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Chris Guthrie

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# Panacea or Pandora's Box?: The Costs of Options in Negotiation

Chris Guthrie\*

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## INTRODUCTION

Negotiation is ubiquitous. From banal exchanges between family members and friends to business transactions involving multi-national corporations to settlement discussions in complex litigation, negotiation is a central aspect of our personal, professional, and public lives.<sup>1</sup> What we get—and what we give up—often depends upon how well we negotiate.

Because of its pervasiveness, negotiation has attracted the attention of teachers, scholars, and practitioners from a variety of disciplines.<sup>2</sup> In traditional academic departments like economics and psychology; in professional schools of business, law, and public policy; and even in the “real world,” negotiation experts have developed a vast prescriptive literature on the subject.<sup>3</sup> Across these disciplinary divides,<sup>4</sup> the prescriptive literature exhorts negotiators to generate, evaluate, and select from multiple options at the bargaining table.<sup>5</sup>

For example, the authors of the highly influential *Getting to Yes* argue that “the key to wise decision making in negotiation lies in selecting from a

1. Negotiation is simply “an interactive communication process that may take place whenever we want something from someone else or another person wants something from us.” G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 6 (1999).

2. See, e.g., *id.* at xii (observing that graduate and professional schools throughout the country address negotiation in their curricula).

3. See, e.g., Chris Guthrie, *Review Essay: Using Bargaining for Advantage in Law School Negotiation Courses*, 16 OHIO ST. J. ON DISP. RESOL. 219, 219–20 (2000) (citing sources).

4. Researchers at Harvard’s Program on Negotiation recently conducted a survey of faculty teaching Negotiation in graduate schools of business, international relations, law, and public policy at a variety of universities around the country and found “considerable redundancy within and across the professors interviewed.” Sara Cobb, *An Overview of a Research Survey*, in *NEGOTIATION PEDAGOGY* 3 (Program on Negotiation Harvard Law School ed., 2000) (on file with the author).

5. See, e.g., ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE* 145 (1989) (advocating option generation) [hereinafter *GETTING TOGETHER*]; ROGER FISHER & DANNY ERTEL, *GETTING READY TO NEGOTIATE: THE GETTING TO YES WORKBOOK* 33 (1995) (advocating option generation) [hereinafter *GETTING READY TO NEGOTIATE*]; ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 56–80 (2d ed. 1991) (identifying option generation as one of four principles that should guide negotiators) [hereinafter *GETTING TO YES*]; ROY J. LEWICKI ET AL., *NEGOTIATION: READINGS, EXERCISES, AND CASES* 90 (1999) (describing option generation as the penultimate phase of integrative negotiation); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 37–39 (2000) (proposing option generation as a way to manage the tension between value-claiming and value-creating behavior) [hereinafter *BEYOND WINNING*]; GERARD NIERENBERG, *THE COMPLETE NEGOTIATOR* 192 (1973) (advancing option generation as a goal of good negotiation); LEIGH L. THOMPSON, *THE MIND & HEART OF THE NEGOTIATOR* 144 (2d ed. 2001) (noting that she “strongly advocate[s] that negotiators generate several options, all of equal value to themselves”); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 821–22 (1984) (advancing a problem-solving approach to negotiation in which the parties engage in a fluid, joint search for mutual options).

great number and variety of options.”<sup>6</sup> Similarly, the authors of *Getting Together* argue that “[t]he chance that a negotiation will produce a good substantive agreement improves if the negotiators, without commitment, generate a large number of relevant ideas and suggestions.”<sup>7</sup> Indeed, “[b]eing able to come up with creative alternatives is seen as one of the basic concepts of successful negotiation.”<sup>8</sup>

The negotiation literature’s “option-generation prescription” receives its fullest expression in “brainstorming.”<sup>9</sup> Designed to “stimulate the free flow of ideas and creativity”<sup>10</sup> and to uncover “a wide variety of potential solutions,”<sup>11</sup> brainstorming is a structured exercise in which negotiators work with one another to generate options without evaluating or judging them.<sup>12</sup> In *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, Robert Mnookin, Scott Peppet, and Andrew Tulumello describe how one negotiator (a job candidate) might propose brainstorming to her counterpart (a prospective employer):

Well, I think I have a good sense of your interests, and you seem to understand mine. Now I’m wondering how we can meet those interests. I’d like to take the job if we can work out these remaining issues, and I’ve got some ideas. My suggestion is that we take ten minutes and just try to brainstorm as many possible solutions to this problem as we can think of—even crazy solutions. Then we can decide if any of them make sense.<sup>13</sup>

At first glance, the option-generation prescription seems unassailable. After all, negotiators can include in their agreements only those options that they actually consider, and the more options they consider, the more options they will have to choose from at the bargaining table. As the authors of *Getting Ready to Negotiate* put it, “The more options that are generated, the greater the chance that one of them will effectively reconcile the differing interests of the parties.”<sup>14</sup>

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6. GETTING TO YES, *supra* note 5, at 66.

7. GETTING TOGETHER, *supra* note 5, at 145.

8. NIERENBERG, *supra* note 5, at 194.

9. See A. F. OSBORN, APPLIED IMAGINATION 151–53 (3d ed. 1963) (describing the origins of brainstorming).

10. DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 113 (1986).

11. MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 100 (1992).

12. For efforts in the prescriptive negotiation literature to explain how negotiators should use brainstorming, see, for example, GETTING TO YES, *supra* note 5, at 60–65, BEYOND WINNING, *supra* note 5, at 37–39, and THOMPSON, *supra* note 5, at 178.

13. BEYOND WINNING, *supra* note 5, at 37. For other approaches to generating options, see generally RALPH L. KEENEY, VALUE-FOCUSED THINKING: A PATH TO CREATIVE DECISIONMAKING (1992), and L. Robin Keller & Joanna L. Ho, *Decision Problem Structuring: Generating Options*, in 18 IEEE TRANSACTIONS ON SYSTEMS, MAN, AND CYBERNETICS 715 (1988).

14. GETTING READY TO NEGOTIATE, *supra* note 5, at 33.

Upon closer inspection, however, the option-generation prescription begins to appear vulnerable, for it rests on a questionable premise about the behavior of negotiators. It assumes that negotiators will make rational decisions when selecting from multiple options. Regardless of the number of options available or the manner in which they are presented, it assumes that negotiators will independently assess the subjective value of each option, rank-order them, and then select the one that offers the most value.<sup>15</sup> In reality, however, people often have great difficulty selecting the value-maximizing option when multiple options are on the table; that is, the very presence of multiple options has a tendency to induce people to make suboptimal decisions.<sup>16</sup>

The purpose of this Article is to describe some of the predictable problems that may arise as a consequence of option generation in negotiation. Relying on existing experimental research, new experimental research, and “real-world” empirical evidence, the Article identifies four potential costs associated with option generation: option devaluation, context dependence (both contrast and compromise), non-compensatory decision making, and decision regret. Taken together, these “option costs” stand for the ironic proposition that negotiators who heed the option-generation prescription may be more likely than those who ignore it to enter into inferior agreements with which they may be less satisfied. In short, option generation may not be the panacea its proponents imagine, but rather a Pandora’s box that can lead negotiators astray.

The purpose of this Article is *not* to argue that negotiators should cease option generation. As its proponents have observed, option generation may enable negotiators to identify novel alternatives that “effectively reconcile the differing interests of the parties.”<sup>17</sup> The problem, however, is that this very same process can also induce negotiators to make suboptimal decisions at the bargaining table. Thus, this Article’s more modest goal is merely to delineate some of the potential pitfalls that can accompany option generation.<sup>18</sup>

Although the aims of this Article are primarily descriptive, the Article does venture into the prescriptive. Because option generation offers potential benefits as well as the potential costs described below, the Article explores whether there is a way for negotiators to reap these benefits without incurring the costs. The Article attempts to determine, in other words, how

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15. See sources cited *infra* note 24.

16. Many of these decision-making tendencies reflect departures from traditional, normative notions of “rationality.” See *infra* Parts I.A–I.B. Even if they do not, they still cast doubt on the wisdom of the prescriptive negotiation literature’s devotion to option generation.

17. See GETTING TO YES, *supra* note 5, at 11.

18. This Article is comparable in spirit to Gerald B. Wetlauffer, *The Limits of Integrative Bargaining*, 85 GEO. L.J. 369, 369 (1996) (arguing that the prescriptive negotiation literature overstates opportunities for “value creation” or “joint gains” in negotiation).

those seeking to resolve a dispute or “do a deal” can put multiple options on the table without falling prey to the decision-making problems they can cause.

The Article argues that *lawyer*-negotiators, acting on behalf of clients, are more likely than *non-lawyer*-negotiators, acting on their own behalf, to maximize the benefits and minimize the costs of option generation in negotiation. Specifically, the Article makes a three-part argument about the constructive role that lawyers can play for their clients in complex negotiations. First, lawyers, in contrast to their clients, are likely to assess decision options according to rational principles of choice (and evidence suggests that principals want their agents to evaluate decision options in this fashion). Second, because lawyers can assess decision options rationally, they can help clients faced with multiple options make “better” decisions at the bargaining table. Finally, and perhaps more controversially, sophisticated lawyers can use decision options strategically in negotiation to induce their counterparts to make desired concessions.

In short, this Article adds to a small but growing body of legal scholarship that seeks to identify the specific ways in which lawyers can and do add value for their clients (and society).<sup>19</sup> The Article contributes to this emerging literature by describing the special role that lawyers can play as “option brokers” in negotiation (and beyond).

The Article proceeds as follows. In Part I, the Article describes each of the option costs identified above, explores experimental evidence documenting their operation, and explains how they can undermine a negotiator’s decision making at the bargaining table. In Part II, the Article argues that lawyers are less likely than others to fall prey to the option costs identified in Part I and that they are therefore better situated to capitalize on the option-generation process for their clients. Finally, the Article concludes with some observations about broader descriptive and prescriptive implications.

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19. See, e.g., Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 509 (1994) (arguing that litigators can use their reputations for cooperation to build trust and facilitate effective negotiated agreements); Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 239 (1984) (describing how business lawyers can function as “transaction cost engineers” to facilitate better deals for their clients); Jason Scott Johnston & Joel Waldfoegel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39, 39 (2002) (finding that lawyers who litigate frequently against each other are more likely to settle and to settle more quickly); Richard W. Painter, *Game Theoretic and Contractarian Paradigms in the Uneasy Relationship Between Regulators and Regulatory Lawyers*, 65 FORDHAM L. REV. 149, 149 (1996) (contending that lawyers representing regulators and regulated firms can cooperate and improve the regulatory process for their respective clients).



## I. OPTION COSTS

The prescriptive literature on negotiation seeks to help negotiators obtain better outcomes at the bargaining table. To do so, the prescriptive literature advises negotiators to generate as many options as possible to enable them to satisfy their “interests”<sup>20</sup> in negotiation.<sup>21</sup> Negotiators who generate multiple options will “open doors and produce a range of potential agreements satisfactory to each side.”<sup>22</sup> Having done so, they need only decide which of the available options to select.

The prescriptive literature assumes that negotiators will make rational decisions when selecting from these options. What it means to decide “rationally” is a subject of some dispute,<sup>23</sup> but generally speaking, rational models of choice assume that negotiators will assign a subjective value to each option based solely on the characteristics of that option, rank-order the options in the choice set, and then select the one that they should prefer.<sup>24</sup> Rational models assume, in other words, that irrelevant options or irrelevant characteristics of a set of options will *not* induce negotiators to select an option other than the one they most prefer. Unfortunately, however, this assumption is often wrong because the addition of options to a choice set can induce negotiators to make non-value-maximizing decisions. Specifically, the addition of options can give rise to four phenomena that tend to occur in the following order:

The first phenomenon arises when a choice set grows from one option

20. A negotiator’s “interests” are her “needs, desires, concerns, and fears.” GETTING TO YES, *supra* note 5, at 40. “Interests motivate people; they are the silent movers behind the hubbub of positions.” *Id.* at 41.

21. Option generation is most closely associated with the “principled” or “problem-solving” approach to negotiation. *See id.* at 9–14 (introducing the principled approach to negotiation).

22. *Id.* at 80.

23. *See, e.g.,* Deborah Frisch & Robert T. Clemen, *Beyond Expected Utility: Rethinking Behavioral Decision Research*, 116 PSYCHOL. BULL. 46, 47 (1994) (proposing their own critique of rational choice and identifying other critics as well).

