your client's permission], you filed suit against the landlord in small claims court for failing to heat your [your client's] apartment. Prior to the small claims court trial, you [you and your client] agreed to meet with the landlord.

Question:

At the meeting, the landlord made you [your client] a settlement offer of $900 if you [your client] would agree to drop the lawsuit. He told you that it was the highest offer he would make, and given the impracticality of any further meetings or discussions, there is no reason to doubt him. Therefore, you must [you must advise your client to] either accept the offer or reject it and go to small claims court.

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113. "ASSU" is the abbreviation for the Associated Students of Stanford University, a Stanford student government organization that provides free legal counseling to students.

Will you [Will you advise your client to]:
Definitely accept the offer _____
Probably accept the offer _____
Undecided _____
Probably reject the offer _____
Definitely reject the offer _____

Again, litigant and lawyer subjects randomly assigned to experimental Group B received the same scenario as the one given to Group A, with a single difference. Instead of being told that the landlord had failed to return numerous phone calls, Group B subjects were informed that the landlord had been unable to have the heater repaired because he had been out of the country dealing with a "family emergency."

This manipulation caused a statistically significant shift in preferences on the part of litigant subjects.[114] Group A subjects ("Broken Promise" subjects) were more likely to reject the settlement offer than accept it, providing a mean response of 2.60, while Group B subjects ("Family Emergency" subjects) were more likely to accept the offer and avoid small claims court, responding, on average, 3.41.[115]

Although the experiment was designed to provide subjects in Groups A and B with the same legal endowment should they reject the settlement and go to court, one plausible explanation for the divergent responses is that subjects presumed that the quality of the landlord's excuse (or lack thereof) for failing to provide heat would affect the expected recovery in small claims court. To rule out this hypothesis, we gave a third group of litigant subjects (Group C) the same scenario we gave to Group A, but we added the following paragraph at the end of the scenario:

> Keep in mind when making your decision that whether you win or lose in small claims court and how much the court might award you will be based on the fact that the landlord failed to provide heat for four months. The fact that the landlord behaved badly toward you by promising to fix the heater but never following through might have made you more upset, but whether the landlord had a sympathetic excuse for failing to provide the heat will not concern the court.

Even with this explicit explanation that the quality of the landlord's excuse would not affect the plaintiff's legal rights, subjects in Group C provided a mean response of 2.69, statistically indistinguishable from the 2.60 response provided by the Group A subjects, who responded to the same scenario without the explicit disclaimer.

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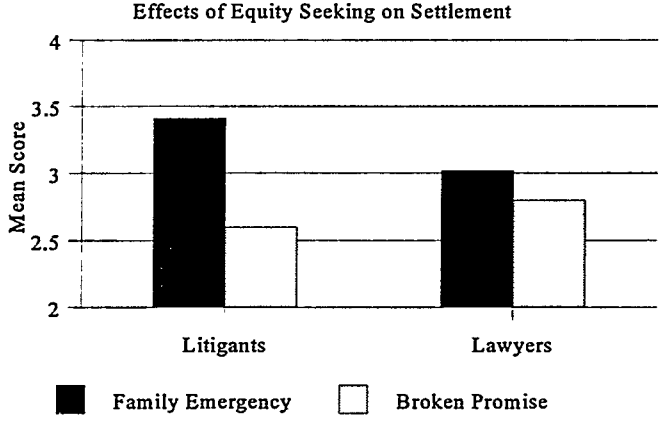
114. $t(115) = 3.24, p < .01$.
115. *See infra* Figure 3.

Because the divergent responses between Group A and B litigants do not appear to be caused by a perceived difference in legal endowments, we suggest that the most plausible explanation for the difference is that the Broken Promise subjects felt the need to recover more from the litigation process than money: they also sought official recognition that the landlord had behaved badly or that their claim was valid. The Family Emergency subjects, by contrast, felt less need for this remedy because the landlord, while failing to fulfill his contractual obligation, did not behave in a morally objectionable manner—he at least had a sympathetic excuse for his failure to behave responsibly. Therefore, while some Broken Promise subjects that felt $900 was adequate monetary compensation might have demanded their day in court anyway, subjects in the Family Emergency group who believed $900 was adequate compensation had no reason to decline the offer.

Figure 3—The Broken Heater



The lawyer subjects, by contrast, did not appear to be conflicted about the goals of the litigation or to be influenced by the equity-seeking construct. Group A lawyers, those representing clients to whom the landlord provided no excuse for failing to fix the heater, gave a mean response of 2.80. Group B lawyers, representing clients whose landlord was out of the country due to family emergency, responded with an average score of 3.02.[116] Although the difference suggests that perhaps the decisions of some lawyers were affected by the landlord's excuse, it falls far short of statistical significance.[117] The interaction between the subject pools and the landlord's excuses—that is, the difference between the

116. *See supra* Figure 3.
117. $t(87) = .088, p = .38$.

effect the excuse had on the litigant subjects and on the lawyer subjects—approached significance, although it fell short according to the usual conventions.[118]

Most of the Broken Heater lawyers appear to have approached this scenario precisely as they approached the scenarios testing the effects of frames and anchors. That is, the attorneys attempted to assess whether the $900 settlement offer, relative to the trial option, made good financial sense. The psychological variable—equity-seeking—did not significantly influence the attorneys' perception of the landlord's settlement offer as more or less desirable than trial. Thus, again, relative to the litigants at least, the lawyers seemed generally uninfluenced by a psychological consideration that does not affect the expected financial value of litigation options.[119]

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118. $F(1, 204) = 2.59, p < .11$.

119. The results of our experiments do not reveal precisely why our litigants and lawyers approached the settlement decision differently. At least two competing hypotheses are possible: (1) lawyers are less affected by psychological factors because of their role as agents, rather than principles, in the dispute, which either (a) causes them to perceive the choice differently, or (b) imbues them with the belief that this role obligates them to base their recommendations on dispassionate analysis rather than more emotional factors (the "role" hypothesis); or (2) regardless of role, lawyers tend to see the world differently than nonlawyers as a result of (a) differences between those who choose to enter the legal profession and the general population, (b) legal education, or (c) experience practicing law (the "population" hypothesis).

The results of other research provide some empirical support for both the population and role hypotheses. In a recent study, Rachlinski demonstrated that a group of undergraduate students *playing the role of lawyers* were susceptible to the framing effect. *See* Rachlinski, *supra* note 9, at 135-38. Because placing subjects in the role of a lawyer did not appear to mitigate the effect of frames, Rachlinski's results suggest, by implication, that the differences between our experimental subjects might be better explained by the population hypothesis (and, more specifically, by either legal education or professional experience).

In a study of how fee-shifting rules might affect settlement decisions, Rowe and Vidmar used two different hypothetical lawsuit scenarios to test the extent to which experimental subjects' preference for settlement would increase under procedural rules that made unsuccessful plaintiffs responsible for defendants' legal fees. *See* Rowe & Vidmar, *supra* note 56, at 13. In the first scenario, modeled after a personal injury case, Duke University law students playing the role of the *plaintiff* were not statistically more likely to accept a given settlement offer when the fee-shifting rule placed an increasing amount of risk upon plaintiffs that demand adjudication—a result in conflict with the authors' prediction that rational plaintiffs' preference for adjudication would decrease as risk increases. *See id.* at 23-27.

In the second scenario, modeled after a civil rights case testing the same hypotheses as the tort scenario, Duke University law students—this time playing the role of the *plaintiff's attorney*—were statistically more likely to accept a given settlement offer when the fee-shifting rule placed a greater risk on plaintiffs who declined settlement offers. *See id.* at 27-29 (producing statistically significant results, $p < .01$). In other words, members of the same population—in this case Duke University law students—made decisions in a way that conforms with the predictions of economic models (that assume rational behavior and a desire to maximize wealth) when they were *agents* but not when they were *principals*. Although Rowe and Vidmar were not attempting to explore the differences in decisionmaking between law students playing the role of lawyers and those playing the role of plaintiffs, their results incidentally provide some support for the role hypothesis.

Understanding the precise reason for the different responses of our litigant and lawyer subjects is not necessary to evaluate the implications of the differences and was consequently beyond the scope

III. Testing the Impact Lawyers Have on the Settlement Decision

Our lawyer subjects were not affected to nearly the same degree as our litigant subjects by the framing, anchoring, and equity-seeking variables tested. Whether this difference is important to the resolution of legal disputes depends not only on whether the experimental results are generalizable to lawyers and litigants outside the experimental setting, but also on the precise role lawyers play vis-á-vis litigants in settlement decisionmaking.

The client, rather than the lawyer, will be the ultimate arbiter of whether to accept or reject a settlement offer. This is, of course, the prevailing rule of legal ethics: The *Model Rules of Professional Conduct* provide that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter."[120] This rule is subject to limited exceptions—for example, when a client is a minor or mentally disturbed[121]—but when a client is competent, it is hard and fast.[122] More fundamentally, the structure of the market for legal services, by its very nature, ensures that clients will be the ultimate decisionmakers: the client—assuming she can pay for legal representation—always retains the ability to fire her attorney and seek alternative representation.[123]

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of this project. Determining which of the competing hypotheses has the most explanatory power, however, would further our understanding of the role of lawyers in the litigation process, and could be a fruitful topic of future research.

120. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995). The ABA Code provides that "it is for the client to decide whether he will accept a settlement offer," MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980), and reminds that "[i]n the final analysis . . . the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." *Id.* at EC 7-8. *See generally* Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984) (discussing the Model Rules as both a restatement of law and a normative directive within a variety of attorney-client relationships). Under the prevailing ethical rules, the lawyer has the authority to determine litigation tactics, an area in which the lawyer is presumed to have substantial expertise. *See* Poole v. United States, 832 F.2d 561, 564 (11th Cir. 1987) (holding that an attorney's stipulation of an easily-proved element of an offense was tactical in nature and did not require the defendant's consent).

121. Even in these circumstances, the Model Rules suggest the client should be permitted, as far as it is practical, to make such decisions. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1995) ("When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."). The Model Code provides, somewhat more directly, that "[a]ny mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1980).

122. *See generally* Debra T. Landis, Annotation, *Conduct of Attorney in Connection with Settlement of Client's Case as Ground for Disciplinary Action*, 92 A.L.R. 3D 288, 291 (1979 & Supp. 1996) (recognizing the rule that an attorney has "no implied authority to compromise and settle his client's claim" and collecting relevant cases).

