HEURISTICS AND BIASES AT THE BARGAINING TABLE

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I. INTRODUCTION

Negotiation is an inherently *interpersonal* activity that nonetheless requires each participant to make *individual* judgments and decisions. Each negotiator must evaluate a proposed agreement, assess its value and the value of alternative courses of action—such as continuing to negotiate or pursuing an alternative transaction—and ultimately choose whether to accept or reject the proposal.

The interdisciplinary field of "decision theory" offers both a normative account (how *should* individuals act) and descriptive accounts (how *do* individuals act) of decision making in the negotiation context. According to the normative model, negotiators should compare the subjective expected value of an agreement to the subjective expected value of non-agreement, taking into account such factors as risks, differential transaction costs, and reputational and relational consequences of each possible course of action.[1] Once a negotiator has calculated the expected value of each course of action, the negotiator should then select the one that promises the greatest return.[2]

There is less agreement about whether negotiators actually make decisions consistent with this approach. Proponents of descriptive or "positive" models based on "rational choice theory"[3] assume that negotiators will invest

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1. *See, e.g.*, RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 43-50 (2002).

2. *See, e.g., id.* (proposing a "prescriptive approach" to calculating reservation prices); MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 1 (1992) ("*Negotiating rationally* means making the best decisions to *maximize* your interests."). The normative approach, while widely accepted, does have its detractors. *See, e.g.*, Gerd Gigerenzer & Peter M. Todd, *Fast and Frugal Heuristics: The Adaptive Toolbox, in* SIMPLE HEURISTICS THAT MAKE US SMART 5 (Gerd Gigerenzer et al. eds., 1999) [hereinafter SIMPLE HEURISTICS] (rejecting the standard normative model of choice and proposing instead "our own vision of ecological rationality—rationality that is defined by its fit with reality").

3. For an accessible account of rational choice theory in its various forms, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060-66 (2000).

optimally in the amount of information needed for decision making, draw accurate inferences from the information they acquire, and then select the option that maximizes their expected utility. In short, proponents of the rational choice-based models assume that negotiators will make choices consistent with the normative model.

Skeptics of rational choice-based models argue that negotiators rarely behave this "demonically."[4] Instead, negotiators routinely employ more intuitive approaches to judgment and choice that rely on a variety of "heuristics" or mental shortcuts to reduce the complexity and effort involved in the reasoning process.[5] While some researchers believe that negotiators intentionally employ such heuristics to economize on the time and effort

4. Gigerenzer & Todd, *supra* note 2, at 5 (observing that "many models of rational inference view the mind as if it were a supernatural being possessing demonic powers of reason, boundless knowledge, and all of eternity with which to make decisions").

5. *See* Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449, 1450 (2003); Amos Tversky and Daniel Kahneman introduced the "heuristics and biases" program into the literature on judgment and decision making. *See, e.g.*, Thomas Gilovich & Dale Griffin, *Introduction–Heuristics and Biases: Then and Now, in* HEURISTICS AND BIASES 1 (Thomas Gilovich et al. eds., 2002) [hereinafter HEURISTICS AND BIASES]. In their initial formulation, Tversky and Kahneman explained that "people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors." Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974) [hereinafter Tversky & Kahneman, *Heuristics*].

More recently, Kahneman and collaborator Shane Frederick have refined their explanation of heuristic decision making as follows:

> We will say that judgment is mediated by a heuristic when an individual assesses a specified *target attribute* of a judgment object by substituting another property of that object—the *heuristic attribute*—which comes more readily to mind . . . . Because the target attribute and the heuristic attribute are different, the substitution of one for the other inevitably introduces systematic biases.

Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment, in* HEURISTICS AND BIASES, *supra*, at 53.