24. For lucid descriptions of rational decision making, see James R. Bettman et al., *Constructive Consumer Choice Processes*, 25 J. CONSUMER RES. 187, 187 (1998). The authors assert:

[A] rational decision maker [is one] with well-defined preferences that do not depend on particular descriptions of the options or on the specific methods used to elicit those preferences. Each option in a choice set is assumed to have a utility, or subjective value, that depends only on the option. Finally, it is assumed that the consumer has ability or skill in computation that enables the calculation of which option will maximize his or her received value and selects accordingly.

*Id.*; *see also* Itamar Simonson & Amos Tversky, *Choice in Context: Tradeoff Contrast and Extremeness Aversion*, 29 J. MARKETING RES. 281, 281 (1992) (“It is commonly assumed that each alternative has a utility or subjective value, and the consumer selects the alternative with the highest value. This assumption, called value maximization (VM), underlies the classical economic theory of the consumer . . .”).

to two or more options. When a choice set expands from the original option under consideration to more than one option, negotiators tend to devalue the initial option (assuming that the options in the set have both advantages and disadvantages relative to one another). Thus, the first option cost the Article explores below is *option devaluation*.<sup>25</sup>

The second phenomenon arises when a choice set consisting of two or more options grows by one. When an option is added to a choice set consisting of two or more options, negotiators tend to reconsider their relative ranking of the options already under consideration even when the additional option sheds no new light on those options. Negotiators do *not*, in other words, make context-independent decisions. Thus, the second option cost the Article explores below is *context dependence*.<sup>26</sup>

The third phenomenon arises when a choice set grows to include a large number of options, perhaps ten, fifteen, or twenty options. When a choice set includes a large number of options, negotiators tend to abandon compensatory decision-making strategies that take all options and attributes into account in favor of simplified decision strategies that consider only some of the available information. Thus, the third option cost the Article explores below is *non-compensatory* or *partial decision making*.<sup>27</sup>

The fourth and final phenomenon arises after the decision has been made. Following a decision, negotiators tend to feel greater regret when they have selected one option over another than when they have simply selected the sole available option. Thus, the fourth option cost the Article explores below is *decision regret*.<sup>28</sup>

Although the prescriptive literature on negotiation is certainly correct that option generation offers potential benefits to negotiators, the four phenomena identified above and described below suggest that option generation poses potential costs as well. Negotiators who generate multiple options may be induced by the very availability of those options to make decisions that run contrary to their true preferences and that induce negative post-decision emotions.

#### A. OPTION COST #1 (OPTION DEVALUATION)

The first phenomenon that may negatively influence decision making in multiple-option negotiation is “option devaluation.” That is, negotiators may unwittingly devalue an option once it becomes part of a set of options because options that look attractive by themselves often look less attractive when compared to others.

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25. See *infra* Part I.A.

26. See *infra* Part I.B.

27. See *infra* Part I.C.

28. See *infra* Part I.D.

### 1. Option Devaluation Explained

Rational models of decision making generally assume that people assess the subjective value of an option based solely on the value of that option.<sup>29</sup> According to the rational model, “an option’s attractiveness does not depend on comparisons drawn between it and other alternatives.”<sup>30</sup> Contrary to the rational model, however, some psychologists have found that comparisons do influence the way people evaluate an option.<sup>31</sup> In fact, “comparisons typically serve to decrease the attractiveness of the options being compared.”<sup>32</sup>

To illustrate these contrasting perspectives, suppose that a college student is trying to decide which law school to attend. Consider two scenarios. In the first, suppose she has been admitted to Harvard Law School alone; in the second, suppose she has been admitted not only to Harvard but also to Stanford. Will her assessment of Harvard differ in these two scenarios? According to the rational model, she will evaluate Harvard the same in either situation; if she rates Harvard a seven on a scale of one-to-ten in scenario one, she will rate Harvard a seven in scenario two as well (unless her admission to Stanford has provided new information relevant to her assessment of Harvard). In contrast, psychological research on option devaluation suggests that the presence of Stanford in scenario two is likely to influence her evaluation of Harvard. She may give Harvard a seven when evaluating it on its own, but when evaluating it in light of another viable option, she is likely to drop her rating to a six or five.

Psychologists use “comparative loss aversion” to explain this “option devaluation” phenomenon.<sup>33</sup> Options, they observe, tend to have both advantages and disadvantages, and the process of comparing options brings to mind the relative advantages and disadvantages of each.<sup>34</sup> Suppose, for example, that our college student prefers to attend a law school with a large enrollment located in a temperate climate. When she compares the two schools, she will deem Harvard’s size to be an advantage relative to Stanford, and Stanford’s location to be an advantage relative to Harvard; at the same time, she will perceive Stanford’s size to be a *disadvantage* relative to Harvard, and Harvard’s location to be a *disadvantage* relative to Stanford.

Psychologists have demonstrated that people tend to find disadvantages or “losses” more aversive than they find equivalent advantages or “gains”

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29. See *supra* note 24 (describing rational decision making).

30. Lyle Brenner et al., *Comparison, Grouping, and Preference*, 10 PSYCHOL. SCI. 225, 225 (1999).

31. *Id.*

32. *Id.*

33. See *id.* (studying whether “within-group comparisons [are] more likely than between-group comparisons” in grouping focus comparisons).

34. *Id.*

attractive.<sup>35</sup> In fact, in experimental investigations of this “loss aversion” phenomenon,<sup>36</sup> psychologists have found that people find disadvantages or losses *at least* twice as painful as they find advantages or gains of the same magnitude pleasurable.<sup>37</sup> Because the process of comparison brings to mind the relative advantages and disadvantages of the options under consideration, and because each option’s disadvantages are likely to loom larger than its advantages, loss aversion implies that comparisons will decrease the attractiveness of *every* option under consideration.<sup>38</sup> When our college student compares Harvard and Stanford Law Schools, for example, Harvard’s location in a harsh climate will decrease its attractiveness more than its size will increase its attractiveness; likewise, Stanford’s small enrollment will decrease its attractiveness more than its location will increase its attractiveness. In short, *both* Harvard and Stanford will seem less attractive when compared to one another than when evaluated independently.

To demonstrate this option devaluation phenomenon, Lyle Brenner, Yuval Rottenstreich, and Sanjay Sood gave a series of decision problems to several hundred visitors to a science museum.<sup>39</sup> The researchers randomly assigned the subjects to three groups.<sup>40</sup> Subjects assigned to the “isolated” group indicated the maximum price they would pay for a single item (e.g., a one-year subscription to *People* magazine).<sup>41</sup> Subjects assigned to the “accompanied” group indicated the maximum price they would pay for each

35. See sources cited *infra* note 36.

36. Loss aversion is a component of “prospect theory.” Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 279 (1979). For more on loss aversion, see generally Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. ECON. PERSP.* 193 (1991) [hereinafter Kahneman et al., *Endowment*] and Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 *AM. PSYCHOL.* 341 (1984).

37. See, e.g., Chip Heath et al., *Goals as Reference Points*, 38 *COGNITIVE PSYCHOL.* 79, 87 (1999); Kahneman et al., *Endowment*, *supra* note 36, at 199.

38. Brenner et al., *supra* note 30, at 225 (“Whenever the options being compared all have meaningful advantages and disadvantages relative to one another, the attractiveness of a given option will decrease as it is compared with other options.”); see also Simonson & Tversky, *supra* note 24, at 289. Simonson and Tversky assert:

Losses and gains are usually defined in relation to a neutral reference point that corresponds to the status quo. In many choice problems, however, alternatives are evaluated in terms of their advantages and disadvantages defined in relation to other options. To explain the effect of context on choice, we extend the notion of loss aversion and propose that disadvantages are weighted more heavily than corresponding advantages.

*Id.* Of course, when one option has only advantages relative to another option in the choice set, comparisons will not lead to the devaluation of that option. Brenner et al., *supra* note 30, at 225. Indeed, comparisons in that case are likely to have the opposite effect. *Id.*; see also *infra* Part I.B (discussing context dependent decision-making and choice preferences).

39. Brenner et al., *supra* note 30, at 225.

40. *Id.* at 226.

41. *Id.*

of four items (e.g., one-year subscriptions to *Business Week*, *The New Yorker*, *People*, or *Time*).<sup>42</sup> Finally, subjects assigned to the “ranked” group rank-ordered each of four items (i.e., the aforementioned subscriptions) and then indicated the maximum amount they were willing to pay for each.<sup>43</sup>

The researchers predicted that subjects would rate options more favorably in isolation than when compared to others.<sup>44</sup> More specifically, they expected “that comparisons would be unlikely in isolated assessments (because only one item was present), more likely in accompanied assessments (because multiple items were present), and essentially required in ranked assessments (because determining one’s favorite entails comparison).”<sup>45</sup> Due to comparative loss aversion, they further expected “isolated prices to exceed ranked prices, with accompanied prices falling somewhere in between.”<sup>46</sup>

Consistent with these expectations, the researchers found that subjects devalued options when they appeared alongside other options.<sup>47</sup> Consider, for example, subjects’ valuations of the one-year subscription to *People* magazine. Subjects were willing to pay \$21.42 in the “isolated” condition but only \$15.96 and \$15.09 in the “accompanied” and “ranked” conditions, respectively.<sup>48</sup> The researchers found comparable results for the other magazine subscriptions under consideration. For example, subjects were willing to pay \$22.83 for a one-year subscription to *Business Week* when assessing it on its own but only \$20.64 (“accompanied” condition) and \$18.61 (“ranked” condition) when assessing it in the presence of other options.<sup>49</sup> Combining the results for each of the four magazine subscriptions, the researchers found that subjects were willing to pay, on average, \$22.60 when assessing each subscription on its own but only \$19.74 when assessing each in the “accompanied” condition and \$18.29 in the “ranked” condition.<sup>50</sup> The three to four dollar differential between the “isolated” condition on the one hand and the “accompanied” and “ranked” conditions on the other may not seem very large, but on a percentage basis, these results show that subjects devalued each subscription from 12.7% to 19.1% when comparing it to the others.

The researchers found similar results in a higher-stakes decision problem involving the purchase of a round-trip airplane ticket from the San

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42. *Id.*

43. *Id.*

44. Brenner et al., *supra* note 30, at 226.

45. *Id.*

46. *Id.*

47. *Id.* at 226–27.

48. *Id.* at 226.

49. Brenner et al., *supra* note 30, at 226.

50. *Id.*

Francisco Bay Area to four different destinations.<sup>51</sup> Subjects indicated that they were willing to pay \$130.97 to fly round-trip to Los Angeles when evaluating that trip on its own.<sup>52</sup> When evaluating it along with round-trips to Seattle, Las Vegas, and San Diego, however, subjects expressed a willingness to pay only \$94.75 in the “accompanied” condition and \$92.84 in the “ranked” condition.<sup>53</sup> Similarly, subjects were willing to pay \$206.27 to fly round-trip to Seattle when evaluating that trip on its own.<sup>54</sup> When comparing it to the other three destinations, however, subjects were willing to pay only \$137.67 in the “accompanied” condition and \$131.00 in the “ranked” condition.<sup>55</sup> Across all of the trips, subjects were willing to pay, on average, \$143.14 when evaluating each trip in isolation but only \$115.58 in the “accompanied” condition and \$109.05 in the “ranked” condition.<sup>56</sup> In other words, subjects devalued each trip from 19.3% to 23.8% when comparing it to others.

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TABLE I  
OPTION DEVALUATION STUDY OF ROUND-TRIP AIR TRAVEL

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	“ISOLATED”	“ACCOMPANIED”	“RANKED”
LOS ANGELES	\$130.97	\$94.75	\$92.84
SEATTLE	\$206.27	\$137.67	\$131.00
TRIP AVERAGES	\$143.14	\$115.58	\$109.05

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## 2. Option Devaluation in Negotiation

This experimental work demonstrates that option devaluation can affect the way consumers evaluate options. When comparing options that have advantages and disadvantages relative to one another, consumers are likely to evaluate options more favorably in isolation than when considered together. Based on this work, I hypothesized that option devaluation might also occur at the bargaining table, where negotiators who heed the advice of the prescriptive negotiation literature are likely to identify options that possess both advantages and disadvantages relative to one another.