123. *But cf.* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 882-84, 889-98 (1990) (arguing that lawyers have enough market

While we assume that the client will serve as the ultimate decision-maker in the settlement context, we also assume that the lawyer has the potential to influence her client's decisionmaking by serving as her client's educator, her advisor, or both. In this Part, building on the previous set of experiments, we begin to explore how effectively lawyers can function as educator or advisor in litigation settlement decisionmaking;[124] in the next Part, we consider whether a lawyer's assumption of these roles is likely to promote efficient litigation settlement decisionmaking.[125]

To assess the extent to which lawyers can help their clients avoid being influenced by cognitive or social-psychological phenomena when choosing between litigation options, we designed a second set of laboratory experiments: the "Lawyer Influence" experiments. In these experiments, all subjects played the role of litigants. We randomly selected 149 subjects from the same pool of Stanford University undergraduate students from which we recruited litigant subjects for the original series of experiments.[126] Each subject received the BMW Driver version of the Automobile Accident scenario and the Broken Promise version of the Broken Heater scenario, each with one modification. At the end of each scenario, the subject received one of four additional pieces of information reputedly provided by the subject's "lawyer." These additional pieces of information represent four techniques lawyers might actually employ to reduce the influence that the cognitive and social-psychological factors had on the original group of subjects.[127] We reached conclusions regarding the efficacy of these techniques by comparing the responses of the original experimental subjects to the responses of the Lawyer Influence subjects who received the same base scenarios along with an additional piece of information.

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power to act as "gatekeepers"—that is, to prevent clients from pursuing undesirable ends by withholding their cooperation).

124. For an example of earlier experimental work on the efficacy of the attorney in affecting the outcome of settlement discussions, see Korobkin & Guthrie, *Psychological Barriers*, *supra* note 16, at 160-64 (describing some initial experiments designed to evaluate such ability).

125. We assume for the sake of argument that lawyers will choose a counseling approach in an effort to serve the client's interests, rather than their own. Not all commentators are willing to make this assumption. *See, e.g.*, Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 12 (1992) (remarking that some proponents of settlement believe lawyers intentionally misadvise their clients in an effort to pad their fees or further their ideological agendas).

126. Subjects were screened to ensure that none of the 149 participants in the Lawyer Influence experiments had participated in any of the original series of experiments.

127. To avoid the possibility that the relative effectiveness of one instruction could be due to the instruction in the other scenario with which it was paired, the four versions of the Automobile Accident and the four versions of the Broken Heater scenario were distributed to ensure each of the sixteen possible combinations of two scenarios appeared an equal number of times.

A. *The Lawyer as Educator*

In the first two Lawyer Influence experiments, the lawyer functions as an educator, attempting to alert clients to psychological processes that might influence behavior. The lawyer does this without imposing her own opinions as to what decision the client should make or how she should make it.

1. The Psychology Lesson.—The most direct way for a lawyer to educate a client about psychological factors that might affect litigation decisionmaking without imposing her own value judgments is simply to explain the way psychological factors have been found to operate in other contexts. This almost purely informational teaching strategy amounts to a version of "here's an interesting psychological phenomenon that sometimes operates in situations like this one." The lawyer shares social science findings with the client (about which the client is probably unaware) prior to client decisionmaking but leaves the conclusions to be drawn from that information, if any, to the client's discretion. Although explaining a psychological effect might carry with it the subtle message that the lawyer disapproves of the result to which it leads, the lawyer's bias is no more evident in this approach than when a lawyer provides any piece of information to a client that might be relevant in making any decision.[128]

In the context of the Automobile Accident scenario, we tested this "Psychology Lesson" strategy by providing BMW Driver subjects with the following piece of information immediately after they learned of the defendant's $21,000 settlement offer and immediately before they were asked whether they would accept or reject the offer:

> Your attorney has made it clear that "it is up to you to decide whether to accept or reject the settlement offer." However, your attorney has advised you to be aware of a psychological tendency

128. William Simon illustrated this point anecdotally: Two lawyer friends were representing a woman unjustly accused of leaving the scene of an automobile accident. When it came time to consider a prosecution plea offer that would have her enter a plea of no contest and avoid jail time, the lawyers separately explained the ramifications of the settlement and trial options to the client, carefully avoiding a recommendation of either course of action. *See* William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213, 214-16 (1991). The first lawyer ended his explanation with the observation that, if the client accepted the plea offer, "there probably wouldn't be any bad practical consequences, but it wouldn't be total justice," at which time the plaintiff advised him that she would reject the plea. *See id.* at 215, 215-16. The second lawyer then went over the same considerations with the plaintiff but did not offer the "it wouldn't be total justice" observation, at which time the plaintiff advised him that she would accept the plea. *See id.* at 216. Simon concluded that "[e]ven where they think of themselves as merely providing information for clients to integrate into their own decisions, lawyers influence clients by myriad judgments, conscious or not, about what information to present, how to order it, what to emphasize, and what style and phrasing to adopt." *Id.* at 217.

> that many people exhibit when making settlement decisions. When choosing between options that appear to represent a financial loss, people are much more likely to gamble than they are in other circumstances.
>
> Thus, when asked to choose between a sure loss of $500 or a fifty percent chance of losing $1000, most people choose the fifty percent chance, even though the value of each option ($500 and 50% × $1000) is the same. This decision may produce good results (half of the people who choose the riskier option will not lose anything) or bad results (half of the people who choose the riskier option will lose $1000). Regardless, your attorney has advised you to be cognizant of this risk-taking tendency.

In the Broken Heater scenario, the Broken Promise litigants received the following piece of information, also immediately after the defendant made the settlement offer and immediately before the answer choices were posed:

> Your attorney has made it clear that "it is up to you to decide whether to accept or reject the settlement offer." However, your attorney has advised you to be aware of a psychological tendency that many people exhibit in making settlement decisions. When people perceive the other side as blameworthy, they often allow their desire for vindication to influence their assessment of the offer. This may produce good or bad results. Regardless, your attorney has advised you to be cognizant of this equity-seeking tendency.

2. *Consider the Opposite.*—Psychologists have hypothesized that judgmental errors can result when people consider only one side of a problem.[129] This hypothesis suggests that decisions can be affected by convincing the decisionmaker to "Consider the Opposite"—that is, to view the problem from alternative and, if possible, opposing perspectives.[130] The Consider the Opposite strategy is less directly educational than the Psychology Lesson approach, but it is similarly value-neutral.

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129. For example, one group of psychologists stated:

> We believe that there are also more specific and more cognitive elements involved in this characteristic failure to *consider the opposite* and that these processes may underlie many attributional and judgmental errors. In particular, we would argue, people typically seem oblivious to the fact that the way they process information may itself influence their judgments and that the questions they ask may determine the answers they receive. Thus any inducement for decision makers to consider that matters might be other than what they seem, especially an inducement to consider possibilities diametrically opposed to one's assumptions, would have an ameliorative effect on judgmental bias.

Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1231-32 (1984) (emphasis in original).

130. *Id.*

In our attempt to test the efficacy of a Consider the Opposite approach, we provided our BMW Driver subjects with the following admonition after they received the settlement offer, but before they were asked to select one of the answer choices:

> Your attorney has made it clear that "it is up to you to decide whether to accept or reject the settlement offer." However, your attorney has advised you to think carefully about your decision, pointing out both the negative and positive aspects of the settlement offer. Your attorney has acknowledged that the settlement offer is $7000 less than you hoped to recover. However, your attorney has also taken note of the fact that the settlement offer will leave you better off than you are right now and will enable you to avoid a trial, where the results are uncertain.

Similarly, the Broken Promise subjects in the Broken Heater scenario were urged not to lose sight of the monetary aspect of the litigation in pursuit of the legal system's validation of their claim:

> Your attorney has made it clear that "it is up to you to decide whether to accept or reject the settlement offer." However, your attorney has advised you to think carefully about your decision, pointing out both the negative and positive aspects of the settlement offer. Your attorney has acknowledged that accepting this settlement offer might not be as satisfying as a potential small claims court judgment against the landlord. However, your attorney has also taken note of the fact that accepting the settlement offer will enable you to recover damages and avoid a potential small claims court judgment in favor of the landlord.

B. The Lawyer as Decisionmaker

In the third and fourth versions of the Lawyer Influence experiments, the lawyer replaces his educator hat with his advisor hat. That is, the lawyer moves from merely providing information to affirmatively using the client's perception of him as experienced, knowledgeable, and wise to persuade the client to adopt the lawyer's method of evaluating the decision options.[131] In both of these versions, the lawyer explicitly recommends that the client accept the proposed settlement offer.

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131. *See, e.g.*, DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 186 (1977) (noting that "the client may be unduly influenced by what the lawyer, the 'authority figure,' would do"); ANTHONY T. KRONMAN, THE LOST LAWYER 15 (1993) (describing the "lawyer-statesman" as one "distinguished by the exceptional wisdom he displays" and noting that "others look to him for leadership on account of his extraordinary deliberative power").

1. Recommendation with Expected Value Explanation.—In our third Lawyer Influence experiment, the lawyer recommends settlement and briefly explains the reasoning that leads to that recommendation. The reasoning is based on information presented in the Consider the Opposite approach manipulation, but here the information is presented with the intent to persuade the client to settle. Following the description of the settlement offer, the BMW Driver subjects in the Automobile Accident learn:

> Your attorney has advised you that "it is up to you to decide whether to accept or reject the settlement offer." However, he has recommended that you accept the offer for the following reason: since a trial would give you about a fifty percent chance of recovering $10,000 and about a fifty percent chance of recovering $28,000, the expected value of going to trial is approximately $19,000—$4000 less than the settlement offer.

Similarly, the Broken Promise subjects in the Broken Heater scenario learn:

> Your attorney has advised you that "it is up to you to decide whether to accept or reject the settlement offer." However, your attorney recommends that you accept the offer for the following reason: if the landlord had a good excuse for being unable to fix the heater, $900 would probably seem like a fair offer given your inconvenience. If you think this is true, then it makes sense to accept the $900 even though the landlord does not seem to have a very good excuse because whether the landlord is a good or bad person is irrelevant to the fact that he owes you a partial refund for failing to provide heat.