Rather than comparing the use of heuristic reasoning to rational choice analysis, Gerd Gigerenzer and his colleagues at the ABC research group evaluate heuristic reasoning based on its usefulness in solving problems in specific contexts. *See generally* SIMPLE HUERISTICS, *supra* note 2. Scholars working in this research tradition focus on identifying heuristics with normative appeal in certain situations. *See* Daniel G. Goldstein & Gerd Gigerenzer, *The Recognition Heuristic: How Ignorance Makes Us Smart, in* SIMPLE HEURISTICS, *supra* note 2, at 37; Gerd Gigerenzer & Daniel G. Goldstein, *Betting on One Good Reason: The Take the Best Heuristic, in* SIMPLE HEURISTICS, *supra* note 2, at 75. While scholars in the Tversky-Kahneman tradition tend to emphasize how heuristics can lead decision makers astray, *see* SIMPLE HEURISTICS, *supra* note 3, at 28, scholars in the Gigerenzer tradition tend to emphasize how helpful heuristics can be, *id.*, although this difference in emphasis between approaches can be overstated. *See, e.g.*, Tversky & Kahneman, *Heuristics*, *supra*, at 1124 (observing that "[i]n general, these heuristics are quite useful").

required to make decisions,[6] others believe that reliance on heuristics is unconscious.[7] In all likelihood, there is truth in both perspectives; that is, negotiators rely on heuristics intuitively and unconsciously in some circumstances and consciously employ heuristics in others. Either way, negotiators should appreciate the important role that heuristics are likely to play in their decision making—and in the decision making of their counterparts—at the bargaining table.

In this essay, we examine the role of heuristics in negotiation from two vantage points. First, we identify the way in which some common heuristics are likely to influence the negotiator's decision making processes. Namely, we discuss anchoring and adjustment, availability, self-serving evaluations, framing, the status quo bias, contrast effects, and reactive devaluation.[8] Understanding these common heuristics and how they can cause negotiators' judgments and choices to deviate from the normative model can enable negotiators to reorient their behavior so it more closely aligns with the normative model or, alternatively, make an informed choice to take advantage of the effort-conserving features of heuristics at the cost of the increased precision that the normative approach offers.[9] Second, we explore how

6. *See, e.g.*, Gilovich & Griffin, *supra* note 5, at 4 ("Heuristics have often been described as something akin to strategies that people use deliberately in order to simplify judgmental tasks that would otherwise be too difficult for the typical human mind to solve.").

7. *Id.* at 4-5 (observing that the "other way that heuristics have been described" is as "natural assessments elicited by the task at hand that can influence judgment without being used deliberately or strategically").

8. In their initial formulation, Tversky and Kahneman identified three basic heuristics—representativeness, availability, and anchoring and adjustment. *See* Tversky & Kahneman, *Heuristics, supra* note 5. More recently, Kahneman and Frederick have argued that the three basic heuristics are representativeness, availability, and the affect heuristic. *See* Kahneman & Frederick, *supra* note 5, at 56 ("It has become evident that an *affect heuristic* should replace anchoring in the list of major general-purpose heuristics."). *But see* Daniel T. Gilbert, *Inferential Correction, in* HEURISTICS AND BIASES, *supra* note 5, at 167 (arguing that anchoring and adjustment "describes the process by which the human mind does virtually all of its inferential work").

Nonetheless, most decision researchers use the terms "heuristics and biases" loosely to include several mental shortcuts that decision makers are likely to make. *See, e.g.*, HEURISTICS AND BIASES, *supra* note 5 (containing articles describing several different phenomena); Tversky & Kahneman, *Heuristics, supra* note 5. Likewise, in recent years, legal scholars have broadly defined heuristics and biases when applying them to law. *See* Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1170-73 (2003) (observing that legal scholars have focused primarily on representativeness, availability, hindsight bias, anchoring, and self-serving bias). For applications of many different heuristics and biases to many different legal problems, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Korobkin & Ulen, *supra* note 3; Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

9. *Cf.* JOHN PAYNE ET AL., THE ADAPTIVE DECISION MAKER (1993) (describing decision making behavior as a trade-off between accuracy and effort).

negotiators might capitalize on the knowledge that their counterparts are likely to rely on heuristics in their decision making processes. We consider, in other words, how negotiators can exploit heuristic reasoning on the part of others for personal gain.

II. UNDERSTANDING NEGOTIATOR JUDGMENT AND DECISION MAKING

When deciding whether to accept or reject an actual or anticipated set of deal terms, a negotiator must perform two cognitive tasks. First, the negotiator must evaluate the content of the available options, a task we can loosely call "judgment." For example, a negotiator contemplating the purchase of a particular business must try to evaluate the market value of the business's assets, determine what percentage of the business's current clients will be retained in case of a change of ownership, estimate how much profit the business will earn in the future, and evaluate the likelihood that the negotiator would find a similar business to purchase if the negotiator opted not to purchase this one. From this perspective, judgment tasks concern a search for facts about the world.