To test for this, I constructed a simple problem based on the negotiation and purchase of a small car. I randomly assigned first-year law student subjects at the University of Missouri to one of two groups: a one-car

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51. *Id.*

52. *Id.*

53. *Id.*

54. Brenner et al., *supra* note 30, at 226.

55. *Id.*

56. *Id.*

group and a three-car group. I instructed each subject in both groups to “[i]magine that you are planning to negotiate with a car dealer to buy the base model of a new small sedan.”<sup>57</sup> I then made the following request of the subjects assigned to the one-car group:

Please indicate the maximum amount of money you would pay for:

Toyota Corolla: \_\_\_\_\_ (\$ amount)<sup>58</sup>

I made a similar, though slightly different, request of the subjects assigned to the three-car group:

Please rank order the following from 1 to 3 (with 1 being the most desirable, 2 the second most desirable, and 3 the least desirable) and then indicate next to each the maximum amount of money you would pay for:

\_\_\_\_\_ Honda Civic: \_\_\_\_\_ (\$ amount)

\_\_\_\_\_ Toyota Corolla: \_\_\_\_\_ (\$ amount)

\_\_\_\_\_ Mazda Protege: \_\_\_\_\_ (\$ amount)<sup>59</sup>

In both groups, the subjects anticipated negotiating with a seller to purchase one small sedan. I asked the subjects in both groups to indicate how much they would pay for a Toyota Corolla. The only difference between the two groups was that I asked subjects in the three-car group to consider two other small sedans as well, a Honda Civic and a Mazda Protege.

Because the subjects were randomly assigned to the two groups, there was no reason to expect them to evaluate the Toyota Corolla differently. Nonetheless, I found that the mere presence of the additional options prompted subjects in the three-car group to evaluate the Corolla less favorably. Subjects in the one-car group<sup>60</sup> indicated they would pay an average amount of \$13,125 for the Corolla, while subjects in the three-car group<sup>61</sup> indicated that they would pay only \$11,447.37 for the very same car.<sup>62</sup> Even though the additional options presented to the three-car group conveyed no information about the value of the Toyota Corolla, their very presence depressed average valuations by \$1,677.63 or 12.8%.

57. Stimulus materials (on file with the author).

58. *Id.*

59. *Id.*

60. n=20.

61. n=19.

62.  $t(37) = 1.33, p = .096$ . To test for statistical significance, I performed a t-test. The t-test measures the likelihood that any observed difference between the two mean scores is the result of an actual difference between the two groups' responses rather than random error. See generally WILLIAM L. HAYS, STATISTICS 271-300 (3d ed. 1981). The results indicate that there is a marginally statistically significant difference between the two groups.

In negotiation, as well as consumer decision making, people seem to devalue options when comparing them to others. When the “other” options provide relevant information about the value of the options already under consideration, this is quite reasonable; however, this phenomenon seems to occur even when the added options do not provide relevant contextual information. This is because the very process of comparison “emphasize[s] the advantages and disadvantages of options under consideration” and “disadvantages are given greater weight than advantages” in the evaluation.<sup>63</sup> Thus, “whenever the options under consideration have both meaningful advantages and meaningful disadvantages, comparisons hurt.”<sup>64</sup>

### B. OPTION COST #2 (CONTEXT DEPENDENCE)

The second phenomenon that can induce suboptimal decision making in multiple-option negotiation arises when a new option is added to an existing choice set. Rational models of choice generally assume that the presence of an additional option will not alter a person’s relative valuation of options already under consideration unless the new option conveys relevant information about those other options.<sup>65</sup> Various labels “context independence”<sup>66</sup> or the “independence of irrelevant alternatives” condition,<sup>67</sup>

63. Brenner et al., *supra* note 30, at 228.

64. *Id.* But see Christopher K. Hsee & France Leclerc, *Will Products Look More Attractive Presented Separately or Together?*, 25 J. CONSUMER RES. 175, 177–85 (1998) (finding that if an option is unattractive relevant to a salient reference point, comparison with another option may increase its attractiveness).

65. See, e.g., Amos Tversky & Itamar Simonson, *Context-dependent Preferences*, 39 MGMT. SCI. 1179, 1179 (1993). The authors state:

The theory of rational choice assumes that preference between options does not depend on the presence or absence of other options. This principle, called *independence of irrelevant alternatives*, is essentially equivalent to the assumption that the decision maker has a complete preference order of all options, and that—given an offered set—the decision maker always selects the option that is highest in that order.

*Id.*

66. See, e.g., Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 287 (1996). The authors assert:

Normative analyses of choice commonly assume *value maximization*: a numerical value or utility is associated with each option such that, given a set of options, the decision maker chooses the one with the highest value. An immediate consequence of value maximization, called *context-independence*, is that the relative ranking of any two options should not vary with the addition or deletion of other options.

*Id.*

67. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 26–28 (1951) (explaining why irrelevant alternatives should not alter preferences of other alternatives in the choice set); Bettman et al., *supra* note 24, at 206 (“One of the classic assumptions of models of choice is the independence of irrelevant alternatives assumption. The basic idea behind this assumption is that the ratio of choice probabilities for any pair of options does not change if the



the idea is that a person who prefers A to B will not change that preference upon learning that C is also available.<sup>68</sup> Of course, if the new option conveys relevant information about the other options, it is perfectly reasonable for people to alter their assessments of the other options in the choice set;<sup>69</sup> but if the new option does *not* convey relevant information, people should not adjust their assessments of the other options.<sup>70</sup> As Mark Kelman, Yuval Rottenstreich, and Amos Tversky explain, a person who prefers chicken over pasta might rationally change her preference from chicken to pasta upon learning that veal parmesan is on the menu because the presence of veal parmesan might indicate that the restaurant specializes in Italian food.<sup>71</sup> But “[a] person who prefers chicken over pasta should not change this preference on learning that fish is also available.”<sup>72</sup>

Psychologists have discovered, however, that people’s assessments of initially considered options are often systematically influenced by the emergence of an additional, irrelevant option.<sup>73</sup> People “make context-based inferences about the worth of alternatives whether or not the context provides a valid basis for such inferences.”<sup>74</sup> Researchers have documented two distinct types of “context-dependent” decision effects: “contrast” and “compromise.”<sup>75</sup>

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composition of the choice set containing the two is changed.”); Tversky & Simonson, *supra* note 65, at 1179 (observing that the independence of irrelevant alternatives principle embodied in rational choice theory “assumes that preference between options does not depend on the presence or absence of other options”).

68. See Simonson & Tversky, *supra* note 24, at 281. The authors assert:

A major implication of VM [value maximization] is that the preference between alternatives is independent of the context, as defined by the set of alternatives under consideration. Thus, if the consumer prefers brand *x* to brand *y* in one context (e.g., when only *x* and *y* are available), then *y* cannot be preferred to *x* in another context (e.g., when a third brand, *z*, is added to the choice set).

*Id.* (citation omitted).

69. See, e.g., *id.* at 292 (“Context effects can sometimes be justified normatively in terms of the information derived from the background or the local context.”).

70. See, e.g., sources cited *supra* note 24.

71. Kelman et al., *supra* note 66, at 287 n.2.

72. *Id.* at 287.

73. People tend to make context-dependent decisions rather than context-independent decisions. See generally Tversky & Simonson, *supra* note 65 (proposing a context-dependent model of choice).

74. Simonson & Tversky, *supra* note 24, at 292.

75. For another example of context-dependent decision making, see Donald A. Redelmeier & Eldar Shafir, *Medical Decision Making in Situations That Offer Multiple Alternatives*, 273 JAMA 302, 304 (1995) (finding in studies of medical and legislative decision making that “preference between two options shifts due to the availability of a third option that increases the difficulty of making a choice but is itself not chosen”).

## 1. Contrast Explained

Research on contrast demonstrates that people are likely to evaluate an existing option more favorably when a similar but inferior option is added to the choice set.<sup>76</sup> In other words, if C is similar but inferior to A, then people are more likely to select A when it appears alongside both B and C than when it appears alongside B only. Researchers refer to this phenomenon as “contrast,”<sup>77</sup> “tradeoff contrast,”<sup>78</sup> “attraction,”<sup>79</sup> or “asymmetric dominance.”<sup>80</sup>

To illustrate, recall our college student. Suppose she hopes to attend a highly ranked law school and has been admitted to Georgetown Law Center and the University of Texas Law School, two schools often ranked comparably.<sup>81</sup> Finally, suppose American University has just informed her that she has been admitted there as well. Her admission to American should have no effect on her preference for Georgetown or Texas, but psychological research suggests that the American admission might tip the scales in favor of Georgetown because (for her) American is a similar, though inferior, option (i.e., private law school in Washington, D.C. ranked lower than Georgetown<sup>82</sup>). Its presence in her choice set may increase the attractiveness of the option that “dominates” it, i.e., Georgetown.

Several psychologists have demonstrated this contrast phenomenon.<sup>83</sup>

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76. Joel Huber, John Payne, and Christopher Puto first identified and described this phenomenon in 1982. See Joel Huber et al., *Adding Asymmetrically Dominated Alternatives: Violations of Regularity and the Similarity Hypothesis*, 9 J. CONSUMER RES. 90, 90 (1982).

77. Kelman et al., *supra* note 66, at 288.

78. Simonson & Tversky, *supra* note 24, at 281.

79. Itamar Simonson, *Choice Based on Reasons: The Case of Attraction and Compromise Effects*, 16 J. CONSUMER RES. 158, 158 (1989).

80. Huber et al., *supra* note 76, at 90. Although the terms are used synonymously, “attraction” is a broader category that includes “asymmetric dominance” or “contrast” or “tradeoff contrast.” Stated differently, attraction can occur in some circumstances even where there is no asymmetrically dominated alternative. See Douglas H. Wedell, *Distinguishing Among Models of Contextually Induced Preference Reversals*, 17 J. EXPER. PSYCHOL.: LEARNING, MEMORY, AND COGNITION 767, 768 (1991) (noting that attraction “can occur even when the decoy is not dominated by either of the choice alternatives”).

81. In the 2003 *U.S. News* rankings, Georgetown was ranked 14th (with a peer assessment score of 4.2) and Texas was ranked 15th (with an academic reputation score of 4.2). U.S. NEWS & WORLD REPORT, BEST GRADUATE SCHOOLS 60 (2003) [hereinafter U.S. NEWS] (reflecting 2002 data).

82. In the 2003 *U.S. News* rankings, American University’s Washington College of Law was ranked tied for 49th with a peer assessment score of 2.9. U.S. NEWS, *supra* note 81, at 60.

83. For a meta-analysis of some of the experimental work on contrast or attraction, see generally Timothy B. Heath & Subimal Chatterjee, *Asymmetric Decoy Effects on Lower-Quality Versus Higher-Quality Brands: Meta-Analytic and Experimental Evidence*, 22 J. CONSUMER RES. 268 (1995). Some studies of this phenomenon include Joel Huber & Christopher Puto, *Market Boundaries and Product Choice: Illustrating Attraction and Substitution Effects*, 10 J. CONSUMER RES. 31 (1983); Huber et al., *supra* note 76; Kelman et al., *supra* note 66; Donald R. Lehmann & Yigang Pan, *Context Effects, New Brand Entry, and Consideration Sets*, 31 J. MARKETING RES. 364 (1994); Yigang

In one simple experiment, for example, Itamar Simonson and Amos Tversky randomly assigned subjects to a two-option group or a three-option group and asked the subjects in each group to select either cash or a pen.<sup>84</sup> The subjects in the two-option group could choose to receive \$6 or an elegant Cross pen.<sup>85</sup> Subjects in the three-option group could choose \$6, the elegant Cross pen, or a lesser known, unattractive pen.<sup>86</sup> The researchers found that 36% of the subjects in the two-option group, as compared to 46% of the subjects in the three-option group, selected the Cross pen.<sup>87</sup> Despite the fact that subjects in the latter group chose from among three options rather than two, 27.8% more of them selected the Cross pen.<sup>88</sup> The availability of the inferior option, i.e., the unattractive pen, substantially increased the likelihood that subjects would select the superior option, i.e., the Cross pen.<sup>89</sup>

## 2. Contrast in Negotiation

Consumers are influenced by contrast effects, so it seems reasonable to speculate that negotiators might be as well. Negotiators who heed the option-generation prescription are likely to find themselves in situations where they have identified a set of options, evaluated them, and then come up with an additional option. Even if that additional option provides no relevant information about the options already under consideration, it might alter their assessments of one or more of the other options.

To test for this effect in negotiation, I asked first-year law student subjects to imagine that they were involved in a dispute with their law partner over a "Rioner" painting. I randomly assigned subjects to a two-option group or a three-option group. Regardless of the group to which they were assigned, all subjects read the following facts about the dispute:

Imagine that you and your law partner have decided to go your separate ways.