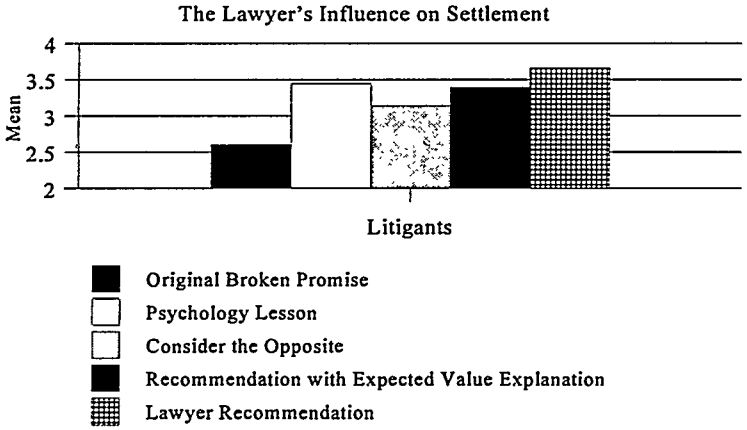
2. Lawyer Recommendation.—The fourth Lawyer Influence experiment—which most clearly represents the view that the lawyer is a professional to whom the client should defer—simply informs the client that the lawyer recommends settlement. The lawyer does not explain how or why he reached this conclusion or why the client should agree with his assessment; rather, this manipulation implicitly suggests that the client should substitute his attorney's judgment for his own. Subjects responding to both the Automobile Accident and the Broken Heater scenarios received the same brief statement following the relevant settlement offer:

> Your attorney has made it clear that "it is up to you to decide whether to accept or reject the settlement offer." However, your attorney has recommended that you accept the offer.

C. *Experimental Results*

The four Lawyer Influence manipulations of the Broken Heater scenario increased the propensity of litigant subjects to favor settlement. While the original Broken Promise litigants in the Broken Heater experiment said, on average, that they would reject the landlord's $900 settlement offer (providing a mean score of 2.60),[132] the lawyer's efforts to educate, advise, or both caused subjects, on average, to favor settlement.[133] Psychology Lesson subjects scored 3.44, Consider the Opposite subjects 3.14, Recommendation with Expected Value Explanation subjects 3.39, and Lawyer Recommendation subjects 3.66. The responses of the four groups were significantly different from the original group.[134]

Figure 4—The Broken Heater



A drastic reduction in the number of subjects who said they would "definitely reject" the settlement offer largely explains these results. Thirty percent of subjects in the original group said they would definitely reject the offer, but no more than nine percent of those in the four Lawyer Influence groups were so disposed. Thus, although none of the four manipulations caused subjects to rush to accept the settlement offer, opposition to settlement was far less pronounced. Among the groups, the most notable finding is that all four strategies produced remarkably similar

132. *See supra* note 116 and accompanying text.

133. *See infra* Figure 4.

134. Adding a lawyer's statement significantly affected responses: $F(4, 201) = 4.68$, $p < .01$. Follow up t-tests demonstrate that each of the four manipulations led to responses significantly different than the baseline version of the Broken Heater: Psychology Lesson: $t(90) = 3.13$, $p < .01$; Consider the Opposite: $t(75) = 1.81$, $p < .05$; Recommendation with Expected Value Explanation: $t(81) = 2.84$, $p < .01$; and Lawyer Recommendation: $t(82) = 3.88$, $p < .01$.

results. Lawyer Recommendation group subjects were the most likely to accept the settlement offer, but they were not significantly more likely to accept than subjects who responded to the other three manipulations.

Not only did all four lawyer instructions produce responses that were significantly different from the original group's responses, subjects in the Broken Promise manipulation groups were as likely to accept the landlord's settlement offer as the original Family Emergency subjects. The original Family Emergency subjects provided a mean score of 3.41,[135] statistically indistinguishable from the mean scores that subjects in the manipulation groups provided.[136] This result suggests that lawyers may be able to change the expressed preferences of clients who initially favor trial over settlement due to a desire for formal vindication.[137]

The power of this finding is somewhat undercut by the fact that the Lawyer Influence manipulations did not have a similar effect on BMW Drivers in the Automobile Accident scenario. Although the mean responses of all four manipulation groups were somewhat higher than that of the original group of BMW Drivers,[138] the differences were not significant,[139] and the manipulations failed to increase the preference for settlement among BMW Drivers to the level of the original Toyota Driver subjects.[140]

The inconsistent results of the Lawyer Influence experiments lead us to the tentative conclusion that, at least in some circumstances, lawyers taking an active role in their client's litigation decisionmaking processes *probably* can affect the extent to which psychological factors, as opposed to the comparison of the expected financial values of alternative litigation options, motivate litigants' ultimate decisions. Our results also suggest that the effect of the reference point heuristic might be more persistent than the impulse to seek equity. This finding in turn hints at the broader hypothesis

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135. *See supra* note 116 and accompanying text.

136. $F(4, 199) = .74, p = .56$.

137. The findings are remarkably robust considering that results of this type of "debiasing test"—tests of whether reliance on heuristics will subside when subjects are provided more knowledge or advice—are usually limited. *See* John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 669, 671 (1996) (reviewing literature on debiasing tests).

138. Original BMW Drivers = 3.64; Psychology Lesson = 3.78; Consider the Opposite = 3.80; Recommendation with Expected Value Explanation = 3.84; Lawyer Recommendation = 4.03.

139. $F(4, 185) = .60, p = .66$.

140. An ANOVA comparing the results of the four lawyer-influence manipulations of the BMW Driver scenario with the original Toyota Driver group was significant, $F(4, 183) = 2.74, p < .05$, as were individual comparisons between each manipulation and the Toyota Driver group: the difference between original Toyota Drivers and Psychology Lesson BMW Drivers was $t(65) = 2.96, p < .01$; the difference between Toyota Drivers and Consider the Opposite BMW Drivers was $t(75) = 3.06$, $p < .01$; the difference between Toyota Drivers and Recommendation with Expected Value Explanation BMW Drivers was $t(61) = 2.46, p < .02$; and the difference between the original Toyota Drivers and the Lawyer Recommendation BMW Drivers was $t(58) = 1.76, p < .09$ (approaching significance).

that cognitive heuristics may be more deeply ingrained in people's minds than socially-constructed desires such as the desire to be treated fairly or to have the validity of one's position acknowledged.[141] Much more work needs to be done, however, before we could present a theory of when a lawyer is likely to have influence over a client's decisionmaking approach and when she is not.

Finally, one additional point about the Lawyer Influence experiments bears noting: in both the Automobile Accident and the Broken Heater scenarios, the most successful manipulation was the Lawyer Recommendation, in which the lawyer advised settlement without providing an explanation, although in neither case was the difference between this manipulation and the others statistically significant. This finding (if it is not the result of chance), seems counterintuitive: providing the client with *more* information apparently reduces the likelihood of convincing a client to change his position. We hypothesize that this might be because the Lawyer Recommendation manipulation places the opinion of the respected lawyer-advisor behind the settlement option without providing a justification that some clients might find unconvincing. While a Recommendation with Expected Value Explanation approach might, through the persuasiveness of the explanation, convince some clients to adopt the lawyer's evaluative technique, it might also convince some clients who would otherwise be inclined to rely on their attorney's advice to reject that advice because they fail to find the underlying reasoning compelling. If this explanation is correct, our results are consistent with previous psychological research finding that observed framing effects are remarkably persistent even after experimental subjects have the effect explained to them.[142] This explanation also will become important when we turn in subpart IV(C) to the normative question of how a lawyer should counsel a client during settlement negotiations.

IV. Considering Lawyers' Impact on Settlement Rates

A. Lawyers as Settlement Promoters

Our experimental results suggest that litigants and lawyers systematically evaluate litigation options differently. Specifically, our

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141. This appears to contradict the hypothesis of at least one research team. *See* Lord et al., *supra* note 129, at 1232 (explaining that they chose to attempt to correct certain social-psychological biases because they "seemed more involving than many statistical or mathematical problems . . . and thus presumably more resistant to correction").

142. *See* Kahneman & Tversky, *Choices*, *supra* note 41, at 343 (describing an experiment in which subjects evaluating a plan to attack a disease expressed different preferences for the *same plan* depending on whether it was described in terms of lives it would save or people it would kill even after the experimenters discussed the inconsistency of these results).

results suggest that lawyers are more likely to explicitly or implicitly employ expected financial value calculations when considering litigation options, whereas litigants are more likely to deviate from this method of analysis in a variety of circumstances. This insight suggests a new perspective from which to analyze the lawyers' effect on settlement rates.

Most literature concerning lawyers' effect on settlement rates focuses on what has been called the "principal-agent problem."[143] Although lawyers are professionally obligated to consider only the interests of the client when recommending litigation decisions,[144] the principal-agent literature assumes that lawyers will not always hew to this ideal but instead will often seek personal gain when their interests conflict with those of their clients.[145]

The incentive effects of lawyers' fee arrangements is an oft-considered issue.[146] Contingent fee arrangements, for example, might promote higher levels of settlement because the contingency-fee lawyer can often maximize her income by settling many cases for a percentage of the take, rather than shepherding a smaller number of cases through the far more time-intensive trial process.[147] The lawyer preferring a quick settlement

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143. *See generally* Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, 51 ECONOMETRICA 7 (1983); Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55 (1979) (both analyzing the effect of the attorney's fee arrangement on the alignment of interests between the attorney and the client).

144. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1995) ("A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests . . . ."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(A) (1980) (prohibiting representation if "the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests"); *see also* Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 210 (1987) (noting that the standards for professional conduct "are fully applicable in the settlement context").

145. *See, e.g.*, Langevoort & Rasmussen, *supra* note 48 (manuscript at 8) ("Lawyers seek to maximize their income while clients seek to obtain accurate, cost-justified information. Placed in the language of economics, there is an agency problem inherent in the lawyer/client relationship.").

146. The fee arrangement literature is extensive. Some notable works include Lucian Arye Bebchuk & Andrew T. Guzman, *How Would You Like to Pay for That? The Strategic Effects of Fee Arrangements on Settlement Terms*, 1 HARV. NEGOTIATION L. REV. 53 (1996) (arguing that contingent fee arrangements systematically work to benefit plaintiffs' strategic position in settlement negotiations); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 676 (1986) (suggesting that contingent fee arrangements in derivative and class actions do not provide an "excessive" incentive to litigate); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996) (modeling the economically optimal contingent fee arrangement assuming that fees affect attorneys' work effort and that effort affects litigation results); Miller, *supra* note 144 (addressing agency issues under a number of attorney-client fee arrangements); and Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1126 (1970) (concluding that a "contingent fee does not necessarily put the lawyer on the client's side or automatically lead him to do what the client would desire if the client could understand the nature of his case and the intricacies of litigation").