Second, the negotiator must determine which available option he prefers, a task we can call "choice." For example, would he rather purchase the business under consideration for a specific price or reject such a deal in favor of continuing his search, thus taking a chance that he will find an equally desirable business at a lower price or a more desirable business at the same price?

In performing both of these tasks—i.e., judgment and choice—the negotiator *should* evaluate options and make decisions consistent with the normative model of choice. However, both social science research and common experience suggest the negotiator's decision making processes will often depart from the normative model.

A. Judgment

Negotiators cannot know the objective values and probabilities of every option they might consider before reaching a negotiated outcome. Thus, to estimate the values and probabilities associated with each option, negotiators are likely to rely on heuristics. Heuristics often enable negotiators to make good judgments in a "fast and frugal"[10] manner.[11] On other occasions,

10. *See generally* SIMPLE HEURISTICS, *supra* note 2, at 97.

11. *See, e.g.*, Jean Czerlinski et al., *How Good are Simple Heuristics, in* SIMPLE HEURISTICS, *supra* note 2, at 97 (comparing the success of the "take the best" heuristic to multiple regression analysis in a number of judgment tasks); Jorg Reiskamp & Ulrich Hoffrage, *When Do People Use Simple Heuristics and How Can We Tell, in* SIMPLE HEURISTICS, *supra* note 2, at 141 (inferring the

heuristics prove to be poor substitutes for more complex reasoning and result in negotiator decisions that fail to best serve the negotiator's interests.

1. Anchoring and Adjustment

One heuristic approach to judgment tasks that can lead to suboptimal results is known as "anchoring and adjustment." To estimate the value of an option, negotiators are likely to start with the value of a known option, the "anchor," and then adjust to compensate for relevant differences in the character of the known and unknown item.[12]

For example, a negotiator buying a business might estimate its future profits by starting with the known profits recently earned by a similar business and then adjusting his estimate based on the fact that the known business has fewer current clients and higher labor costs than the subject of the negotiation. Alternatively, the negotiator might base his estimate on the profits earned by the business in question the previous year and then adjust his estimate of next year's profits based on changing market conditions or the presence of new competitors. Although adjusting from a known anchor is a useful approach to making a judgment, experimental evidence indicates that people often fail to adjust sufficiently away from the initial "anchor."[13] In other words, negotiators who rely on this heuristic will often undervalue the differences between the known and unknown values.

In addition, especially when numerical estimates are necessary, individuals sometimes anchor on values that are largely, or even completely, irrelevant. In one well-known example, subjects estimated that the average annual temperature in San Francisco was higher after first being asked if it was higher or lower than 558 degrees![14] In an example more obviously relevant to negotiation, we found that the opening offer in a litigation settlement negotiation can affect the recipient's judgment of a subsequent final offer even when the opening offer does not convey relavent information.[15]

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frequency that experimental subjects used simple heuristics in judgment tasks).

12. *See* Tversky & Kahneman, *Heuristics*, *supra* note 5.

13. There is some debate about whether anchoring effects are a product of insufficient adjustment, *see, e.g.*, Nicholas Epley & Thomas Gilovich, *Putting Adjustment Back in the Anchoring and Adjustment Heuristic*, 12 PSYCHOL. SCI. 391 (2001), or the availability of anchor-consistent information, *see, e.g.*, Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value, in* HEURISTICS AND BIASES, *supra* note 5, at 120, 130-33.

14. SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISIONMAKING 146 (1993) (referring to an unpublished study by George Quattrone and colleagues).

15. *See* 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, 11-13, 18-19 (1994) [hereinafter Korobkin & Guthrie, *Opening Offers*].

Whether a negotiator bases a judgment on an appropriate anchor adjusted insufficiently or bases the judgment on an inappropriate anchor, the resulting judgment will often be less precise than the negotiator might have made given the available information. Returning to our original hypothetical, depending on the anchor consulted, the negotiator could make a suboptimal estimate of the profits the target business is likely to achieve the next year.