There is no personal animosity between you, and you have successfully negotiated all issues but one. Unfortunately,

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Pan & Donald R. Lehmann, *The Influence of New Brand Entry on Subjective Brand Judgments*, 20 J. CONSUMER RES. 76 (1993); Simonson, *supra* note 79; Simonson & Tversky, *supra* note 24.

84. Simonson & Tversky, *supra* note 24, at 287.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Simonson & Tversky, *supra* note 24, at 287. For efforts to explain the contrast effect, see, for example, Sanjay Mishra et al., *Antecedents of the Attraction Effect: An Information-Processing Approach*, 30 J. MARKETING RES. 331, 332-35 (1993) (identifying "various antecedent variables" that account for the contrast effect); Pan & Lehmann, *supra* note 83, at 76-84 (exploring causes of the contrast effect); Simonson, *supra* note 79, at 158 (proposing the need for reasons or justification as an explanation for the selection of the dominating alternative).

however, you find yourselves in conflict over how to resolve that one issue: You can't agree how to handle the "Rioner" painting hanging in the lobby of your former office.

When decorating the office years ago, you jointly selected and purchased an abstract painting created by a young, unknown, local artist named Rioner. In the intervening years, you have both become increasingly fond of the painting, and neither of you really wants to part with it. Because Rioner has achieved some fame, the painting is worth about \$40,000, much more than you originally paid for it.

In prior discussions, each of you has expressed to the other a desire to own the painting, and neither of you has been willing to budge. Today, your law partner called and proposed the following:<sup>90</sup>

I asked subjects assigned to the two-option group to select one of two options to resolve the dispute:

\_\_\_\_ Your partner keeps the painting and pays you \$20,000 in one lump sum payment.

\_\_\_\_ You and your partner sell the painting back to Rioner, for whom the painting holds sentimental value. You then split the \$40,000 proceeds equally.

Like subjects in the two-option group, subjects in the three-option group could choose either to give the painting to the law partner and pocket a \$20,000 lump sum or sell the painting back to Rioner and pocket \$20,000. Additionally, subjects in the three-option group could select the following option:

\_\_\_\_ Your partner keeps the painting and pays you \$20,000 in four annual installments of \$5,000 per year.

This third option is similar to the first option but obviously inferior to it. Both options require the subject to give the painting to the law partner. However, subjects selecting the first option receive an immediate \$20,000, while those selecting the third option get \$20,000 paid out in four \$5,000 installments over the course of four years. This latter option is inferior to the former option because of the greater uncertainty associated with a multi-year pay-out and because the time value of money renders \$20,000 paid now worth more than \$20,000 paid out over four years.

Rational models of choice assume that the presence of an additional, inferior option will have no influence on the subjects' relative preferences

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90. Stimulus materials (on file with the author).

between the initial two options.<sup>91</sup> If, for example, 50% of the subjects in the two-option group prefer to give the painting to the law partner and 50% prefer to sell it to Rioner, that proportion should hold in the three-option condition as well. In fact, however, I found that subjects' preferences were affected rather dramatically by the presence of the third option. In the two-option condition,<sup>92</sup> 65% of the subjects preferred to sell the painting to Rioner, and 35% preferred to give it to the law partner. In the three-option condition,<sup>93</sup> the subjects' preferences reversed; that is, only 30% of the subjects preferred to sell the painting to Rioner, while 70% of the subjects preferred to give it to the partner.<sup>94</sup>

TABLE 2  
CONTRAST RESULTS

	"GIVE TO PARTNER"	"SELL TO ARTIST"
TWO-OPTION GROUP	35%	65%
THREE-OPTION GROUP	70%	30%

For subjects assigned to the three-option group, the "\$20,000 lump sum" option appeared more attractive because it was accompanied by a similar, though demonstrably inferior, option. Subjects who would otherwise prefer to sell the painting back to the artist were induced to give the painting to their law partner for \$20,000. The presence of the third option—giving the painting to the law partner in exchange for four \$5,000 payments—dramatically increased the attractiveness of the first option—giving the painting to the law partner in exchange for an immediate \$20,000. Indeed, the presence of the inferior option induced a "preference reversal"<sup>95</sup> among the subjects.<sup>96</sup>

91. See, e.g., sources cited *supra* note 24 (describing rational decision making and value maximization).

92. n=20.

93. n=20.

94. p=.03 (one-tailed). To test for statistical significance between the two groups, I performed a one-tailed, Fisher's exact test, which is "[a] procedure for determining the exact probability of obtaining particular frequencies in a 2 x 2 table," rather than an approximation. BARRY COHEN, EXPLAINING PSYCHOLOGICAL STATISTICS 715 (1996); see also B.S. EVERITT, THE ANALYSIS OF CONTINGENCY TABLES 14–19 (2d ed. 1992) (explaining Fisher's exact test). The difference between the two groups is statistically significant.

95. Preference reversals occur when "the rank order of the two options changes between the two evaluation modes" contrary to the predictions of normative models of choice. Hsee & Leclerc, *supra* note 64, at 176. Preference reversals may be "task-induced," "frame-induced," or "context-induced," as here. Wedell, *supra* note 80, at 767.

96. It is conceivable—though it seems unlikely—that the presence of the third option

In another recent study, Kelman and his colleagues found evidence of contrast in settlement negotiations between a faculty member and her university.<sup>97</sup> The researchers asked student-subjects enrolled in a "Psychology of Gender" class to imagine that they were representing the faculty member, an untenured Associate Professor who believed she was denied tenure on the basis of her gender.<sup>98</sup> They informed the subjects that their client wanted financial compensation, public admission of liability on the part of the university, and a commitment from the university to engage in affirmative action in her department.<sup>99</sup> They also informed the subjects that she was unsure how to weigh these three interests.<sup>100</sup>

The researchers randomly assigned the subjects to a two-option group or a three-option group.<sup>101</sup> Subjects in the two-option group learned that the university has offered either (1) to pay \$45,000 in damages and admit liability, or (2) to impose an affirmative action plan on the department without paying damages or admitting liability.<sup>102</sup> In the two-option group, 50% of the subjects expressed a preference for the first option and 50% for the second.<sup>103</sup> Subjects assigned to the three-option group learned that the university has offered not only the first two options but also a third: to pay \$35,000 to the professor's favorite charity and admit liability. This third option seems similar, though inferior, to the first option. Comparing the two options, the researchers explained that "it appears inferior to the proposal in which the university pays \$45,000 in damages. The professor could always accept the \$45,000, give \$35,000 to charity and keep \$10,000 for herself."<sup>104</sup>

Although the principle of context independence "implies that an option can never be 'more popular' in a three-option offered set than in a corresponding two-option offered set," the researchers observed that "[c]ontrast predicts that subjects are more likely to prefer, and hence recommend, the \$45,000 proposal over the affirmative action proposal when the third inferior proposal is offered than when it is not."<sup>105</sup> In fact, the researchers found that 74% of the subjects in the three-option group (in contrast to the 50% in the two-option group) selected the \$45,000 payment.<sup>106</sup> That is, 48% more subjects selected the \$45,000 payment when

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provided relevant information to the subjects about which option to choose. For example, the fact that subjects were asked to choose between two options in which the partner gets the painting may have suggested to them that they should prefer one of the "partner" options.

97. Kelman et al., *supra* note 66, at 297-99.

98. *Id.* at 298.

99. *Id.*

100. *Id.*

101. *Id.*

102. Kelman et al., *supra* note 66, at 298.

103. *Id.* at 299 tbl. 4.

104. *Id.* at 298.

105. *Id.*

106. *Id.* at 299.

it appeared alongside the clearly inferior option. The researchers concluded that “[t]he presence of an inferior option leads to a markedly more favorable evaluation of a similar but superior option.”<sup>107</sup>

This work suggests that negotiators may alter their evaluations in predictably non-normative ways when an inferior option is added to the choice set. Although negotiators are unlikely to select the inferior option, its presence is likely to make the similar, superior option seem more attractive than it appeared before.

### 3. Compromise Explained

Compromise or “extremeness aversion”<sup>108</sup> is another form of context dependence. Research on compromise suggests that people are likely to evaluate an option more favorably when it appears to be intermediate, rather than extreme, in a choice set.<sup>109</sup> In other words, B appears more attractive when it lies along a continuum between A and C than when it appears alongside A alone.

To illustrate this phenomenon, suppose our college student has established state residency in Virginia. Suppose further that she has applied to, and been accepted by, the law schools at the University of Virginia and William & Mary and that the two factors most relevant to her decision are prestige and cost. She knows that Virginia generally ranks higher than William & Mary (currently 7th versus 32nd in the *U.S. News* rankings),<sup>110</sup> but William & Mary is much less expensive (currently \$10,400 tuition versus \$18,090 at Virginia),<sup>111</sup> so she is not sure which school she prefers.

Now suppose our college student has just learned that she has been admitted to Columbia, which is more prestigious (currently ranked 4th)<sup>112</sup> but also more expensive (\$30,868 tuition).<sup>113</sup> From a rational perspective, her admission to Columbia should not have any effect on her preference for Virginia or William & Mary. Research on compromise suggests, however, that her admission to Columbia is likely to make Virginia seem relatively

107. Kelman et al., *supra* note 66, at 299; *see also id.* at 299–300 (describing another test of the impact of contrast on settlement offers in a hypothetical nuisance dispute).

108. Simonson & Tversky, *supra* note 24, at 281.

109. Compromise occurs where “a brand in a two-alternative set can gain market share following the addition of an adjacent competitor that makes the brand a compromise choice within the set.” Simonson, *supra* note 79, at 159; *see also* Simonson & Tversky, *supra* note 24, at 290–92 (exploring compromise); Tversky & Simonson, *supra* note 65 (exploring context dependence generally).

110. In the 2002 *U.S. News* rankings, Virginia was tied for 7th (with a peer assessment score of 4.5) and William & Mary was tied for 32nd (with a peer assessment score of 3.3). *U.S. NEWS*, *supra* note 81, at 60.

111. *Id.* at 190.

112. In the 2003 *News* rankings, Columbia ranked 4th (with a peer assessment score of 4.7). *U.S. NEWS*, *supra* note 81, at 60.

113. *Id.* at 184.

more attractive than William & Mary because it renders Virginia an intermediate or compromise option. Columbia is the most prestigious of the three schools but is also the most expensive; William & Mary is the least expensive but also the least prestigious; Virginia is in between on both dimensions. Although counterintuitive, the research on compromise suggests that our college student is more likely to select Virginia when she gets into both William & Mary and Columbia than when she gets into William & Mary alone.

Psychologists have demonstrated the compromise effect in several experiments.<sup>114</sup> For example, Itamar Simonson and Amos Tversky asked subjects to make a hypothetical camera purchase.<sup>115</sup> They asked one group of subjects to select either a lower-quality, lower-priced camera (a \$169.99 Minolta X-370) or a medium-quality, medium-priced camera (a \$239.99 Minolta Maxxum 3000i).<sup>116</sup> They asked another group of subjects to choose either of those two cameras or a higher-quality, higher-priced camera (a \$469.99 Minolta Maxxum 7000i).<sup>117</sup> In the two-option group, 50% of the subjects selected the lower-quality camera and 50% selected the medium-quality camera.<sup>118</sup> In the three-option group, in which the medium-quality camera appeared to be a compromise option relative to the lower- and higher-quality cameras, a much larger 72.2% selected the medium-quality camera.<sup>119</sup>

#### 4. Compromise in Negotiation

Like contrast, compromise appears to affect consumer decision making. And, as with contrast, it seems reasonable to suspect that compromise affects negotiation as well. To test for the compromise effect in negotiation, I asked first-year law student subjects to imagine that they were representing a

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114. See, e.g., Simonson & Tversky, *supra* note 24, at 290–92.

115. *Id.* at 290.

116. *Id.*

117. *Id.*

118. *Id.*

119. Simonson & Tversky, *supra* note 24, at 290. Because the compromise effect addresses the impact that a third option (in this case, the higher-quality, higher-priced camera) has on a person's relative valuation of the initial two options under consideration, I exclude from this statistic the subjects selecting the third option. See also Kelman et al., *supra* note 66, at 288 (reporting the results in the same way).