147. *Cf.* Miller, *supra* note 144, at 198-202 (demonstrating that under traditional contingent fee arrangements attorneys will favor settlement at lower monetary levels than will plaintiffs); Schwartz

to free up time for other potentially profitable opportunities may exert pressure on her client to settle.[148] Hourly fee arrangements, by contrast, might impede settlement because the time required to stage a trial enriches the lawyer while the client bears the attendant financial risk.[149] This incentive problem may be exacerbated by the legal profession's culture of adversarialism.[150]

Although each individual incentive story undoubtedly contains valuable insights, the principal-agent literature as a whole fails to provide a coherent theory about whether lawyers, on balance, promote or impede settlement. For every plausible claim that lawyers' fee arrangements have one-directional effect on settlement rates, there is an equally plausible claim that lawyers' long-term financial incentives might cut in the opposite direction.[151] A lawyer's desire to build reputational capital might outweigh his desire to maximize income in any particular case.[152] This suggests that a contingency fee lawyer might favor trial over settlement, rather than the reverse, if he wants to enhance his reputation as a gladiator in order to attract future clients.[153] An hourly fee lawyer who calculates that his reputation would be harmed more by losing a trial than it would be enhanced by winning a trial might favor settlement after all,[154] despite his immediate financial incentive to favor trial. In short, the assumption of the fee arrangement literature that lawyers will seek to maximize their

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& Mitchell, *supra* note 146, at 1136-38 (suggesting that contingent fee agreements promote earlier settlements that are less lucrative for clients so that attorneys can maximize their earnings per hour of work).

148. *See, e.g.*, Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market For Champerty?*, 71 CHI.-KENT L. REV. 625, 627-28 n.12, 672 n.212 (1995) (describing litigation in which attorneys allegedly employed coercive tactics in order to obtain a quick settlement and collect legal fees).

149. *See* Miller, *supra* note 144, at 203, 202-03 ("[A] purely rational and self-interested attorney would never settle an hourly fee case in which he or she is working for a profit.").

150. *See, e.g.*, Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 2 (1994) ("[W]hile adversarial legalism stems *primarily* from enduring features of American political culture and governmental structure, the legal profession itself does play a significant *independent* role in promoting and perpetuating adversarial legal contestation as a prominent feature of governance." (emphasis in original)); Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994) (arguing that tort lawyers have reduced doctrinal certainty and increased litigation in products liability law to benefit themselves); *cf.* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 793-94 (1984) (criticizing the adversarial nature of legal negotiation).

151. *See generally* Gary Mendelsohn, *Lawyers as Negotiators*, 1 HARV. NEGOTIATION L. REV. 139, 139-43 (1996) (cataloguing a variety of reasons that lawyers with different financial and reputational incentives might promote *or* hinder settlement).

152. *See* Painter, *supra* note 148, at 670 (claiming that "'reputational capital' is the single largest asset of many lawyers").

153. *See* JEFFREY O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 46 (1971).

154. *See* Mendelsohn, *supra* note 151, at 143 (speculating that successful litigators might have an incentive to settle close cases to avoid risking a "blemish" on their litigation scorecard).

income even when doing so is harmful to clients, even if true,[155] provides little insight into whether lawyers, as a class, promote or impede settlement.

Our approach provides the basis for a more certain directional prediction as to the impact of lawyers on settlement rates. The high monetary costs of staging a trial[156] suggest that a decisionmaker concerned primarily or exclusively with the financial value of litigation will favor settlement more often than a decisionmaker affected by frames, anchors, a desire to maintain equitable relationships, or other non-wealth-maximizing psychological phenomena.[157] If our experimental data correctly predict that lawyers are more likely than litigants to concern themselves primarily with the financial value of litigation, lawyers are likely to facilitate a higher rate of settlement than we would expect litigants to negotiate on their own. This prediction is consistent with the extremely high actual rate of settlement.[158] While our "cognitive" account is not necessarily or even likely to be the sole explanation of high settlement rates,[159] we believe it is a crucial piece of the puzzle of why we observe such high rates of settlement despite the myriad ways negotiation breakdown can occur in the litigation context.[160]

B. Lawyers and the Efficiency of the Litigation System

Whether a higher settlement rate than would otherwise be observed indicates that lawyers promote more efficient dispute resolution is another question entirely, and the answer is not obvious. Like other private agreements, settlements are generally considered efficient because they place the contracting parties in a situation that is Pareto superior to their

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155. We are more optimistic than the authors of the fee incentive literature that cultural norms of ethical lawyering are sufficiently strong in the legal community that the lawyer who pads his wallet at the client's expense is the exception rather than the rule. *See* Langevoort & Rasmussen, *supra* note 48 (manuscript at 53) ("Perhaps only a deviant segment of the bar would deliberately allow self-interest to affect the objectivity of advice to their clients."); Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 368-70 (1992) (contending that the norm of loyalty to the client is central to lawyers' concept of their profession).

156. *See supra* note 1.

157. This prediction is, of course, for aggregate numbers of cases. In any individual case, a strict expected-financial-value analysis could point toward trial, whereas sensitivity to psychological phenomena could lead to a preference for settlement.

158. The observed correlation between our prediction and the actual data on settlements does not, however, prove causation. But we believe it does indicate that our experimental findings lead to a very plausible explanation of the high rate of settlement deserving of further study.

159. For example, it might also be true that clients have an incentive to select lawyers with a reputation for cooperative behavior, and, by building and maintaining such reputations, lawyers promote settlement. *See* Gilson & Mnookin, *supra* note 24, at 512-13, 522-27 (demonstrating that the existence of cooperative attorneys allows coordinated action between disputants to solve a "prisoner's dilemma" situation).

160. *See infra* notes 193-222 and accompanying text.

prior situation.[161] That is, if the litigating parties both voluntarily agree to settlement terms and waive their rights to seek adjudication of their dispute, we presume one or both litigants is better off as a result of the transaction, and neither is worse off.[162] But if a litigant who would otherwise choose not to settle *decides to settle* as a result of her lawyer's influence, it is unclear *a priori* whether the settlement leaves the litigant better off than would a decision to risk adjudication.[163]

This concern appears to have led, implicitly if not explicitly, to the position maintained by some legal ethicists that the primary goal of client counseling is the preservation of client decisionmaking autonomy.[164] Under this "client-centered" model of counseling,[165] the lawyer serves as an objective and unopinionated counselor.[166] According to Binder and Price, the model's most notable proponents, the proper role of the lawyer is entirely process-oriented.[167] The lawyer may help clients

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161. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 12 (1988) ("A particular distribution of goods among consumers is said to be *Pareto efficient* if it is not impossible to redistribute the goods so as to make at least one consumer better off (in his own estimation) without making another consumer worse off (again, in his own estimation).").

162. *See supra* note 161.

163. In other words, if lawyers as a group promote more settlements than would be reached otherwise, those marginal settlements could make at least one of the parties worse off: the party who would otherwise have declined to settle on the specified terms. If this is true, the settlement will not only be detrimental to that party, it will not be Pareto superior to adjudication and thus may be inefficient.

Exchanges that are not Pareto superior can in some circumstances be efficient under the Kaldor-Hicks test, a less stringent measure of efficiency than the Pareto test. Under the Kaldor-Hicks test, an exchange is considered efficient if the benefitting party benefits more than the harmed party is harmed. *See* POSNER, *supra* note 31, at 13-14 (comparing the Pareto and Kaldor-Hicks tests). In a settlement negotiation setting, though, in which transaction costs are likely to be low, the settlement payoff can be adjusted such that any settlement that would be a Kaldor-Hicks efficient settlement can be made acceptable to both parties and, thus, Pareto superior to trial.

164. *See generally* Simon, *supra* note 128, at 213 (describing the "influential view" that "the lawyer's most basic function is to enhance the autonomy of the client").

165. The label is borrowed from BINDER & PRICE, *supra* note 131, at 19-22 (defining the characteristics of the client-centered approach); *see also* DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (1991) (describing the client-centered approach as an attitude of looking at problems from the client's perspective while making the client a true partner in the resolution of her problems).

166. Some argue that it is impossible for a lawyer to present options in a truly neutral manner. How the lawyer packages the choices will always affect the way that the client evaluates them. *See generally* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 30 (1988) ("Lawyers who say they just provide technical input and lay out the options while leaving the decisions and methods of implementing them up to their clients are kidding themselves . . . ."). The truth in this observation, however, does not suggest that a lawyer striving for complete neutrality and objectivity cannot come substantially closer to achieving this goal than one who seeks to persuade.

167. In the first edition of their influential work on client-centered counseling, Binder and Price defined client counseling as "a process in which potential solutions, with their probable positive and negative consequences, are identified and then weighed in order to decide which alternative is most appropriate." BINDER & PRICE, *supra* note 131, at 135.

reach decisions by identifying alternatives[168] and analyzing consequences,[169] but under most circumstances he should "refrain from announcing what [he] think[s] a client should do."[170] In fact, Binder and Price recommended in their initial work on the subject that the lawyer decline to offer an opinion even when asked.[171]

This client-centered theory, in its strongest form, seems difficult to defend. A client generally presumes her lawyer will provide substantive advice, rather than just procedural assistance.[172] And if a lawyer in fact

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168. *See id.* at 158-63 (describing the cooperative role of attorney and client in identifying alternatives); BINDER ET AL., *supra* note 165, at 292 ("Once a client's objectives are out in the open, the *second step* is to identify alternatives." (emphasis in original)); Simon, *supra* note 10, at 9 (describing the "crude" autonomy view as requiring the lawyer to present the client with all relevant information, and the "refined" version of autonomy as requiring the lawyer to present information that the typical person in the client's position would consider relevant).

169. *See* BINDER & PRICE, *supra* note 131, at 166 ("After the lawyer and client have joined their talents to articulate the alternatives that bear consideration, the counseling dialogue can then be turned to an analysis of the potential consequences of each alternative."). During this process, "[t]he lawyer will both identify the consequences which he/she sees as probable and also inquire of the client what consequences the client foresees." *Id.*; *see also* BINDER ET AL., *supra* note 165, at 293-308 (detailing the process involved in identifying consequences).

170. BINDER & PRICE, *supra* note 131, at 186.

171. *See id.* at 187. Binder and Price suggested that the lawyer respond to requests for advice by explaining that she is not in a position to know the client's value system and by offering to facilitate the client's decisionmaking process. They offered the following hypothetical response for illustration:

> Mr. Hawkins, I'm not really in a position to evaluate the situation. . . . Only you know what is most important to you, and you're the person who's going to have to live with the decision. I can understand it's difficult to decide, but given I can't know what's most important to you, I think you should make the decision. I'll be glad to explore the consequences with you some more if that will help.