2. Availability

When a negotiator's option could have a variety of consequences, each probabalistic, rather than a single certain outcome—for example, if the negotiator enters an agreement to buy the business under consideration, the business might make a large profit or, alternatively, it might go bankrupt—the negotiator will often evaluate the likelihood of the various possible outcomes based on the ease with which the possible outcomes come to mind. Because probabilistic judgments are based on how mentally *available* the possible results are, this method of judgment is known as the "availability" heuristic.[16]

Like anchoring and adjustment, basing judgments on the availability of outcomes is a reasonable, time-saving device that will often yield acceptable outcomes because availability is often correlated with frequency. But when the available outcomes are not typical, or when there are important differences between the past and future circumstances, the heuristic can lead to flawed predictions. For example, a negotiator evaluating the prospects of entrusting his or her lawsuit to a jury for the purpose of deciding whether to accept a settlement offer might overestimate the likelihood of winning punitive damages at trial if he recalls a recent multi-million dollar verdict in a tobacco lawsuit publicized in the news, because the media exposure afforded to that verdict does not reflect its typicality.[17]

3. Self-Serving Evaluations

Substantial evidence indicates that individuals are particularly likely to make judgments concerning existing facts and future probabilities in ways that confirm pre-existing belief structures,[18] assume high degrees of personal

16. *See* Tversky & Kahneman, *Heuristics, supra* note 5.

17. The availability heuristic is quite similar to what is sometimes called the "salience" or "vividness" heuristic. *See, e.g.*, RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 8 (1980) (observing per the salience heuristic that "people effectively assign inferential weight to physical and social data in proportion to the data's salience and vividness").

18. *See, e.g.*, Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2102 (1979) (finding that factual evidence about the death penalty reinforced the prior beliefs

agency in the world,[19] and create a positive presentation of self.[20] This tendency will often result in judgments compromised by what is called the "self-serving" or "egocentric" bias.[21]

A plethora of studies demonstrate that individuals often judge uncertain options as more likely to produce outcomes that are beneficial to them than an objective analysis would yield.[22] Depending on the specific context, the bias could cause negotiators to overestimate either the likely benefits that would result from reaching a negotiated agreement or the likely benefits that would result from rejecting the proposed agreement and pursuing an alternate course of action. In one study, for example, George Loewenstein and his colleagues assigned some experimental subjects to the role of plaintiff and others to the role of defendant and then asked each to judge the value of the lawsuit based on the very same information.[23] Both plaintiff and defendant subjects believed that a judge would be more likely to rule for their side should the case go to trial, suggesting that, on average, subjects' judgments of the quality of their non-agreement option (i.e., adjudication) were inflated relative to the objective quality of that option.[24]

B. Choice

After judging the objective attributes of available options, negotiators must eventually make a choice between them. Normative models assume that negotiators will make choices based on a comparison of the expected values of each option; the decision theory literature suggests that choices often fail to reflect this reasoning process.

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of subjects who both supported and opposed the policy).

19. *See, e.g.*, Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 814 (1980) (finding increased, unfounded optimism when subjects perceived the events at issue to be controllable).

20. *Id.*

21. *See, e.g.*, Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, 37 J. PERSONALITY & SOC. PSYCHOL. 322 (1979).

22. *See, e.g.*, Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 441-43 (1993) (finding that recently married couples expect that they will not get divorced, despite knowing the divorce rate); Ross & Sicoly, *supra* note 21, at 324-26 (finding that people overestimate their relative contributions to conversations and their relative contribution to housework); Weinstein, *supra* note 19, at 809-11 (finding that people routinely overestimate how healthy they are relative to others).

23. *See* George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993).

24. *Id.*

1. Framing

When choosing between an option with a known outcome and one with an uncertain outcome, research demonstrates that individuals often consider not only the expected value of each choice, but also whether the possible outcomes appear to be "gains" or "losses" relative to a reference point, typically the status quo.[25] In the standard case, individuals tend to exhibit risk aversion when choosing between an option that promises a certain gain and one that has a chance of resulting in a greater gain, but risk-seeking tendencies when choosing between an option associated with a certain loss and one with a probabilistic chance of a larger loss.[26] These findings suggest that if agreement will generate a certain outcome (such as the settlement of a lawsuit for a fixed sum of money) and non-agreement will leave the negotiator to pursue a risky alternative (such as a trial with a probability of winning a large sum and a probability of winning nothing), the negotiator's choice between agreement and impasse could depend on whether her reference point for evaluating the decision options is the status quo[27] or some other reference point.[28]

2. The Status Quo Bias

All other things equal, individuals on average tend to prefer an option if it is consistent with the status quo than if it requires a change from the status quo.[29] Often, we prefer the status quo because we receive more utility from

25. This observation is derived from Daniel Kahneman and Amos Tversky's "prospect theory." *See generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979). For an accessible introduction to prospect theory and its application to law, see Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115 (2003).