In another set of consumer choice experiments, Simonson asked subjects to make hypothetical purchase decisions, randomly assigning half of the subjects to choose one of two products and the other half to choose one of three. Simonson, *supra* note 79, at 160–67. Simonson found that “the market shares of alternatives in the TV, apartment, calculator, mouthwash, and calculator battery categories were, on average, 17.5 percent larger when they were compromise brands than when they were not.” *Id.* at 166. Simonson concluded that “alternatives’ attractiveness and choice probability significantly increase when they are a compromise choice.” *Id.*



property management company in a prospective land deal. I randomly assigned subjects to a two-option group or a three-option group. Regardless of the group to which they were assigned, all subjects read the following facts about this prospective transaction:

Imagine that you are a lawyer representing a property management company that specializes in building and managing apartment complexes located on relatively inexpensive plots of land that target undergraduate and graduate students. The company seeks to build a 200-unit apartment complex on a 15-acre plot of land in Columbia and has hired you to negotiate and purchase a plot. You have been in discussions with several property owners and have negotiated the best deals you can with each. You must now choose one of the following to recommend to the company:<sup>120</sup>

I asked subjects assigned to the two-option group to select one of two options, BlueAcre or RedAcre:

\_\_\_\_\_BlueAcre – Located on an open field 7 miles from the university campus, BlueAcre is available for \$150,000

\_\_\_\_\_RedAcre – Located in a residential neighborhood 1 mile from the university campus, RedAcre is available for \$250,000

Like subjects assigned to the two-option group, subjects in the three-option group could choose either BlueAcre or RedAcre. Additionally, subjects in the three-option group could select YellowAcre, an extreme option:

\_\_\_\_\_YellowAcre – Located in a residential neighborhood one half mile from the university campus, YellowAcre is available for \$580,000

Subjects in both groups were asked to recommend one plot of land to the property management company, and subjects in both groups were provided information on two criteria: location and price. With respect to the location criterion, the company would prefer for the land to be close to campus because it plans to build apartment housing for university students. With respect to the price criterion, the company would prefer for the land to be cheaper.

For subjects assigned to the two-option group, RedAcre is more attractive than BlueAcre on location (one mile away versus seven miles away), but BlueAcre is more attractive than RedAcre on price (\$150,000 versus \$250,000). There is no compromise option. For subjects assigned to the three-option group, YellowAcre is the most attractive on location (one

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120. Stimulus materials (on file with the author).

half mile away versus one or seven miles away) but the least attractive on price (\$580,000 versus \$150,000 or \$250,000); BlueAcre is the most attractive on price (\$150,000 versus \$250,000 or \$580,000) but the least attractive on location (seven miles away versus half or one mile away); and RedAcre is the intermediate choice on both criteria. In short, the inclusion of YellowAcre in the three-option set renders RedAcre a compromise option for subjects assigned to this group.

Rational models of choice assume that the presence of an additional option like YellowAcre will have no influence on subjects' relative preferences between the initial two options.<sup>121</sup> If, for example, 50% of the subjects in the two-option group prefer RedAcre and 50% BlueAcre, that proportion should hold in the three-option group as well. In fact, however, I found that subjects' preferences were significantly affected by the presence of the third option.

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TABLE 3  
COMPROMISE RESULTS

	BLUEACRE	REDACRE	YELLOWACRE
TWO-OPTION GROUP	44.4%	55.6%	n/a
THREE-OPTION GROUP	14.3%	77.1%	8.6%

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In the two-option group,<sup>122</sup> 44.4% of the subjects recommended BlueAcre and 55.6% of the subjects recommended RedAcre. In the three-option group<sup>123</sup> a much larger percentage of subjects preferred RedAcre: 77.1% recommended RedAcre, 14.3% BlueAcre, and 8.6% YellowAcre.<sup>124</sup> Excluding those subjects in the three-option group who recommended YellowAcre,<sup>125</sup> a substantial 84.4% recommended RedAcre and 15.6% BlueAcre.<sup>126</sup>

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121. See, e.g., sources cited *supra* note 24 (discussing rational decision making).

122. n=34.

123. n=35.

124. p=.05. To test for statistical significance, I used a one-tailed, Fisher's exact test to compare the proportion of subjects selecting RedAcre versus not-RedAcre in the two-option condition to the proportion of subjects selecting RedAcre versus not-RedAcre in the three-option condition. For more on the Fisher's exact test, see *supra* note 94. The difference between the two groups is statistically significant.

125. n=3.

126. p=.01. For purposes of this statistical analysis, I again used a one-tailed, Fisher's exact test. See *supra* note 94. This time, however, I excluded those subjects in the three-option condition who selected YellowAcre (which is appropriate because the compromise effect addresses the impact that a third option has on a subject's relative valuation of the initial options under consideration, in this case RedAcre and YellowAcre). In other words, I compared

For subjects assigned to the three-option group, RedAcre seems to have appeared more attractive because it was an intermediate or compromise option. Subjects who would otherwise have preferred to purchase BlueAcre were induced to prefer RedAcre. The presence of the third option, YellowAcre, increased RedAcre's attractiveness vis-à-vis BlueAcre by a substantial 65.9%.

This research suggests that negotiators may alter their evaluations in non-normative ways when an extreme option is added to the choice set. Although negotiators are unlikely to select that option, its presence is likely to make the intermediate option appear more attractive than it appeared before.<sup>127</sup>

### C. OPTION COST #3 (NON-COMPENSATORY DECISION MAKING)

The third phenomenon that may influence negotiators who are choosing from multiple options is partial or "non-compensatory" decision making. When several options are available, negotiators may make decisions based *not* on an evaluation of all available information (compensatory decision making), but rather on the basis of a simplified decision-making process (non-compensatory decision making).<sup>128</sup> This, in turn, may decrease the likelihood they will select their preferred option.

#### 1. Non-Compensatory Decision Making Explained

Rational models of choice posit that people selecting from multiple options will do so (and should do so) using a "compensatory"<sup>129</sup> strategy like the "weighted adding" or "multi-attribute utility" strategy.<sup>130</sup> When using

the proportion of subjects selecting RedAcre and BlueAcre in the two-option condition to the proportion of subjects selecting RedAcre and BlueAcre in the three-option condition. The difference is statistically significant.

127. For an exploration of the impact that compromise effects might have on jurors' grading or sentencing decisions, see Kelman et al., *supra* note 66, at 290–95.

128. See *infra* Part I.C.1. Ilan Yaniv and Yaacov Schul have also found that people make different decisions when asked to *select* from a large set of options than when asked to *eliminate* from a large set of options. See Ilan Yaniv & Yaacov Schul, *Acceptance and Elimination Procedures in Choice: Noncomplementarity and the Role of Implied Status Quo*, 82 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 293, 293 (2000).

129. "A compensatory strategy is one in which a good value on one attribute can compensate for a poor value on another. A compensatory strategy thus requires explicit trade-offs among attributes." Bettman et al., *supra* note 24, at 190.

130. For discussions of these models, see JONATHAN BARON, THINKING AND DECIDING 341–48 (2d ed. 1994) (describing multi-attribute utility theory); RALPH L. KEENEY & HOWARD RAIFFA, DECISIONS WITH MULTIPLE OBJECTIVES: PREFERENCES AND VALUE TRADEOFFS (1976) (developing multi-attribute utility theory); JOHN W. PAYNE ET AL., THE ADAPTIVE DECISION MAKER 24–25 (1993) (explaining the "weighted additive rule"); DETLOF VON WINTERFELDT & WARD EDWARDS, DECISION ANALYSIS AND BEHAVIORAL RESEARCH 259–77 (1986) (providing an introduction to multi-attribute utility theory); Bettman et al., *supra* note 24, at 190 (explaining the "weighted adding strategy").

such an approach, a decision maker (implicitly, if not explicitly) identifies and evaluates all options and all of the salient attributes of those options<sup>131</sup> before making a choice.<sup>132</sup> The compensatory strategy is deemed “rational” precisely because it incorporates all of these factors into the decision process.<sup>133</sup> Even those who eschew value maximization in favor of other notions of rationality believe that decision making must be compensatory to be rational.<sup>134</sup> “A decision should reflect the desirability and likelihood of all of the different consequences of different possible actions,” Deborah Frisch and Robert Clemen explain.<sup>135</sup> “One is more likely to achieve desirable outcomes if one’s decisions reflect all of the possible consequences of one’s actions.”<sup>136</sup>

To illustrate the compensatory strategy, consider the following example. Suppose our college student has been admitted to three law schools: Chicago, Duke, and Southern California. Because it will cost her roughly the same amount to attend each school, she plans to base her decision on three criteria: prestige of the school (the more prestigious the better), student/faculty ratio (the lower the better), and location (an interesting city in a temperate climate). After careful consideration, she concludes that the school’s location is slightly more important to her than its prestige, but that both prestige and location are much more important to her than student/faculty ratios. Thus, she decides that 50% of her decision should be

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131. See, e.g., PAYNE ET AL., *supra* note 130, at 24. The authors discuss the weighted additive rule:

The weighted additive rule considers the values of each alternative on *all* the relevant attributes and considers *all* the relative importances or weights of the attributes to the decision maker. Further, the conflict among values is assumed to be confronted and resolved by explicitly considering the extent to which one is willing to trade off attribute values, as reflected by the relative importances or weights.

*Id.*

132. James Bettman and his colleagues explain that this decision-making process:

consists of considering one alternative at a time, examining each of the attributes for that option, multiplying each attribute’s subjective value times its importance weight, and summing these products across all of the attributes to obtain an overall value for each option. Then the alternative with the highest value would be chosen.

Bettman et al., *supra* note 24, at 190 (parenthetical omitted).

133. See, e.g., PAYNE ET AL., *supra* note 130, at 2 (observing that compensatory models of decision making are “often associated with normative theories of preferential choice” because they involve “the use of all relevant information” and the “making [of] explicit tradeoffs”).

134. Frisch & Clemen, *supra* note 23, at 51.

135. *Id.*

136. *Id.* But see Gerd Gigerenzer & Daniel C. Goldstein, *Betting on One Good Reason: The Take the Best Heuristic*, in SIMPLE HEURISTICS THAT MAKE US SMART 75, 75–95 (Gerd Gigerenzer et al. eds., 1999) (showing how a non-compensatory strategy called the “take the best heuristic” performs as well as compensatory strategies in a simple evaluative problem).

based on the “location” attribute, 40% on the “prestige” attribute, and 10% on the “student/faculty ratio” attribute.

Having identified the attributes that matter to her, she then assigns a subjective value to each school on each attribute according to a scale on which “one” is the lowest possible score and “ten” the highest. Because she perceives Chicago to be more prestigious than Duke and Duke more prestigious than Southern Cal, she assigns Chicago a score of ten, Duke an eight, and USC a seven on the “prestige” attribute.<sup>137</sup> She learns that Chicago has a much lower student/faculty ratio than the other two schools, so she rates it a ten, Duke a three, and USC a four.<sup>138</sup> Finally, she likes the city of Chicago, but she thinks it is virtually uninhabitable in the winter. Thus, she rates its location a three. She thinks Duke’s home—Durham, North Carolina—is boring, but the moderate climate prompts her to give Duke a four. She has mixed feelings about Los Angeles as a city, but she gives USC a six on the “location” attribute because L.A.’s climate is so mild. Thus, her subjective valuations look like this:

TABLE 4  
LAW SCHOOL DECISION: SUBJECTIVE VALUES OF ATTRIBUTES

	CHICAGO	DUKE	USC
PRESTIGE	10	8	7
STUDENT/FACULTY RATIO	10	3	4
LOCATION	3	4	6

To calculate a weighted added value for each attribute for each school, she then multiplies the importance weighting she assigned to each attribute (40% prestige, 50% location, and 10% student/faculty ratio) by the rating she gave to each school on each attribute. Chicago obtains the highest overall score (6.5 versus 5.5 for Duke and 6.2 for USC):

137. In the 2003 *U.S. News* rankings, Chicago was ranked 6th (with a peer assessment score of 4.7), Duke was 12th (with a peer assessment score of 4.3), and USC was tied for 18th (with a peer assessment score of 3.7). *U.S. NEWS*, *supra* note 81, at 60.

138. In the 2003 *U.S. News* rankings, Chicago reported a student/faculty ratio of 12.7:1. Duke (15.8:1) and USC (15.4:1) reported much higher ratios of students to faculty. *Id.*

TABLE 5  
LAW SCHOOL DECISION: WEIGHTED ADDED VALUES

	CHICAGO	DUKE	USC
PRESTIGE (40%)	10 (4)	8 (3.2)	7 (2.8)
STUDENT/FACULTY RATIO (10%)	10 (1)	3 (.3)	4 (.4)
LOCATION (50%)	3 (1.5)	4 (2)	6 (3)
TOTAL	6.5	5.5	6.2

Assuming she follows the compensatory model to its logical end, she will choose to go to Chicago. Based on a careful assessment of each option (Chicago, Duke, and USC), each salient attribute (prestige, student/faculty ratio, and location), the relative importance of each attribute (40%, 10%, and 50%, respectively), and a subjective valuation of each school on each attribute, Chicago is the value-maximizing choice for her.