Id. In the second edition of their work on client-centered counseling, Binder, Bergman, and Price adopted a more moderate view:

> A radical view of the client-centered approach might lead you to reject requests for advice in order to avoid influencing decisions. However, that view demeans clients' ability to make independent judgments; deprives clients of the opportunity to get advice from a person who has professional expertise and emotional distance from a problem; and may well defeat the expectations of most clients. We therefore reject such a radical position.
>
> However, though you may ultimately provide a client who asks for it with your opinion, you should do so only after you have counseled a client thoroughly enough that you can base your opinion on the client's subjective values, not your own.

BINDER ET AL., *supra* note 165, at 279.

172. *See, e.g.*, BINDER & PRICE, *supra* note 131, at 197 (noting that some clients "insist upon the lawyer's opinion . . . . In their view, a proper lawyer-client relationship is one where the client is passive and the lawyer tells the client what the lawyer thinks is best."); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1088 (1976) ("[I]n very many situations a lawyer will be advising a client who wants to effectuate his purposes within the law, to be sure, but who also wants to behave as a decent, moral person. It would be absurd to contend that the lawyer must abstain from giving advice . . . ."); Rutledge R. Liles, *Lawyers as Counselors: The Conflict Between Ordinary Morality and Practical Reality*, 42 FLA. L. REV. 479, 479 (1990) ("Lawyers, by virtue of their education, practical experience, and position in society, attract

knows what is best for the client, it is difficult to defend the morality, much less the efficacy, of the lawyer's failure to provide direct advice.[173] But the Binder and Price dedication to autonomy[174] seems less ideological than pragmatic. While Binder and Price believe litigation decisions ultimately should be consistent with the *values* of the client, thus demonstrating some ambivalence about the primacy of client autonomy, they hypothesize that the lawyer is usually not in a position to fully understand those values, and they fear that he, therefore, might influence a client to make a decision inconsistent with her values.

Other ethical theorists are less wedded to client autonomy than Binder and Price.[175] They believe the lawyer can play a more active role in settlement decisionmaking. To proponents of this paternalistic view,[176] the lawyer sometimes knows what is better for the client than the client does herself,[177] and thus the lawyer intervenes in client

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people who seek advice on a multiplicity of problems. Although a lawyer's counseling efforts generally are focused on legal issues, clients frequently seek legal advice on business and personal matters.").

173. *See* Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1267-68 (1995) (noting that "[a]vailable evidence indicates certain irrationalities in people's determinations of a fair bargain" but that a lawyer negotiating a settlement "can moderate these irrational predispositions by undertaking persuasion of his client based on his more extensive experience"); *see also* Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717, 767 (1987) ("It seems fair to say that a lawyer who avoids giving advice to a client capable of assessing it is acting with disrespect towards her client by failing to treat him as a competent person.").

174. At least one scholar has questioned whether the original Binder and Price client-centered counseling model is really dedicated to client autonomy. *See* Ellmann, *supra* note 173, at 744-46. Ellmann argued that the client-centered model is manipulative because it dictates the very decisionmaking process that the lawyer and client pursue. The lawyer decides, for example, what steps the two of them will take together, in what order they will be taken, and who will ultimately decide what to do. *See id.* at 745-46.

175. *See, e.g.*, Thomas D. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 447 (1990) ("I do not like the concept of 'autonomy.' . . . None of us should see ourselves as truly autonomous. We were born into families and nurtured by communities. As a result, we owe obligations to those individuals and groups, as well as to the broader society.").

176. *See* Simon, *supra* note 128, at 213, 223-24 (contrasting the autonomy view of lawyering to the opposing, paternalist view).

177. *See, e.g.*, Ellmann, *supra* note 173, at 764 ("A more familiar rationale for attorneys' manipulation of their clients is that a lawyer has a duty to protect the client's best interests even if the client does not perceive them."); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 491 (arguing that attorneys may sometimes be able to assess when their clients' "wants" are inconsistent with their "values" better than clients can); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 488, 486 (1984) (noting that his vision of lawyering acknowledges "that people might have interests of which they are not aware" and that "[t]he precept that the lawyer further the client's interests, as she understands them, is qualified by the precept that she also try to enhance the client's capacity to express her own interests"); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1, 17 (1975) ("[I]t is the received wisdom within the professions that the client lacks the perspective necessary to pursue in a satisfactory way his or her own best interests, and that the client requires a detached, disinterested representative to look after his or her interests.").

decisionmaking to help a client accomplish what she really, albeit unknowingly, values.

Luban, for instance, argued that lawyers should exercise what he called "Interests Over Wants" paternalism in client counseling.[178] He placed litigants' possible litigation goals into three categories: "interests," "values," and "wants."[179] Interests are those items that serve as "generalized means to any ultimate ends," like freedom or money, that are useful to anyone.[180] Wants constitute desires. Values "are those reasons [for acting] with which the agent most closely identifies—those that form the core of his personality, that make him who he is."[181] Under Luban's conception of ethical lawyering, the lawyer may not intrude on client decisionmaking autonomy when the client pursues interests consistent with his values. But when the client pursues interests consistent with his wants but inconsistent with his values, the lawyer may intervene.[182] Another way of stating this principle is that a lawyer has more counseling latitude when a client's expressed desire does not faithfully reflect her settled preferences.[183] The rules of legal ethics incorporate shades of this conception of lawyering by allocating the power to make decisions about litigation tactics to lawyers rather than clients[184]—a rule that can be understood as codifying the belief that a client's expressed desires about litigation tactics are not the type of wants capable of reflecting values and could, in fact, conflict with client values.

Other legal ethicists view the lawyer-client relationship as a limited friendship.[185] According to this conception, no person is completely autonomous,[186] and candid advice is more beneficial than destructive to the service of the client's values.[187] Kronman's conception of the lawyer takes this analogy a step further. Kronman referred to his ideal attorney as a "lawyer-statesman": a wise sage whose advice is valued because her

178. Luban, *supra* note 177, at 472, 472-74 (defining Interest Over Wants paternalism as "constraining, in another's own best interest, his liberty to do what he wants").

179. *Id.* at 467-72.

180. *Id.* at 471.

181. *Id.* at 470.

182. *See id.* at 474.

183. *Cf.* Joel Feinberg, *Legal Paternalism*, *in* PATERNALISM 3, 7 (Rolf Sartorius ed., 1983) (distinguishing between "fully voluntary" assumptions of risk—in which the action is a result of "deliberate choice" made with time, information, a clear head, and rational faculties—and "not fully voluntary" assumptions of risk).

184. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 1 (1995) ("In questions of means, the lawyer should assume responsibility for . . . legal tactical issues . . . ."); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980) ("In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own.").

185. *See, e.g.*, Fried, *supra* note 172, at 1065-67; Morgan, *supra* note 175, at 455-59.

186. *See* Morgan, *supra* note 175.

187. *See id.* at 457-59.

character and experience make her uniquely qualified to help others better understand their own ideals and values.[188] The underlying premise of this conception is that the lawyer has the capacity to understand what course of action is best for the client[189] and thus possesses the ability to serve the client well by following a course of action that consists of more than merely carrying out direct orders.[190] Elements of the friend and lawyer-statesman approaches to lawyering also appear in the ethical rules governing the practice of law. For example, the Model Rules require the lawyer to "exercise independent professional judgment and render candid advice."[191] The rules also instruct the lawyer to consider "moral, economic, social and political factors" when rendering that advice.[192]

These paternalistic models of lawyering are based on the belief that, at least in some circumstances, the lawyer can create value for his client by intervening in the client's process of evaluating litigation options. This belief, though, is not strictly inconsistent with Binder and Price's fear that lawyer intervention can have just the opposite effect. The question that theories rooted in paternalism and autonomy both beg is this: When are a litigant's stated desires concerning litigation options inconsistent with her settled values and preferences? Both types of theories assume that lawyers cannot know the answer, and thus they ignore the question. Our experimental results cast light on how difficult a question this is, but also illuminate a theoretically sound, although practically complex, approach lawyers should take to counseling clients concerning litigation options.

C. *The Cognitive Error Approach to Lawyering*

1. The Importance of the Means-Ends Distinction.—The critical question raised by our experimental results is whether lawyers and clients evaluate litigation options differently because they seek different *ends* or because they use different *means* in an effort to attain the same ends. If the latter is the case, lawyers may assume that clients fall prey to computational or representational errors[193] that a lawyer

188. KRONMAN, *supra* note 131, at 14-17 (describing the leadership and character of the lawyer-statesman ideal). Elihu Root is often cited for the observation that "[a]bout half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop." Gilson, *supra* note 123, at 884.

189. *See* Simon, *supra* note 128, at 224, 222-26 ("The paternalist view is intensely individualistic to the extent that it aspires to deep knowledge of the client as a concrete individual and grounds the lawyer's decision in the client's self-realization.").

190. *See* Fried, *supra* note 172, at 1071 (describing the lawyer as a limited-purpose friend because "he acts in your interests, not his own; or rather he adopts your interests as his own").

191. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1995).

192. *Id.*

193. *See* Rachlinski, *supra* note 9, at 146 (claiming that "framing poses a representational, rather than a computational problem").

can remedy, leading to settlement decisions that better serve the clients' interests;[194] if the former is the case, lawyers should recognize that their influence on clients' decisionmaking could lead to settlements that do not maximize client utility[195] and are thus inefficient, at least under a Pareto standard.[196]

We think it nearly self-evident that a lawyer who knows his client is embarking on a course with a lower expected utility than an alternative course has an ethical obligation to take preventive action.[197] On the other hand, when the client's expressed litigation desires maximize his expected utility, the lawyer should avoid any action that might convince the client to abandon his position. In other words, the lawyer should avoid substituting her utility function for her client's.

The cognitive error approach to counseling, then, requires the lawyer to assess whether an observed difference between the lawyer's and client's analysis of decision options is due to the client's cognitive error or is merely the manifestation of differences in utility functions. If the difference is due to cognitive error, the lawyer should attempt to change the client's outlook. If the difference is the result of different preference structures, the lawyer should scrupulously avoid any interference.[198]

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194. Selecting among alternative means to a given end is, at root, an exercise in the counting of costs, and it is possible to say some are "better" at making such calculations than others without instigating a debate over subjective values that underlie disagreements concerning ends. *See* KRONMAN, *supra* note 131, at 63, 54-56 ("To the extent that a personal choice presents a question of means and nothing more, it can be settled by calculation, and the person who deliberates ably about such questions will simply be the one who calculates well.").