26. *See* Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 296 (1992).

27. *See* Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996) (arguing plaintiffs should be risk averse because all settlement offers should be framed as gains). *But see* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000) (arguing based on prospect theory that plaintiffs in "frivolous" or "low-probability" litigation are likely to be risk seeking rather than risk averse).

28. For example, she might use her pre-event position as a reference point. *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994) [hereinafter Korobkin & Guthrie, *Psychological Barriers*] (demonstrating that plaintiffs could frame settlement as a loss if the settlement offer would not restore them to the position they enjoyed prior to an accident). Alternatively, she might use some expectation about what she deserves as a reference point. *See* Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1 (2002) (arguing that high negotiator aspirations can create risk-seeking negotiating behavior).

29. *See* Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1231-42 (2003) (reviewing empirical evidence of the effect).

availability of the inferior pen substantially increased the likelihood that subjects would choose the Cross pen over the $6.[35] The implication is that a negotiator's preference for one agreement possibility over another, or for a proposed agreement over an outside alternative, might depend on whether other options that make the proposed agreement appear desirable in contrast are also considered as part of the calculus.[36]

In some contexts, the presence of a third option, C, could logically affect a decision maker's preference for A versus B, because C provides information about the quality of A or B.[37] But if C sheds no new light on A or B, its effect on the A versus B decision would violate the normative model of choice.[38] As Mark Kelman and his colleagues explain, an individual who prefers chicken over pasta might rationally change her preference from pasta to chicken upon learning that veal parmesan is on the menu because "the availability of veal parmesan on the menu might [indicate] that the restaurant specializes in Italian [food]."[39] But "[a] person who prefers chicken over pasta should not change this preference on learning that fish is also available."[40]

4. Reactive Devaluation

Finally, some evidence indicates that a negotiator's choice might depend on the source of one or more options, even when that source provides no information about the objective quality of the options. More simply stated, a proposal can look less desirable than it otherwise would merely because a counterpart offered it. This phenomenon is known as "reactive devaluation."[41]

As a general rule of thumb, devaluing options proposed by a counterpart whose interests are largely adverse to one's own will be useful in many circumstances. For example, an agreement proposed by an adversary might signal that the adversary has private information unknown to the recipient

35. Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281, 287 (1992).

36. *See* Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601, 617-19 (2003).

37. *See, e.g.*, Simonson & Tversky, *supra* note 35, at 292 ("Context effects can sometimes be justified normatively in terms of the information derived from the background or the local context.").

38. *See, e.g.*, James R. Bettman et al., *Constructive Consumer Choice Processes*, 25 J. CONSUMER RES. 187, 187 (1998) (observing that per the rational model of choice, "[e]ach option in a choice set is assumed to have a utility, or subjective value, that depends only on the option").

39. Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 287 n.2 (1996).

40. *Id.* at 287.

41. *See, e.g.*, Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 392 (1991) (explaining reactive devaluation).

the current state of affairs than we expect to receive from some other state affairs, suggesting that the status quo bias is consistent with the normati model of choice. In other circumstances, however, reliance on this heuris can lead decision makers to make choices that depart from the normati model. The status quo bias suggests that, all other things being equ negotiators will prefer their initial endowments over endowments they mig hope to receive through exchange,[30] that they will favor deal terms that a consistent with legal default rules,[31] and that they will prefer terms of tra that are conventional for the type of bargain that is at issue.[32]

As is true with framing, evidence of the status quo bias suggests th negotiator choice can depend on the negotiator's particular perception of t status quo. Consider, for example, a customer whose car lease is about expire and is considering the car dealer's offer to sell the car to him f $10,000. The customer's choice between accepting the offer and rejecting t offer (and shopping elsewhere for transportation) could conceivably effected by whether the customer's perception of the status quo is (a) that leases rather than owns a car or (b) that he operates the leased car. Bo descriptions of the world are factually accurate, yet the status quo bi suggests that focusing on the first would make the customer more likely reject the dealer's proposal than focusing on the second.