Researchers have found that people often follow a compensatory strategy when making simple decisions like this one.<sup>139</sup> “When faced with decision problems involving just two or three alternatives,” John Payne explains, “people often use decision strategies that process all relevant information and require one to decide explicitly the extent to which one is willing to trade off less of one valued attribute or dimension for more of another valued attribute.”<sup>140</sup>

139. PAYNE ET AL., *supra* note 130, at 2.

140. *Id.* (parentheticals omitted); *see also* Bettman et al., *supra* note 24, at 188 (observing, based on their review of the consumer literature, that “the use of simple decision processes increases with task complexity”); Barbara E. Kahn & Jonathan Baron, *An Exploratory Study of Choice Rules Favored for High-Stakes Decisions*, 4 J. CONSUMER PSYCHOL. 305, 306 (1995) (reporting that “[e]mpirical studies have shown that when people are confronted with simple decisions MAUT [multi-attribute utility theory] may provide good approximations of behavior”); Denis A. Lussier & Richard W. Olshavsky, *Task Complexity and Contingent Processing in Brand Choice*, 6 J. CONSUMER RES. 154, 164 (1979) (finding that “[w]hen the number of alternatives was small (three), subjects evaluated alternatives using a compensatory strategy”); John W. Payne, *Contingent Decision Behavior*, 92 PSYCHOL. BULL. 382, 386 (1982) (observing that “[w]hen faced with two alternatives, subjects use compensatory types of decision strategies”) [hereinafter Payne, *Contingent Decisions*]; John W. Payne, *Task Complexity and Contingent Processing in Decision Making: An Information Search and Protocol Analysis*, 16 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 366, 384 (1976) (finding evidence consistent with compensatory decision models in two-option problems but not in problems involving six to twelve options) [hereinafter Payne, *Task Complexity*]; John W. Payne & Myron L. Braunstein, *Risky Choice: An Examination of Information Acquisition Behavior*, 6 MEMORY & COGNITION 554, 559 (1978) (finding that subjects were more likely to use compensatory strategies in risky decision making when presented with few options).

When making more complicated decisions, however, people tend to depart from this rational decision model.<sup>141</sup> Confronted with multiple options and multiple attributes, people tend to make “non-compensatory”<sup>142</sup> decisions in which they focus solely on some of the available information.<sup>143</sup> “When faced with more complex choice problems involving many alternatives,” Payne explains, “people often adopt simplifying strategies that are much more selective in the use of information. Further, the strategies adopted tend to be noncompensatory, in that excellent values on some attributes cannot compensate for poor values on other attributes.”<sup>144</sup>

Suppose for the sake of argument that our college student is overwhelmed by her law school decision and feels incapable of evaluating all of her options (i.e., Chicago, Duke, and USC) along all of the dimensions that are relevant to her (i.e., prestige, student/faculty ratio, location). In that event, she might employ any number of simplifying, non-compensatory decision strategies,<sup>145</sup> like a “lexicographic” strategy<sup>146</sup> or an “elimination-by-aspects” strategy,<sup>147</sup> to make her law school selection.

141. Bettman et al., *supra* note 24, at 190.

142. “In a noncompensatory strategy, a good value on one attribute cannot make up for a poor value on another.” *Id.*

143. PAYNE ET AL., *supra* note 130, at 2.

144. *Id.* (parenthetical omitted); see also Bettman et al., *supra* note 24, at 199 (“Studies of the effects of problem size show that increases in the number of alternatives facing the consumer lead to greater use of noncompensatory strategies that eliminate alternatives.”); Robert S. Billings & Stephen A. Marcus, *Measures of Compensatory and Noncompensatory Models of Decision Behavior: Process Tracing Versus Policy Capturing*, 31 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 331, 348 (1983) (“When a subject is faced with a moderate to large number of alternatives, the strategy seems to be to eliminate alternatives quickly. Accordingly, noncompensatory strategies are used and a variable search pattern is produced as alternatives are eliminated when a cutoff is not met.”); Eric J. Johnson & Robert J. Meyer, *Compensatory Choice Models of Noncompensatory Processes: The Effect of Varying Context*, 11 J. CONSUMER RES. 528, 539 (1984) (finding that “there was an increase in the tendency for subjects to use elimination strategies when faced with larger set sizes”); Kahn & Baron, *supra* note 140, at 306 (“[W]hen the decision-making task increases in complexity, systematic differences are observed between the compensatory model and actual behavior. Many naive decision makers use either simple decision heuristics or no decision rules at all.”) (citations omitted); Lussier & Olshavsky, *supra* note 140, at 164 (finding that subjects departed from the compensatory model “when the number of alternatives was increased (to six and twelve)”); Payne, *Contingent Decisions*, *supra* note 140, at 387 (finding that when subjects were “faced with more complex (multi-alternative) decision tasks,” they tended to use non-compensatory decision strategies); Payne, *Task Complexity*, *supra* note 140, at 384 (finding that subjects engaged in information search patterns more consistent with non-compensatory decision models when faced with multiple options); Payne & Braunstein, *supra* note 140, at 559 (“[T]he tendency for decision makers to adopt other [i.e., non-compensatory] decision strategies increased as the number of gambles in a choice set increased.”); Gunilla A. Sundstrom, *Information Search and Decision Making: The Effects of Information Displays*, 65 ACTA PSYCHOLOGICA 165, 169 (1987) (“Generally, a greater number of alternatives results in a change from compensatory to noncompensatory strategies.”).

145. For discussions of various non-compensatory decision models, see generally PAYNE ET AL., *supra* note 130, at 25–29 (describing the equal weight heuristic, the satisficing heuristic, the lexicographic heuristic, the elimination-by-aspects heuristic, the majority of confirming

Suppose first that she adopts a lexicographic strategy, according to which “the alternative with the best value on the most important attribute is simply selected.”<sup>148</sup> In this instance, our college student would select Southern Cal because it has the highest score (six) on the most important attribute to her (location). Alternatively, suppose she follows an elimination-by-aspects strategy. This strategy “eliminates options that do not meet a minimum cutoff value for the most important attribute. This elimination process is repeated for the second most important attribute, with processing continuing until a single option remains.”<sup>149</sup> Assume she determines that four is her minimum acceptable score on the “location” attribute and eight on the “prestige” attribute. Beginning with the location attribute, she would compare the three schools and eliminate Chicago because it falls below her minimum cutoff score of four. Then, she would compare the remaining two schools on the “prestige” attribute and eliminate USC because it falls below her minimum cutoff score of eight. By following this elimination-by-aspects strategy, she would eventually select Duke.

Decision theorists disagree about whether it is “rational” or “irrational” for people to use non-compensatory decision strategies like the lexicographic strategy or the elimination-by-aspects strategy. Proponents of the “rational” view contend that people deliberately select non-compensatory strategies as a way to balance their desire to reach optimal decisions on the one hand against their desire to minimize cognitive effort on the other.<sup>150</sup> From this perspective, people are “higher level”<sup>151</sup> value-maximizers who decide which decision strategy to employ based on a careful

dimensions heuristic, the frequency of good and bad features heuristic, and combined approaches); Bettman et al., *supra* note 24, at 190–91 (same); Russell Korobkin, *The Efficiency of Managed Care ‘Patient Protection’ Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1, 48–51 (1999) (same). For papers describing some of the individual models, see generally Hillel J. Einhorn, *Use of Nonlinear, Noncompensatory Models as a Function of Task and Amount of Information*, 6 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 1 (1971) (conjunctive choice model); David Grether & Louis Wilde, *An Analysis of Conjunctive Choice: Theory and Experiments*, 10 J. CONSUMER RES. 373 (1984) (conjunctive choice model); Amos Tversky, *Elimination by Aspects: A Theory of Choice*, 79 PSYCHOL. REV. 281 (1972) (elimination-by-aspects model); Amos Tversky & Shmuel Sattath, *Preference Trees*, 86 PSYCHOL. REV. 542 (1979) (proposing a preference tree model).

146. For descriptions of this decision strategy, see PAYNE ET AL., *supra* note 130, at 26–27; Bettman et al., *supra* note 24, at 190.

147. Tversky, *supra* note 145; see also Paul Slovic, *Choice Between Equally Valued Alternatives*, 1 J. EXPERIMENTAL. PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 280, 280 (1975) (providing evidence supportive of Tversky’s elimination-by-aspects model).

148. Bettman et al., *supra* note 24, at 190 (parenthetical omitted).

149. *Id.*

150. See, e.g., PAYNE ET AL., *supra* note 130, at 9 (“[W]e believe that the two primary considerations underlying contingent decision behavior are the desire to achieve a good decision and the desire to minimize the cognitive effort needed to reach a decision.”).

151. Payne, *Contingent Decisions*, *supra* note 140, at 383 (describing the “rational” view as “a higher level decision problem involving consideration of costs and benefits”).



analysis of each strategy's costs (i.e., cognitive effort) and benefits (i.e., optimal decision).<sup>152</sup> Proponents of the "irrational" view contend that when people are faced with complicated decision problems, they have no choice but to use non-compensatory decision strategies because of inherent constraints on their information-processing abilities.<sup>153</sup> From this perspective, people want to make optimal decisions, but they are unable to do so due to their very human limitations.

Whether "rational" or "irrational,"<sup>154</sup> the problem with non-compensatory decision making is that "alternatives may be eliminated (or chosen) based on the value of one attribute without considering the values of other potentially compensating attributes."<sup>155</sup> This, in turn, means that people employing non-compensatory decision strategies may fail to select their preferred option. Consider, again, our college student. Based on all relevant information, she preferred to attend Chicago over USC or Duke. Thus, when she decided according to a compensatory model, she selected Chicago. When she used a lexicographic strategy, however, she selected Southern Cal, and when she employed an elimination-by-aspects strategy, she selected Duke. Whether it was "rational" for her to engage in either of these non-compensatory decision strategies is immaterial because each led her to select an option other than the one she most preferred based on all of the criteria relevant to her.

## 2. Non-Compensatory Decision Making in Negotiation

Negotiators who heed the advice of the prescriptive literature on negotiation are likely to engage in formal or informal brainstorming

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152. Some researchers argue not only that the selective use of information is rational but also that it may be indicative of expert decision making. See Richard Ettenson et al., *Expert Judgment: Is More Information Better?*, 60 PSYCHOL. REP. 227, 237 (1987) (arguing, based on a study of auditors, that the "ability to concentrate on what is relevant without necessarily using all available information may differentiate expert decision makers from their less-experienced counterparts" and that "the nonuse of information by experts reflects 'skilled omission' rather than a cognitive limitation").

153. "The perceptual framework is usually associated with the work of Tversky and Kahneman; they prefer explanations of constructive decision making based on principles of human perception." Bettman et al., *supra* note 24, at 192. See generally Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955) (proposing bounded rationality).

154. Many thoughtful commentators contend that each explanation accounts for some of the reliance on non-compensatory decision strategies in multiple-option decisions. See PAYNE ET AL., *supra* note 130, at 9 ("Although we believe that decision processing generally reflects reasonable effort and accuracy tradeoffs, there are also important constraints on human adaptivity in decision making."); Bettman et al., *supra* note 24, at 192 ("Although the accuracy-effort and perceptual frameworks, considered separately, can each account for some findings in constructive choice, we believe that an integrated framework that extends each approach and then combines the two approaches is both possible and would be extremely useful.").

155. Kahn & Baron, *supra* note 140, at 307.

processes that may result in the generation of dozens of potential options.<sup>156</sup> When confronted with a long list of options, negotiators, like consumers, seem likely to rely on non-compensatory decision strategies that might distract them from their preferred alternative.<sup>157</sup> Several studies provide indirect support for this proposition.