195. Law and economics scholars assume that rational people will attempt to maximize their expected utility. *See, e.g.*, Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1813 (1995) (calling the utility-maximizing assumption "a standard heuristic in economic analysis"); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213 (1995) ("According to the standard economic model of choice, an actor who must make a choice in the face of uncertainty will rationally select the option that maximizes his subjective expected utility." (citation omitted)); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 23 (1989) (explaining that the pure law and economics model "assumes that an actor will choose the course of action that will maximize his personal expected utility"); *see also, e.g.*, John F. Nash, Jr., *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950) (applying the utility-maximizing assumption to a classical bargaining problem).

196. For a discussion of an alternate standard of efficiency, see *supra* note 163.

197. *Cf.* KRONMAN, *supra* note 131, at 129 ("[W]hen surrounding circumstances suggest a client's decision is impetuous, a responsible lawyer will test his client's judgment before accepting it, recognizing that in such situations the danger of regret is large and that a lawyer must protect his client from this familiar species of self-inflicted harm . . . ."); Bundy, *supra* note 125, at 23 (arguing that when the lawyer can identify with confidence that a client has made an irrational decision—one not based on her "preferences and values"—the lawyer should intervene and attempt to correct the error).

198. *Cf.* Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 533-34 (1994) (posing the questions: "[u]nder what circumstances should a lawyer offer the client her own advice . . . or urge a client to pursue or refrain from pursuing a particular course of action?" and "[a]re lawyers—by virtue of training, experience, or professional distance—sometimes better

Although the prescription is clear in theory, the following analysis of our experimental scenarios makes it clear that lawyers may find it quite difficult to make such judgments in individual cases.

2. Evaluating the Demonstrated Lawyer-Client Differences.—Neale and Bazerman contended that "individuals deviate from rationality" when they are affected by the reference point heuristic.[199] This characterization is descriptively accurate, at least as "rationality" is usually defined.[200] Individuals relying on reference points violate the invariance principle, the basic tenet of rationality that posits that individuals should make the same choice between two options no matter how the two options are presented.[201] But Neale and Bazerman's critique is normative as well as descriptive. They wrote to alert negotiators that the world is made up of "imperfectly rational actors"[202] and to help those negotiators avoid becoming one of that group's number.

Under the Neale and Bazerman view of decisionmaking in negotiation—the conventional view—some of the BMW Drivers in our Automobile Accident scenario *erred* by permitting the value of the lost vehicle to affect their comparison of the two options before them. Implicitly, Neale and Bazerman concluded that behavior that falls beyond the bounds of the traditional postulates of rationality, such as this, signifies the failure of individuals to maximize their utility.

If our BMW Driver subjects maximize utility by maximizing wealth, this characterization is accurate.[203] In the language of an accountant, the BMW Drivers faced a thinly veiled "sunk-cost" problem.[204] The value of the subject's destroyed automobile is a sunk cost: it is nonrecoverable and does not affect the expected value calculation of either decision choice. An accountant would no doubt advise the client that the BMW's value is

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decisionmakers than their clients, and what implications does this have for the client-centered model [of counseling]?").

199. NEALE & BAZERMAN, *supra* note 41, at 41. In a chapter entitled "Individual Biases in Negotiations," Neale and Bazerman discussed the "framing" and "anchoring" effects that we have tested under the rubric of reference point heuristics as well as research on problems of "availability" and "overconfidence." *Id.* at 43; *see also* Bundy, *supra* note 125, at 16 (observing that many litigants may miscalculate outcomes or "rely on simplifying information-processing heuristics" that can result in erroneous choices because they deviate from rationality).

200. *See supra* note 4; *see also* Eisenberg, *supra* note 195, at 218 ("[A] basic assumption of expected-utility theory, sometimes called invariance, is that a decisionmaker's preference between two options should not depend on how a choice is characterized and presented, or 'framed.'").

201. *See* PLOUS, *supra* note 4, at 82 (defining the invariance principle).

202. NEALE & BAZERMAN, *supra* note 41, at 59.

203. *Cf.* Langevoort & Rasmussen, *supra* note 48 (manuscript at 58) (claiming that "rational client[s] seeking legal advice about a proposed course of action" should ask for a probability calculation and then make a "straightforward calculation of the expected utility").

204. RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 95 (3d ed. 1988) ("Sunk costs are like spilt milk: they are past and irreversible outflows.").

irrelevant to the settlement-versus-trial decision.[205] So would most economists.[206] From this perspective, a subject's decision to settle or demand adjudication should not depend on the car destroyed in the accident. That Toyota Drivers were more likely than BMW Drivers to accept the settlement offer suggests that some BMW Drivers based their decisions on sunk-cost considerations, and, therefore, some of those subjects rejected a favorable offer. This result does not necessarily mean that our subjects are poor decisionmakers, in a general sense. Reliance on a reference point heuristic might enable people to make utility-maximizing decisions in *most* cases while simultaneously minimizing the time and resource costs of decisionmaking.[207] But the apparent cost of using this heuristic in litigation decisionmaking is that it can lead to individual decisions that fail to maximize the utility of the litigant—decisions that, therefore, can be classified normatively as "mistakes." If the conclusion that follows from this experiment is that a statistically significant percentage of the BMW Driver subjects made mistakes, it must also be true that the lawyer subjects representing BMW Drivers did not make mistakes.[208] Put slightly differently, the lawyer subjects, compared to the nonlawyer subjects, were less likely to suffer the cost of relying excessively on the reference point heuristic.

By focusing on the settlement-versus-trial decision solely from a financial perspective, however, this approach is too narrow. While it is undoubtedly true that some litigants in the Automobile Accident scenario violated the invariance principle, they might have actually maximized their

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205. *Cf.* NEALE & BAZERMAN, *supra* note 41, at 79 (noting that accounting instructors teach students that it is rational to ignore sunk costs but that students commonly make the mistake anyway); Conlisk, *supra* note 137, at 671-72 (noting that professors teach economic reasoning and provide grades as an incentive for "getting the right answers" but still "use gallons of red ink to inform students that they [did] not").

206. *See, e.g.*, POSNER, *supra* note 31, at 8 ("Rational people base their decisions on their expectations of the future rather than on their regrets about the past. They treat bygones as bygones."); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 37 (1988) ("One of the earliest lessons in economics is that decisions should be based on incremental benefits and costs. . . . [H]owever, [this rule] must compete with an alternative intuition: the larger the past resource investment in a decision, the greater the inclination to continue the commitment in subsequent decisions."); Thaler, *supra* note 47, at 98 ("Historical or sunk costs should be irrelevant.").

207. *See generally* Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1139-40 (1987) ("Experiments have shown that as intuitive statisticians, we do not naturally use precise tools like multiple regression or Bayes' theorem, but instead we cope by using a limited number of rules of thumb called heuristics. . . . Often these heuristics prove quite useful."); Conlisk, *supra* note 137, at 671 ("[H]euristics often provide an adequate solution cheaply whereas more elaborate approaches would be unduly expensive." (footnote omitted)); Warren Thorngate, *Efficient Decision Heuristics*, 25 BEHAV. SCI. 219, 223 (1980) ("[A] wide variety of decision heuristics will usually produce optimal, or close to optimal, choices and can thus be termed relatively efficient.").

208. *See supra* section II(A)(1).

utility by choosing trial rather than settlement. In such a case, it is meaningless to point out that these subjects violated formal principles of rationality.[209] In fact, it is probably more helpful to think of two types of rationality—"objective" rationality, which demands that decisionmakers follow certain principles of logic (including the invariance principle), and "subjective" rationality, which demands that decisionmakers know their goals and pursue them in a way reasonably likely to lead to success[210]—and to affirm the subjective rationality of such subjects while conceding that they violate principles of objective rationality.

Individuals derive utility from a broad range of sources,[211] and their preferences often may be situationally dependent rather than absolute.[212] In the Automobile Accident scenario, for instance, some BMW Drivers might have had a strong desire for maintaining the status quo in their lives.[213] The possibility of recovering enough money at trial to maintain a pre-accident level of consumption could conceivably be important enough to a BMW-driving litigant that he would maximize expected utility—although not expected dollar income—by engaging in risky behavior.[214] Other subjects might have sought to satisfy a taste for status rather than a

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209. *See* JONATHAN ST. B.T. EVANS & DAVID E. OVER, RATIONALITY AND REASONING 8 (1996) ("It is foolish in itself to assume that someone who violates some normative principle does not know what he is doing nor how to achieve the goal he has in mind.").

210. *See id.* at 7-10. In describing the two types of rationality, Evans and Over also referred to what we have labeled objective rationality as "impersonal" rationality and what we have labeled subjective rationality as "personal" rationality. *Id.* at 6; *see also* JOHN R. ANDERSON, THE ADAPTIVE CHARACTER OF THOUGHT 28 (1990) (distinguishing between "logically correct reasoning" and reasoning that is "optimal in terms of achieving human goals"). Evans and Over contended that a major problem with the large body of experimental research on reasoning is that experimenters often assume rationality is limited to the objective or impersonal form of rationality. *See* EVANS & OVER, *supra* note 209, at 8.

211. *See* COOTER & ULEN, *supra* note 161, at 23 ("It is important to remember that the [utility] preferences of the consumer are purely *subjective*. That is, they are his or her preferences, to be discovered by finding out what he or she likes, not by telling him or her what to like." (emphasis in original)).

212. *See* Thomas S. Ulen, *Rational Choice and the Economic Analysis of Law*, 19 LAW & SOC. INQ. 487, 512 (1994) ("[A]n individual's behavior may vary according to the context in which the procedures under which choice is made or judgment exercised, even though the substance of the particular decision to be made appears identical to that involved in another choice or judgment situation confronted by the same individual.").

213. There is a substantial literature describing the so-called "status quo bias." *See, e.g.*, RICHARD H. THALER, THE WINNER'S CURSE: PARADOXES AND ANOMALIES OF ECONOMIC LIFE 68 (1992) ("[I]ndividuals have a strong tendency to remain at the status quo, because the disadvantages of leaving it loom larger than the advantages."); Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993) (surveying the experimental literature on the status quo bias); *see also* Korobkin, *supra* note 77, at 663-708 (describing the challenge to conceptions of efficiency caused by the status quo bias and suggesting alternative ways for law and economics to respond to the challenge).

214. *See* THALER, *supra* note 213, at 74-75 (noting that in many situations, "[f]oregone gains are less painful than perceived losses").

taste for transportation.[215] BMW Drivers with such an outlook could have viewed trial as providing a fifty percent chance at maintaining a "BMW" level of status, whereas settlement, because it would leave them unable to replace the lost automobile, would result in a loss of status that would leave them no worse off (or only marginally worse off) than would an adverse trial verdict.