3. Contrast Effects

Evidence also suggests that choice can depend on the full range of optio available to the decision maker, even when the normative model suggests t the availability of certain options should be irrelevant. Researche investigating such "contrast effects"[33] have demonstrated, for example, t individuals are more likely to select an option in the presence of a simil inferior option than in the absence of the inferior option.[34] In one illustrati experiment, Itamar Simonson and Amos Tversky found that 28% m subjects chose an elegant Cross pen when they were also offered alternative choices of $6 in cash or an inferior pen than when subjects w offered only the choice between the Cross pen and the $6 in cash. That is,

30. *See, e.g.*, Daniel Kahneman et. al., *Experimental Tests of the Endowment Effect and Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

31. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. 608 (1998).

32. Russell Korobkin, *Inertia and Preference: The Psychological Power of Default Rules Form Terms*, 51 VAND. L. REV. 1583 (1998).

33. *See* Joel Huber et al., *Adding Asymmetrically Dominated Alternatives: Violatio Regularity and the Similarity Hypothesis*, 9 J. CONSUMER RES. 90 (1982).

34. *Id.*

about the objective value of the agreement.[42] But in some circumstances relying on this heuristic could cause a negotiator to reject a proposed agreement in favor of pursuing an outside alternative when she would have made precisely the opposite choice had the same proposal emanated from another source.

III. INFLUENCING NEGOTIATOR JUDGMENT AND DECISION MAKING

Negotiators who recognize that their counterparts are likely to rely on heuristics when making the types of judgments and choices commonly required in bargaining settings can use this knowledge to increase the likelihood of securing agreements and of securing agreements on highly favorable terms. This section briefly outlines some ways in which a negotiator can make use of heuristic reasoning to influence her counterpart's judgment and choice behavior. We use litigation bargaining anecdotes as examples, but the concepts can be employed just as effectively in other negotiation contexts.

A. Influence Through Anchoring

The anchoring and adjustment heuristic suggests that a negotiator can affect her counterpart's judgment of the quality of a proposed agreement if she can determine the content of the anchor. In commercial negotiations, where monetary values are usually the bargaining currency, a monetary figure that appears, even superficially, related to the subject of the negotiation can affect one's counterpart's judgments.

In litigation bargaining, the settlement versus adjudication decision rests in large part on the negotiator's judgment of what a court would award the plaintiff should settlement negotiations fail. Because adjudication results are notoriously difficult to predict, the plaintiff's lawyer has a clear opportunity to improve his chances of convincing the defendant to choose settlement at a favorable price over adjudication (and vice versa for the defendant's lawyer) by manipulating the defendant's judgment of the adjudication option. Of course, the plaintiff's lawyer might accomplish this by persuasive argumentation. He might also accomplish this, however, by exposing the defendant to a high anchor—perhaps by making a very high initial settlement demand. Even if the defendant immediately rejects the high demand out of hand, the demand could anchor the defendant's prediction of a jury verdict, making that judgment higher than it otherwise would be, and thus increasing

42. *See* Korobkin & Guthrie, *Psychological Barriers, supra* note 28, at 150-60 (breaking the concept of reactive devaluation into competing hypotheses).

the likelihood that the defendant would choose a somewhat lower settlement demand over the adjudication alternative.

Several pieces of experimental evidence support this contention. Researchers have found, for instance, that those who open with an extreme demand may be more likely to reach agreement;[43] that those who open with extreme demands may be more likely to receive larger settlements;[44] and that extreme demands are likely to influence mock jurors' assessments of the value of a plaintiff's case.[45]

B. Influence Through Availability

Recall that the availability heuristic causes probability estimates of outcomes to be effected by the mental availability of similar prior outcomes. That an outcome's availability is not always highly correlated with its frequency offers an opportunity for exploitation in bargaining. A negotiator can increase the chances that her counterpart will accept a proposed agreement favorable to the negotiator if the negotiator can increase the availability in the counterpart's mind of outcomes that are favorable to the negotiator and unfavorable to the counterpart.

As we identified in the context of the anchoring and adjustment heuristic, the best opportunity to exploit the availability heuristic is when negotiation decision making requires probabilistic judgments of highly uncertain events, such as outcomes of adjudication. By drawing the defendant's attention to large verdicts in recent cases that bear at least a surface similarity to the case at hand, for example, the plaintiff's lawyer might increase the defendant's prediction of the likelihood that a jury would return a large plaintiff's verdict. This might, in turn, induce the defendant to accept a particular settlement offer that he would otherwise reject.