In one study, Richard Olshavsky recruited forty MBA students to select a vacation condominium from among several options.<sup>158</sup> He randomly assigned subjects to different groups based on the number of options available (either three or twelve) and the number of attributes on which information was provided (either six or fifteen), such as rental price, laundry facilities, furnishings, and the like.<sup>159</sup> He used a "protocol analysis" methodology to assess subjects' decision-making strategies.<sup>160</sup> That is, he provided the subjects with written information about the condos and then tape-recorded the subjects as they described their decision-making processes. Thereafter, he transcribed the tapes and coded the subjects' comments according to criteria established by other researchers.<sup>161</sup> Based on this coding process, he found that subjects tended to use a compensatory strategy when choosing from among three options but a non-compensatory strategy (at least initially) when choosing from among twelve options.<sup>162</sup>

Other researchers have demonstrated that the use of non-compensatory strategies leads people to make choices contrary to what appear to be their actual preferences. In one study, for instance, Naresh Malhotra recruited three hundred male and female heads of households to participate in a

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156. See *supra* text accompanying notes 9–13.

157. Of course, the negotiator might not have even identified the preferred option without having engaged in an option-generation process in the first instance.

158. Richard W. Olshavsky, *Task Complexity and Contingent Processing in Decision Making: A Replication and Extension*, 24 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 300, 303 (1979). Olshavsky also did a stereo selection study. *Id.* For the sake of simplicity, I describe the condominium study only, but it is worth observing that Olshavsky obtained comparable results in his stereo selection study.

159. Olshavsky also varied subjects' assignments based on the complexity of the attribute information provided (i.e., "simple" vs. "complex"). *Id.*

160. *Id.* at 305–07.

161. *Id.* at 307.

162. See *id.* at 310 ("In the three-alternative condition, in 14 out of 20 cases, a one-stage strategy was used. In sharp contrast, in the twelve-alternative condition, in seventeen out of twenty cases a multistage strategy (either two-stage or three-stage) was used."); *Id.* at 313. Olshavsky further explains:

When only three alternatives were presented, subjects tended to use some type of one-stage strategy, usually a compensatory strategy. But when twelve alternatives were presented, subjects tended to use a multistage strategy which involved an initial screening of alternatives, typically with a noncompensatory strategy, followed by a closer evaluation of remaining alternatives, usually with a compensatory strategy.

*Id.* For more studies like this one, see generally Lussier & Olshavsky, *supra* note 140 and Payne, *Task Complexity*, *supra* note 140.

hypothetical home-purchase study.<sup>163</sup> He randomly assigned subjects to one of twenty-five groups, which varied based on the number of homes available for purchase (five, ten, fifteen, twenty, or twenty-five) and the number of attributes on which information was provided (five, ten, fifteen, twenty, and twenty-five).<sup>164</sup> Malhotra asked each subject to rank-order the houses under consideration.<sup>165</sup> He compared the subjects' rank-ordering to their preferred alternative based on their responses to a series of questions designed to assess their ideal house.<sup>166</sup> He found that subjects made much less accurate decisions as the number of options under consideration reached ten or fifteen.<sup>167</sup> Holding the number of attributes constant, 70% of the subjects selected the preferred house when only five houses were under consideration.<sup>168</sup> By contrast, when ten houses were under consideration, 48.3% of subjects selected the house that most closely approximated their true preference.<sup>169</sup> When twenty-five houses were under consideration, only 36.7% of subjects made the "correct" choice.<sup>170</sup>

Finally, in a "real-world" empirical study, Judith Hibbard and her colleagues set out to examine how several large companies select health-care plans for their employees and dependents.<sup>171</sup> The researchers interviewed thirty-three professional "purchasers" employed by companies located in four regions.<sup>172</sup> On average, each purchaser was responsible for selecting health care plans for nearly 100,000 "covered lives."<sup>173</sup> The researchers' findings were not encouraging. Half of the purchasers said it was difficult for them to consider all of the attributes that they should consider in selecting the plans; some admitted that they avoided making any trade-offs between the options; and 12% even admitted "that they made their choices on the

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163. Naresh K. Malhotra, *Information Load and Consumer Decision Making*, 8 J. CONSUMER RES. 419, 420-22 (1982).

164. *Id.* at 420.

165. *Id.* at 421.

166. *Id.* at 421-22.

167. *Id.* at 424 (reporting that "respondents experienced information overload when they were provided with ten or more alternatives in the choice set or with information on 15 or more attributes").

168. Malhotra, *supra* note 163, at 422.

169. *Id.*

170. *Id.* Most of the research on information load has found that increases in the number of options have a more detrimental impact on decision making than increases in the number of attributes. *See, e.g.*, Bettman et al., *supra* note 24, at 199 (summarizing research and reporting that "increases in the number of alternatives facing the consumer lead to greater use of noncompensatory strategies that eliminate alternatives" while increases in "the number of attributes do not appear to lead to strategy changes as readily").

171. Judith H. Hibbard et al., *Choosing a Health Plan: Do Large Employers Use the Data?*, HEALTH AFF., Nov.-Dec. 1997, at 172, 172.

172. *Id.* at 173.

173. *Id.*

basis of a single dimension such as cost or geographic access.”<sup>174</sup> Only 20% of the purchasers appeared to use a compensatory strategy in which they attempted to “mak[e] trade-offs and identify high-performing, cost-effective plans.”<sup>175</sup>

Like the hypothetical condo renters in Olshavsky’s study,<sup>176</sup> the hypothetical home purchasers in Malhotra’s study,<sup>177</sup> and the actual health insurance purchasers in the Hibbard study,<sup>178</sup> negotiators who generate a sizeable list of options are likely to use non-compensatory rather than compensatory strategies to reach conclusions. This means that they are unlikely to consider all relevant information and may therefore make choices that fail to reflect their true preferences.

#### D. OPTION COST #4 (DECISION REGRET)

The fourth phenomenon that may have a negative impact on negotiators who follow the option-generation prescription is regret. Regret is one of our more salient emotions—indeed, researchers conducting a study of everyday conversations found that people mentioned regret more often than any other “negative” emotion.<sup>179</sup> Regret is implicated in multiple-option negotiations because negotiators are likely to compare the option they have selected to those they have rejected; these comparisons, in turn, are likely to induce post-decision regret.<sup>180</sup>

##### 1. Decision Regret Explained

Rational models of choice posit that the value of an option depends solely on properties inherent in the option.<sup>181</sup> As this Article has shown, however, the value of an option is often influenced by the value of other options in the choice set.<sup>182</sup> Additionally, the value of an option can be influenced by “feelings invoked by the outcomes of rejected options.”<sup>183</sup> As

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174. *Id.* at 177.

175. *Id.*

176. *See supra* text accompanying notes 158–62.

177. *See supra* text accompanying notes 163–70.

178. *See supra* text accompanying notes 171–75.

179. Susan B. Shimanoff, *Commonly Named Emotions in Everyday Conversations*, 58 PERCEPTUAL & MOTOR SKILLS 514, 514 (1984) (noting that regret was mentioned more frequently than eighteen of nineteen other emotions mentioned in everyday conversation). The emotion mentioned most frequently was “love.” *Id.*

180. *See infra* Part I.D.1.

181. *See* Bettman et al., *supra* note 24.

182. *See, e.g., supra* Part I.A.

183. Marcel Zeelenberg et al., *Consequences of Regret Aversion: Effects of Expected Feedback on Risky Decision Making*, 65 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 148, 148 (1996); *see also* Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 69 (“[T]he value of a decision option is a function not only of its outcome but also of the feelings associated with the outcomes of foregone options.”);

Irvin Yalom explains in his influential text on existential psychotherapy, the rejection of options is painful:

For every yes there must be a no. To decide one thing always means to relinquish something else. As one therapist commented to an indecisive patient, "Decisions are very expensive, they cost you everything else." Renunciation invariably accompanies decision. One must relinquish options, often options that will never come again.<sup>184</sup>

Researchers in economics, psychology, and law have used this insight to develop decision theories based on the feelings of regret induced by the rejection of decision options.<sup>185</sup> According to these theories, people experience decision regret when they must select one option at the expense of other available options.<sup>186</sup> "Regret is created by a comparison between the actual outcome and that outcome that would have occurred had the decision maker made a different choice."<sup>187</sup> If a decision maker "cannot compare what is with what would have been, there should be no reason for regret."<sup>188</sup> In short, regret theory predicts that a decision maker who selects one option among multiple options is more likely to feel regret than one who selects the sole available option.<sup>189</sup>

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Richard P. Larrick & Terry L. Boles, *Avoiding Regret in Decisions with Feedback: A Negotiation Example*, 63 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 87, 87 n.1 (1995) ("[T]he value of a given option is a function not only of its outcomes but also of how its outcomes compare to the outcomes of possible alternatives."); Graham Loomes et al., *Are Preferences Monotonic? Testing Some Predictions of Regret Theory*, 59 ECONOMICA 17, 18 (1992) ("The central intuition behind regret theory is that the utility derived from the consequence of a choice is dependent upon the outcome(s) of the alternative(s) foregone, given the state of the world that occurs.").

184. IRVIN D. YALOM, EXISTENTIAL PSYCHOTHERAPY 318 (1980). For more on existential psychotherapy, see generally ROLLO MAY, THE DISCOVERY OF BEING: WRITINGS IN EXISTENTIAL PSYCHOLOGY (1983).

185. The leading proponents of modern regret theory are Graham Loomes and Robert Sugden, see generally Graham Loomes & Robert Sugden, *Regret Theory: An Alternative Theory of Rational Choice Under Uncertainty*, 92 ECON. J. 805 (1982), and David Bell, see generally David E. Bell, *Regret in Decision Making Under Uncertainty*, 30 OPERATIONS RES. 961 (1982).

186. See sources cited *infra* notes 187–89.

187. David E. Bell, *Reply: Putting a Premium on Regret*, 31 MGMT. SCI. 117, 117 (1985).

188. Zeelenberg et al., *supra* note 183, at 149. Although imagined foregone options can also induce regret, regret theorists contend that regret is much more palpable when a decision maker has rejected actual options. See, e.g., Ilana Ritov, *Probability of Regret: Anticipation of Uncertainty Resolution in Choice*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 228, 236 (1996) (arguing that "regret is less intense when the foregone outcome is hypothetical"); Zeelenberg et al., *supra* note 183, at 149 n.2 ("[T]he regret stemming from comparisons with imagined outcomes is less painful than regret stemming from comparisons with real foregone outcomes."). On the generation of "counterfactuals" or imagined foregone options and their impact on regret, see generally Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCHOL. REV. 136, 145–46 (1986).

189. Regret theory actually makes two predictions about the impact regret is likely to have

To illustrate, suppose that our college student decides to attend New York University Law School. Consider two scenarios. In the first, suppose she applied only to NYU, was admitted, and opted to attend; in the second, suppose she chose NYU over Cornell and Penn. Following her decision, she should value NYU the same in either scenario (unless, of course, she has learned new information in one scenario but not in the other that casts her decision in a different light). Work drawn from regret theory suggests, however, that she is likely to feel more negatively toward NYU in the second scenario because of the regret induced by a comparison between NYU and the two schools she rejected.

## 2. Decision Regret in Negotiation

Negotiators who heed the option-generation prescription are likely to encounter decision regret because they must reject all of the options they generate other than the one they ultimately select. To test for this, I constructed two versions of a problem describing a dispute between two airline passengers, John and David, and an airline, Eastern Continental Airways (ECA). All first-year law student subjects learned the following information about this dispute:

Eastern Continental Airways (ECA) bumped several passengers from Flight 6543, an early morning flight from St. Louis to New York City, because the flight was oversold. Although ECA flew them to New York late in the day, two of the passengers missed important business meetings in the morning. Each of them contacted different ECA Customer Service Managers at the Airport, expressed frustration over the airline's actions, and asked to be compensated for the inconveniences suffered.<sup>190</sup>

In the "cash payment" version of this problem, the subjects learned that both John and David settled with the airline for \$250, but their negotiation processes differed. The Customer Service Manager with whom John negotiated offered him a \$250 cash payment only, while the Customer Service Manager with whom David negotiated offered him a choice of either a \$250 cash payment or a free round-trip ticket on an ECA flight within the continental United States. Subjects further learned that after "carefully considering the offer," both passengers decided to accept the \$250 cash

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on decision making. First, as noted, "people compare what they have received with what they would have received had they made a different choice. If a different choice would have led to a better outcome, then people will feel regret about their decisions . . ." Larrick & Boles, *supra* note 183, at 87. Second, "[b]ecause people know that they experience these feelings after a decision, they take them into account while they are making a decision and try to make choices that minimize the amount of regret they will feel." Robert A. Josephs et al., *Protecting the Self from the Negative Consequences of Risky Decisions*, 62 J. PERSONALITY & SOC. PSYCHOL. 26, 26-27 (1992).