Given these possible explanations of their decisions, we cannot state with certainty that BMW Drivers who opted for trial made decisions that failed to maximize their expected utility,[216] although such a conclusion is certainly one possibility. Thus, a lawyer representing a BMW Driver must recognize that his client's reluctance to accept the $21,000 settlement offer could be *either* a cognitive error (if the client seeks to maximize wealth) or a utility-maximizing choice (if the client prefers maintaining the status quo or maximizing status over maximizing dollar income).[217]

The possibility that our litigant subjects behaved in a *utility*-maximizing way—though not a *wealth*-maximizing way—is even more apparent in the Broken Heater scenario, where the lawyer represents the client who wishes to reject the $900 settlement offer made by the landlord who has no excuse for his bad behavior. This lawyer should ask whether there is reason to believe that choosing adjudication over settlement is antithetical to the maximization of the client's utility. Although a desire for a sense of equity or fairness in interpersonal relationships—which appears to have influenced some Broken Promise subjects in the Broken Heater scenario[218]—may not result in wealth-maximizing behavior in this case, it seems quite consistent with a fairly common preference

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215. *See* Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 47-48 (1992) ("[T]he data . . . suggest[] that the desire for social distinction is powerful."). McAdams argued that changes in income that will affect observable consumption loom larger than changes that will not affect relative social and economic status. "Therefore, people appear to prefer risk when they can take observable losses for a chance at observable gains, but to avoid risk when they can forgo unobservable gains to hedge against unobservable losses. In the former case they would gamble; in the latter, insure." *Id.* at 47. Put more generally, the level of status an amount of dollars can buy is often more important to people than the dollars themselves. Because dollars and status do not have a linear relationship, we can predict that some increments of income will have a relatively low marginal utility, while other increments will have a very high marginal utility.

216. The BMW Driver with such a preference structure could, of course, accept the settlement offer and use it to place a wager that, if successful, would return enough money to pay for a new BMW. This would seem to be the rational option, though, only if the transaction costs associated with making such a gamble were relatively low, and the subject's taste for maintaining the status quo were satisfied as well by replacing the car with gambling winnings as by forcing the adversary to pay to replace the car.

217. *Cf.* Kahneman & Tversky, *Choices*, *supra* note 41, at 343 (arguing that it is not necessarily "wrong to be risk averse in the domain of gains and risk seeking in the domain of losses . . . . These preferences conform to compelling intuitions about the subjective value of gains and losses, and the presumption is that people should be entitled to their own values").

218. *See supra* text accompanying notes 113-16.

structure.[219] In this situation, the lawyer who attempts to influence the client clearly risks talking the client out of a "good" (utility-maximizing) decision without clear evidence that the intervention will help the client avoid a "bad" decision.[220]

By contrast, the responses of the litigant subjects in the Lemon scenario—in which subjects were more likely to accept a final settlement offer if their expectations were anchored by a very low initial offer[221]—seem less likely to be utility maximizing. It is conceivable that the subjects who received the low initial offer derived more utility from the final offer because they wrested a "bigger" concession out of the opposition. Such an explanation, though, seems strained. It is both obvious and meaningless to say the members of the $2000 initial offer group felt "better" about the final settlement offer than their counterparts who received the $10,000 initial offer. It seems far more likely that members of the latter group expressed a greater preference for trial because their attempts to make the utility-maximizing choice were impaired by their cognitive limitations[222] than that they possessed an overwhelming desire to vanquish the opposition or that they derived significantly less utility from a smaller concession than the other subjects did from a larger concession.

3. Normative Implications.—Although everyone's decisions are affected by psychological phenomena and aided by heuristics, lawyers are likely to be more inclined than their clients to adhere to the principles of expected financial value analysis. When a lawyer recognizes that a client's expressed litigation preference is inconsistent not only with expected

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219. *Compare* THALER, *supra* note 213, at 22-24 (describing the results of "ultimatum game" experiments in which two subjects divide a sum of money, with one subject having the power to determine the allocation and the other subject the power to either accept or reject, with a rejection causing both subjects to forfeit any share; and concluding that the most commonly observed offer of a 50/50 split is inconsistent with rational choice theory), *with* Ulen, *supra* note 212, at 498 (contending that the results cited by Thaler are not inconsistent with rationality: "All one needs to assume is that . . . the players have nonmonetary elements in their utility functions."); *see also* Bundy, *supra* note 125, at 24-25 (arguing that it is difficult for observers to determine whether litigiousness is caused by "self-destructive" impulses or rational calculation because preference disorders or calculation failures may resemble a "normal sense of justice or righteous indignation").

220. *Cf.* Nelken, *supra* note 52, at 423 ("[C]lients inevitably suffer when their lawyers insist on divorcing the professional encounter from the emotional underpinnings of the dispute involved. Client dissatisfaction with legal representation often results from the lawyer's inability to see the client's emotional self as anything but an impediment to sensible, rational management of the legal problem . . . .").

221. *See supra* section II(A)(2).

222. *See, e.g.*, JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 139 (1958) (proposing a theory of rational choice in which an actor's decisions are based upon a model of the objective facts whose elements are themselves affected by the psychological and sociological process); NEALE & BAZERMAN, *supra* note 41, at 47-50 (cataloguing the effects of anchoring and adjustment on the negotiation process).

financial value analysis but also with the maximization of the client's desired ends, the lawyer should intervene in the decisionmaking process. At the same time, though, the lawyer should recognize that a client's stated preference might be utility maximizing even if it diverges from expected value analysis. If the lawyer suspects this to be the case, she should avoid intervening in client decisionmaking to ensure that she does not talk the client out of an appropriate decision.[223]

Lawyers, of course, are neither trained psychologists nor mind readers. As the previous discussion suggests, in a vast array of instances in which a client's expressed litigation preference deviates from expected value analysis, the lawyer will be unable to determine whether the deviation represents a different but stable set of preferences or a mistake. We believe that, in these cases, the lawyer should steer a middle course between indiscriminately attempting to influence client settlement decisions and indiscriminately avoiding such a role. The lawyer should engage the client in an interactive counseling process and may eventually want to volunteer advice, but such advice should be accompanied by an explicit description of the considerations underlying the advice and an explanation of the considerations that suggest the client might not want to alter his analysis despite the lawyer's urging.[224] The lawyer who shies away from making recommendations altogether, or who makes them only when pressed, risks abetting client mistakes; the lawyer who makes recommendations without providing sufficient explanation risks persuading clients to abandon good decisions, in the sense that they maximize client utility, for bad ones.[225]

Although the cognitive error approach is difficult to apply in individual cases, it offers lawyers a compass with which to navigate the murky waters of client counseling in the settlement context.[226]

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223. Recall that the second group of Broken Promise subjects participating in the Lawyer Influence experiments were significantly more likely than the original Broken Promise subjects to accept the defendant landlord's settlement offer. *See supra* Part III. This suggests that lawyers can exert substantial influence over their clients, even when the litigant seeks a different end than the lawyer, and even when the lawyer limits her role to educating as opposed to advising.

224. The results of the Lawyer Influence experiments suggest that providing an explanation along with a recommendation might reduce the likelihood that the client will follow the lawyer's advice. *See infra* subpart III(C). Our recommendation that the lawyer provide such an explanation in difficult cases reflects the need to balance the power of an unmitigated recommendation with the uncertainty of the efficacy of that power.

225. *See* BINDER & PRICE, *supra* note 131, at 186 (suggesting that lawyers refrain from telling clients what they think a client should do); Bundy, *supra* note 125, at 21 (discussing the tension between the client's preferences and the lawyer's judgment in settlement decisionmaking); Simon, *supra* note 128, at 213 (advocating the "informed consent" view as opposed to the paternalistic "best interests" view).

226. By requiring the lawyer to attempt to evaluate whether, in any given circumstance, the divergence between the lawyer's and the client's analysis of decision options reflects a cognitive error or a nonmonetary preference, the cognitive error approach demands analytical and interpersonal skills

V. Conclusion: The Legal System and Psychological Aspirations

Our experimental results support the hypothesis that lawyers, on average, evaluate litigation options differently than litigants, with lawyers' evaluations more likely to be consistent with the expected value analysis presumed by economic models of litigation. Because the monetary cost of trial—relative to settlement—is high, it follows that lawyers will favor settlement more often than their clients. Assuming that lawyers have an effect on their clients' litigation decisions, lawyers should be settlement-promoting. This account, of course, is consistent with, and may partially explain, the surprisingly high rate of settlement. Whether the lawyer should attempt to persuade clients to alter their decisionmaking processes, or alternatively, refrain from providing advice, depends on whether the observed differences reflect alternative aspirations and values or merely alternative means of seeking a commonly held set of goals. This means-ends inquiry is critical to reaching normative conclusions about the proper role of the lawyer in litigation decisionmaking.

This normative conclusion, though, is premised on the assumption that the lawyer's sole responsibility is to serve the interests of his client, bounded only by the explicit restrictions of the formal rules of legal ethics.[227] This view of lawyering, often called the "libertarian approach," contrasts with the "regulatory approach" to lawyering.[228]

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that lawyers do not typically learn in law school and do not necessarily develop in practice. This fact highlights the need to include at least a rudimentary review of basic cognitive psychology in the law school curriculum, and, in fact, there appears to be a developing trend in this direction. *See, e.g.*, Brest & Krieger, *supra* note 198, at 553-54 (arguing that to teach professional judgment law schools must introduce students to the psychology of decisionmaking, among other topics traditionally ignored in legal education); *see also* Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS. 5, 10-11 (1995). As long as most lawyers receive no formal training in psychology, the cognitive error approach to counseling will stretch the boundaries of many lawyers' expertise, but the approach is justified nonetheless because it offers skillful lawyers the best opportunity to maximize their clients' utility: securing settlements when it is efficient to do so and seeking adjudication when settlement is undesirable. *Cf.* Dan W. Brock & Steven A. Wartman, *When Competent Patients Make Irrational Choices*, 322 NEW ENG. J. MED. 1595, 1598 (1990) (describing the physician's difficult role of attempting to respect the different weights patients give to avoiding pain and suffering when making decisions about their treatment while simultaneously trying to help patients overcome irrational fears that prevent them from pursuing promising treatments).

227. Even those who ardently believe the lawyer must zealously represent his client to the exclusion of other interests generally admit to some basic limits on the bounds of zealous representation. *Cf.* Gordon, *supra* note 166, at 20 (noting that supporters of such a model of lawyering concede that lawyers should not commit or help their clients to commit crimes, tell lies, or fabricate evidence). It is commonly accepted that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous," MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1995), nor take action on behalf of a client "merely to harass or maliciously injure another." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7-102(A)(1) (1980).