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43. *See* Korobkin & Guthrie, *Opening Offers, supra* note 15.

44. *See* Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCHOL. 657 (2001).

45. *See* Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 756 (1959); Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, The More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 526-27 (1996); Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445, 463 (1999); Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991, 1009 (1995); John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491, 495 (1988); Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW & HUM. BEHAV. 385, 393 (1990).

C. Influence Through Framing

The framing effect suggests that a negotiator's choice between a certain option, such as a litigation settlement agreement, and a probabilistic option, such as adjudication, will depend in part on the reference point from which she compares the two options. Assuming that the options have a similar perceived expected value, she is more likely to choose the certain choice if the options appear favorable (i.e., look like gains); if the options appear unfavorable (i.e., look like losses), she is more likely to prefer the risky choice.[46] A negotiator can therefore increase the likelihood that her counterpart will accept a settlement agreement proposal if she can cause the counterpart to select a reference point that makes settlement look positive in contrast.

Relative to the reference point of the current state of affairs, a litigation settlement or a trial verdict would naturally appear to be gains from the perspective of the plaintiff, who will receive compensation in either event, and a loss for the defendant, who must pay in either event. From this perspective, we would predict that a defendant is more likely to reject rather than to accept a settlement proposal that is roughly equivalent to the expected value of trial.[47] A plaintiff who wishes to maximize the likelihood that the defendant will accept such a proposal, or even one more favorable to the plaintiff, can do so by attempting to provide a different reference point by reframing the options.

Specifically, the plaintiff's lawyer might try to induce the defendant to compare his available options not to the status quo, but to a different reference point that will make those options seem more attractive. For example, she might try to persuade him to compare his options to a realistic worst-case outcome at trial. Relative to that reference point, the defendant's options are likely to look like gains, which should prompt him to find paying the certain settlement relatively more attractive.[48]

D. Influence Through Contrast Effects

A negotiator familiar with contrast effects will recognize that her

46. *See supra* Part II.B.1.

47. *See* Rachlinski, *supra* note 27. This simple analysis is meant only to illustrate the framing issue, not to evaluate the full range of defendants' incentives. Thus, it assumes no transaction costs, no issues involving the time value of money (i.e., the payout would occur at the same time in the event of a trial or a settlement), no difference in reputational consequences between settlement and trial, and no particular desire or reluctance to go to trial beyond the monetary consequences.

48. *But see* Korobkin & Guthrie, *Psychological Barriers*, *supra* note 28, at 163 (arguing that "the barrier to settlement created by negative frames is not ephemeral and might prove quite stubborn and difficult to mitigate in real litigation situations").

counterpart is likely to evaluate an option more favorably if a similar but inferior option is available.[49] The negotiator may thus be able to increase the likelihood that her counterpart will select a particular agreement proposal if a similar but inferior proposal is offered in the alternative.

Suppose, for example, that a fired employee files suit against a company for which she used to work, asserting employment discrimination claims under Title VII. Suppose further that the defendant has offered to pay the plaintiff a $30,000 cash payment to settle the case but that the plaintiff is wavering because trial holds some appeal. Assuming that the defendant wants the plaintiff to accept the $30,000 settlement offer, what might defense counsel do to encourage her to accept it?

In lieu of the $30,000 lump sum payment, for example, defense counsel might offer to donate $30,000 to the charity of the plaintiff's choice, offer $30,000 in merchandise to the plaintiff, or offer to pay her $10,000 per year for three years. Research on contrast effects suggests that the presence of any of these alternative options should make the $30,000 cash offer seem more attractive by comparison than it would appear standing alone. This, in turn, should increase the likelihood that the plaintiff will choose to accept the settlement proposal and forego trial.

IV. CONCLUSION

Negotiators often lack control over the identity of counterparts, the issues, and the bargaining environment, but they do enjoy control over how they make decisions.[50] By understanding the decision making process, the negotiator can exercise that control effectively and even exercise some control over how her counterpart makes decisions as well.

49. *See supra* Part II.B.3.

50. BAZERMAN & NEALE, *supra* note 2, at 4.