228. These precise terms are borrowed from William Simon. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085-90 (1988) (describing the libertarian and

The regulatory approach does not deny the value of loyalty to the client, but it requires the lawyer to balance such loyalty against a responsibility to third parties, including the legal system or society in general.[229] Under this conception of lawyering,[230] the observed differences between the decisionmaking approaches of lawyers and litigants raise more complicated ethical questions, which we can address only briefly in this Article.

Supporters of the regulatory approach, or some variation of it, object to the libertarian approach on the ground that it permits a lawyer to use procedural tools or an adversary's information deficit to prevail in litigation even when the purposes underlying the substantive law would favor the opposite result.[231] Our experiments do not implicate this ethical dilemma; in all three hypothetical scenarios, the plaintiffs had at least arguably meritorious claims and, thus, their lawyers had no cause to question whether vigorously pursuing their client's causes overtly subverted the legal system.

But when a client wishes to pursue even a meritorious claim to trial rather than accept a settlement offer that his lawyer believes is financially

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regulatory approaches as the two conventional models of ethical decisionmaking); *see also* Jamie G. Heller, Note, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503, 2504 (1994) (attributing these labels to Simon).

229. *See generally* Gordon, *supra* note 166, at 10-12 (summarizing the dispute between attorneys who believe the "guiding premise of the entire [legal] system" is "maintaining the integrity of rights-guarding procedures" and those who believe "loyalty to client interests must be balanced against and sometimes overridden by broad, more amorphous obligations, such as the lawyer's duties as 'officer of the court,' member of a public profession, and citizen with a responsibility to uphold the rule of law"); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 705 (1977) (arguing that the role of lawyers as professionals requires that their ethical canons reflect not only the interest of individual clients but also "the public interest in seeing justice done"); Talcott Parsons, *A Sociologist Looks at the Legal Profession*, *in* ESSAYS IN SOCIOLOGICAL THEORY 370, 384 (rev. ed. 1954) (observing that a lawyer acts as a buffer between the desire of clients and the social interest).

The disagreement over the role of the lawyer is generally philosophical, but arguments are sometimes based on practical considerations as well. An example is the argument for the libertarian position on the grounds that government institutions typically focus on the good of society, leaving lawyers among the few who can focus on the good of individuals. *See* Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 816 (1971) ("There are simply enough experts and planners deciding the greatest good for the greatest number; once lawyers start playing that game, the individual suffers the hazard of escalating dehumanization.").

230. This regulatory approach to lawyering finds some support in prevailing rules of ethics:

> The basic legitimacy of some exercise of power by lawyers for the sake of third parties is currently beyond question. After all, lawyers are required to refrain from suborning perjury, even when their clients might help themselves by committing this crime. The reason is that lawyers, even in the lawyer-client relationship, are under some duties, and impose some duties on their clients, derived from obligations to the larger society.

Ellmann, *supra* note 173, at 773.

231. *See, e.g.*, Simon, *supra* note 228, at 1098-99 (describing a scenario in which an insurance defense attorney takes advantage of a plaintiff's attorney's ignorance of a change in the law to settle a meritorious claim on terms favorable to the defense). Although Simon does not support a pure version of the regulatory approach to lawyering, he advocates a related position that calls for lawyers to promote justice rather than merely the interests of their clients. *See id.* at 1091-1119.

advantageous, the lawyer who views himself as a public servant faces a different, though equally difficult, dilemma. The resources necessary to vindicate legal rights are scarce.[232] A client who rejects a settlement offer and demands a trial of uncertain promise not only risks an undesirable outcome for himself, but also appropriates the limited resources of his attorney, the opposing party's legal counsel, a judge, other court staff, and perhaps a jury.[233] The lawyer who accepts the premise that "some rights are more important than others" and believes that he has an ethical obligation to represent clients with relatively meritorious or "important" claims or both[234] must necessarily reassess the effort that should be expended to prosecute a case for a client once that client has received a financially fair settlement offer.[235] If some cases are more

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232. Despite the remarkably high rate of settlement, state and federal courts are backlogged. The State Justice Institute, for instance, reported that state court caseloads are on the rise. According to the Institute, "An extrapolation based on past trends suggests that many trial and appellate courts are likely to see their caseloads double before the end of the decade . . . . [T]he public's demand for services in many courts is outstripping available resources." BRIAN J. OSTROM ET AL., NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992, at xi (1994); *see also* Robert J. MacCoun et al., *Alternative Dispute Resolution in Trial and Appellate Courts*, *in* HANDBOOK OF PSYCHOLOGY AND LAW 95, 97 (D.K. Kagehiro & W.S. Laufer eds., 1992) ("A major impetus for the introduction of court-based ADR is the common perception that American courts are experiencing a 'litigation explosion.'"); Michael D. Planet, *Reducing Case Delay and the Costs of Civil Litigation: The Kentucky Economical Litigation Project*, *in* ABA ACTION COMM'N TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY: PROJECT REPORTS AND RESEARCH FINDINGS 3 (1984) ("The complaint commonly heard is that courts are experiencing increasing difficulty managing caseloads growing both in volume and complexity."); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 529 (1989) ("Litigation delay has proven a ceaseless and unremitting problem of modern civil justice. Civil court delay has been the central focus of serious and concentrated reform in the United States since the late-1950s. . . . Three decades later, it is apparent that little, if any, progress has been made.").

233. The notion that settlement is often preferable to adjudication from a public perspective is pervasive and reflected in rules of court. The *Federal Rules of Civil Procedure* give federal trial judges the authority to require parties to participate in pretrial settlement conferences. *See* FED. R. CIV. P. 16(a)(5), (c)(9). *See generally* David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1985 (1989) (stating that "a major purpose" of the 1983 amendment of Rule 16 "was to recognize, and indeed to embrace, the strong trend toward increased judicial management of litigation from an early stage of the lawsuit"). The Civil Justice Reform Act of 1990 encouraged courts to increase the use of settlement conferences and other alternative dispute resolution procedures. *See* Civil Justice Reform Act of 1990 § 103(a), 28 U.S.C. § 473(a)(3)(A), (a)(6), (b)(5) (1994).

Some have argued that the marginal costs of a single litigation are overestimated because a higher rate of settlement would only encourage other disputes to make their way into the legal system. *See generally* Bundy, *supra* note 125, at 48-49 (stating that "earlier settlement of cases may simply pave the way for additional litigation"); Priest, *supra* note 232, at 535, 534-35 ("Reducing congestion and delay increases the expected value of litigation and increases the volume of litigation.").

234. Simon, *supra* note 228, at 1092-94 (arguing that a lawyer should assess the relative merits of a client's goals before devoting his scaree resources to representing that client).

235. Morgan classified "the expeditious resolution of disputes at the lowest practical cost" as an interest related to but distinct from the public's interest in "seeing justice done." Morgan, *supra* note 229, at 705. Assuming that the amount of resources society is willing to devote to dispute resolution

important than others, it must be true, for example, that the continued prosecution of the BMW Driver's claim in the Automobile Accident scenario becomes relatively less important once the defendant offers a $21,000 settlement.[236]

Our experimental results suggest that clients might seek certain psychological goods from the legal system, such as the sense of avoiding a loss relative to a reference point or of not being taken advantage of by their contractual partners, whereas attorneys are more focused on the goal of redressing economic harm. Whether the lawyer is ethically permitted or obligated to attempt to persuade a client to forego his aspirations depends not only on the degree to which the lawyer must balance the public good against his client's interests, but also on the interests the legal system seeks to vindicate in a given dispute.

Without doubt, there are situations in which society intends for the legal system to vindicate psychological or emotional desires. The tort of libel, for example, provides a means of protecting one's reputation through the invocation of the legal system.[237] But it is less clear that an automobile accident victim properly employs the legal system when he rejects a settlement offer that is generous in light of the uncertainties of the case because he prefers risk to absorbing a "loss" from a self-selected reference point.

If such a use of the legal system is inappropriate given the system's scarce resources, the lawyer who views his ethical role as one of public servant might have a greater obligation to intervene in his client's decision-making process than the lawyer who equates zealous advocacy with the highest ethical standards.[238] Even the lawyer who believes the legal

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is relatively fixed in the short run, faster and lower-cost dispute resolution will lead to more justice being done.

236. The prosecution of some cases to a final adjudication has greater positive than negative externalities. For example, the public might benefit by having an important civil rights case of first impression decided through adjudication rather than settled out of court. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). In the case of garden variety tort, contract, and property disputes of the type described in our experimental scenarios, though, it is probably safe to predict that an adjudication will not produce an important legal precedent and, consequently, the decision to seek adjudication rather than settlement is likely to impose a net social cost.

237. *See, e.g.*, David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 881 (1986) (arguing that the "primary social interest in a libel action is to correct a proven falsehood"); Bezanson, *supra* note 10, at 789 (noting that "the law of libel is supposed to protect reputation"); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 691 (1986) ("The common law of slander and libel is designed to effectuate society's 'pervasive and strong interest in preventing and redressing attacks upon reputation.'" (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966))); *cf.* Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 KAN. L. REV. 39 *passim* (1994) (explaining the psychological needs the tort system fulfills generally).

238. Louis Brandeis, for example, was well known for advising clients to resolve legal problems in ways that comported with his view of the public good. *See, e.g.*, PHILIPPA STRUM, LOUIS D.

system should serve only the interests of individual disputants should give pause because all (or at least most) individual litigants are best served by a legal system that efficiently settles disputes.[239] In short, given that lawyers and clients seem to be affected differently by psychological phenomena, and given that lawyers probably can influence to some degree the impact of such factors on their clients, the legal system must confront the relative merits of its use as a forum for the fulfillment of psychological aspirations.

BRANDEIS: JUSTICE FOR THE PEOPLE 96-99 (1984) (describing Brandeis's advice to a department store owner to make workplace reforms in order to reduce labor strife).

239. This is true in the sense that if all prospective clients were hidden behind a Rawlsian veil of ignorance to select rules governing litigation, they would likely select a system that required the acceptance of settlement offers reasonably related to the value of litigation in order to save limited resources for disputes in which no reasonable settlement is offered. *See* JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971) (arguing that if individuals were denied all knowledge of their position in life, they would be forced to make decisions designed for the benefit of society as a whole); *cf.* Gilson, *supra* note 123, at 875 (arguing for evaluating a client's interests by considering what she would have wanted at the time the rules of litigation were chosen—that is, when she stood behind a Rawlsian veil of ignorance—rather than by considering what she wants at the time she makes a litigation decision).