190. Stimulus materials (on file with the author).

payment and that neither passenger was aware of the other's negotiation. I then asked the subjects to indicate which of the two passengers would feel more regret about his decision.

Regret may be a product of either the outcome of the negotiation or the negotiation process. With respect to the outcome of this negotiation, both passengers settled for the same amount, so there is no reason to expect either negotiator to feel more regret than the other. With respect to the process, David appears to have had a more successful negotiation than John for two reasons. First, he persuaded the Customer Service Manager to offer two options (i.e., the cash or a voucher) rather than one (i.e., the cash). Second, he persuaded the Customer Service Manager to allow him to choose between those options. It thus seems reasonable to predict that subjects would expect John to feel more regret than David given that David appeared to have had a more successful negotiation. In fact, however, 67% of the subjects indicated that they believed David, not John, would feel more regret about accepting the cash payment.<sup>191</sup>

In the "free ticket" version of the problem, the subjects learned that John and David both settled with the airline for a free ticket but that their respective negotiation processes differed. The Customer Service Manager with whom John negotiated offered him a free round-trip ticket on an ECA flight within the continental United States, while the Customer Service Manager with whom David negotiated offered him a choice of either the free round-trip ticket or a \$250 cash payment. Subjects learned that after "carefully considering the offer," both passengers opted to accept the free round-trip ticket. Again, David appears to have had a more successful negotiation than John because the Customer Service Manager offered him a choice between two options. Nonetheless, 60% of the subjects indicated that they believed David, rather than John, would feel more regret.<sup>192</sup>

In both versions, David and John obtained the same outcome, and in both versions, David appeared to have negotiated more successfully with the Customer Service Manager. Still, 63.5% of the subjects believed that David, rather than John, would feel more regret.<sup>193</sup> Why? Regret theory provides a straightforward answer: subjects believe David would feel more regret because he, in contrast to John, had to choose one of two options.<sup>194</sup> By

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191. n=30.

192. n=33.

193. binomial  $z=2.02$ ,  $p<.05$ . To test whether the results (i.e., 63.5% David versus 36.5% John) were statistically significantly different from what the rational model or chance would have predicted (i.e., 50% Davis versus 50% John), I performed a "binomial test." See FREDERICK J. GRAVETTER & LARRY B. WALLNAU, STATISTICS FOR THE BEHAVIORAL SCIENCES 187 (2d ed. 1988). A binomial test "uses sample data to evaluate a hypothesis about the values of  $p$  and  $q$  for a population consisting of binomial data." *Id.* Binomial data "exist whenever a measurement procedure classifies individuals into exactly two distinct categories," like "David" and "John." *Id.* at 186.

194. On this general point, see Jane Beattie et al., *Psychological Determinants of Decision*

selecting one option, David necessarily rejected the other option. Rejecting that option leaves David to wonder whether he made the right choice. John, who was offered only one option, is not left second-guessing whether he erred by rejecting “the other” option.<sup>195</sup>

Assuming negotiators follow the option-generation prescription, they will develop a lengthy list of options, nearly all of which they will ultimately reject. Unless this process enables the negotiator to identify an option that is clearly preferable to all of the others under consideration (and is acceptable to the other side), it appears likely that decision regret will be a predictable by-product of option generation in negotiation.

## II. THE ROLE OF THE LAWYER-NEGOTIATOR

The prescriptive negotiation literature advises negotiators to generate, evaluate, and select from as many options as possible,<sup>196</sup> yet this Article has argued that the presence of multiple options in a choice set can lead negotiators to make suboptimal decisions.<sup>197</sup> Which is right? Is option generation a panacea, as the prescriptive negotiation literature claims, or is it a Pandora’s box, as this Article has suggested?

Negotiators can surely benefit from considering and evaluating multiple options. Negotiators can select only those options they actually consider, so the more options they consider, the more likely it seems they will reach an agreement that maximizes their preferences. Moreover, in some circumstances, the emergence of a “new” option can provide relevant information about the other options under consideration so that negotiators might actually make better decisions.<sup>198</sup> As this Article has sought to

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*Attitude*, 7 J. BEHAVIORAL DECISION MAKING 129, 132 (1994) (demonstrating “decision aversion” in certain choice situations); Jennifer Gerarda Brown, *The ‘Sophie’s Choice’ Paradox and the Discontinuous Self: Two Comments on Wertheimer*, 74 DENV. U. L. REV. 1255, 1261 (1997) (relying on William Styron’s *Sophie’s Choice* to illustrate that sometimes “someone may prefer any alternative to actually having a choice between alternatives”); Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 495 (1998) (“Making choices is painful. Some restaurants have no menu, offering only one item for dinner and saving their customers the time and aggravation of deciding what to order.”).

195. Negotiators may be able to minimize the regret they feel through several psychological mechanisms. See *infra* Part II.B.3.

196. See *supra* text accompanying notes 5–13.

197. Of course, there will be some individual and situational differences among negotiators and negotiations. See generally Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. (forthcoming 2003).

198. See *supra* notes 71–72; see also Max H. Bazerman et al., *Negotiating with Yourself and Losing: Making Decisions with Competing Internal Preferences*, 23 ACAD. MGMT. REV. 225, 230 (1998). The authors explain how alternatives may provide information relevant to the decision making process:

We argue that when we assess options one at a time, we tend to place greater weight on affective, visceral criteria. In contrast, the more reasoned *should* will



demonstrate, however, there is a potential downside to option generation. Negotiators who generate and evaluate multiple options are susceptible to decision-making errors that may lead them to enter into agreements that are inferior to those they would have entered into had they not considered multiple options in the first place.

Thus, option generation is *neither* a panacea *nor* a Pandora's box; rather, it has the potential to be *either* a panacea *or* a Pandora's box. In other words, option generation offers significant potential benefits to negotiators, but it can also impose predictable potential costs. How then can those attempting to settle a dispute or close a deal obtain the benefits of option generation (i.e., identifying creative options that might facilitate the attainment of a better outcome) without incurring the costs (i.e., making non-value maximizing decisions because of the presence of irrelevant options)?

This Article argues that people can maximize the benefits and minimize the costs of option generation by hiring lawyers to negotiate for them. In a seminal article, Ronald Gilson argued that business lawyers can create value for their clients by functioning as "transaction cost engineers" when putting together deals.<sup>199</sup> In a more recent article, Gilson and Mnookin argued that litigators can use their reputations to build trust in the litigation process and thereby facilitate effective dispute resolution.<sup>200</sup> In yet another recent article, Richard Painter describes how lawyers representing regulators on the one hand and regulated firms on the other can cooperate and thereby improve the efficiency and efficacy of the regulatory process.<sup>201</sup> This Article adds to that literature by arguing that lawyers can create value for their clients in deal-making negotiation, dispute-resolution negotiation, *and* regulatory negotiation by serving as "option brokers" who maximize the benefits and minimize the costs of the option generation and selection process.

The argument proceeds in three parts. First, lawyers are more likely than their clients to evaluate negotiation options "rationally" or "normatively" (and evidence suggests this is what clients often want).

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dominate when individuals are more reflective—when the individual confronts multiple options at the same time. Essentially, the second (or more) option forces the decision maker to be more thoughtful, and less impulsive, about the choice.

*Id.*; Christopher K. Hsee, *The Evaluability Hypothesis: An Explanation for Preference Reversals Between Joint and Separate Evaluations of Alternatives*, 67 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 247, 247 (1996) (showing how comparison can help decision makers assess attributes that are hard to evaluate when assessing an option independently).

199. Gilson, *supra* note 19, at 255. See generally *Symposium on Business Lawyering and Value Creation for Clients*, 74 OR. L. REV. 1 (1995).

200. Gilson & Mnookin, *supra* note 19, at 509; see also Rachel Croson & Robert H. Mnookin, *Does Disputing Through Agents Enhance Cooperation? Experimental Evidence*, 26 J. LEGAL STUD. 331 (1997); Ronald J. Gilson & Robert H. Mnookin, *Commentary: Cooperation and Conflict Between Litigators*, 12 ALTERNATIVES TO HIGH COST LITIG. 125, 125 (1994); Johnston & Waldfogel, *supra* note 19, at 39.

201. Painter, *supra* note 19, at 149.

Second, because lawyers are likely to evaluate options rationally, they can help their clients make “better” decisions in negotiation. Finally, lawyers can also use options strategically in negotiation to gain advantage for their clients.<sup>202</sup>

#### A. PROVIDING RATIONAL COUNSEL

Clients want the agents who represent them to evaluate options rationally:<sup>203</sup>

[E]ven though we often don't take a complex approach to personally important topics, we wish our advisors—our physicians, accountants, lawyers, and brokers—to do precisely that for us. When feeling overwhelmed by a complicated and consequential choice, we still want a fully considered, point-by-point analysis of it—an analysis we may not be able to achieve except, ironically enough, through a shortcut: reliance on an expert.<sup>204</sup>

In four “high-stakes” decision-making studies involving cancer treatments, mammography, financial investments, and course selection, Barbara Kahn and Jonathan Baron discovered empirical evidence supporting this claim.<sup>205</sup> In their mammography study, for example, Kahn and Baron found that 61% of the subjects thought physicians should use a rational, compensatory rule when deciding for them, but only 32% indicated that they would use a compensatory rule if deciding for themselves.<sup>206</sup> Similarly, 68% of subjects believed that a stockbroker making investment decisions should do so using a compensatory rule, but only 51%

202. Other third-party agents may also offer some of the same advantages of lawyer-negotiators, though there is specific evidence supporting the claim that lawyers are particularly well-suited to aid their clients in negotiation. *See, e.g., infra* text accompanying notes 212–25.

203. In the typical lawyer-client relationship, the client is the “principal,” and the lawyer is the client’s “agent.” *See, e.g.,* BEYOND WINNING, *supra* note 5, at 69–91 (describing the principal-agent relationship between clients and lawyers). Because the outcome of any negotiation will affect the client directly, the client appropriately retains substantive decision-making authority. *See* MODEL CODE OF PROF'L RESP. EC 7-7 (2001) (stating that “it is for the client to decide whether he will accept a settlement offer”); MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2001) (“A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter.”). The lawyer is not *directly* affected by the outcome, so she may have some emotional distance from the substance of the negotiation and be in a position to evaluate options more dispassionately, thoroughly, and rationally because of that emotional distance. *See* Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 124 (1997). On the other hand, lawyers are certainly *indirectly* affected by negotiation outcomes. *See generally* Gilson & Mnookin, *supra* note 19; Gary Mendelsohn, *Lawyers as Negotiators*, 1 HARV. NEGOT. L. REV. 139 (1996).

204. ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 9 n.5 (4th ed. 2001) (citation omitted).

205. *See* Kahn & Baron, *supra* note 140, at 318–24.

206. *Id.* at 320.

indicated that they would use a compensatory rule themselves.<sup>207</sup> Across their studies, Kahn and Baron found that “although subjects were unlikely to use a compensatory rule when making decisions themselves, they were significantly more likely to advocate the use of compensatory decision rules when an agent was to make the decision on their behalf.”<sup>208</sup>

Lawyers are more likely than others to use compensatory rules when assessing negotiation options because lawyers are among the more rational and analytical members of society.<sup>209</sup> Researchers have used psychological tests like the Myers-Briggs Type Indicator (MBTI),<sup>210</sup> as well as brain-dominance testing instruments, to demonstrate this analytical orientation.<sup>211</sup> Indeed, neuroscientists have “selected lawyers when they wished to test an occupational group that is characteristically analytical in its preferred mode of thought.”<sup>212</sup> This is not to say, of course, that lawyers are pure “rational actors” who are impervious to the effects of psychological “biases” in decision making; in fact, lawyers, like other novice and expert decision makers, are susceptible to such biases.<sup>213</sup> However, experimental evidence suggests that lawyers are more likely than others to be able to resist these biases and make decisions rationally.

Recall, for example, the contrast problem I described above.<sup>214</sup> In it, I asked student-subjects to assume that they were involved in a dispute with their partner over a “Rioner” painting. I presented half of the subjects with two options to resolve the dispute: (1) giving the painting to the other partner for \$20,000; or (2) selling the painting back to the artist. I presented the other half with those same two options along with a third option that appeared similar but inferior to the first option: (3) giving the painting to

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207. *Id.* at 322.

208. *Id.* at 325.

209. For a more comprehensive treatment of the lawyer personality, see generally Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997).

210. See Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 HARV. NEGOT. L. REV. 145, 157 (2001) (“Researchers from the 1960s to the 1990s have found that lawyers are substantially more inclined toward the ‘thinking’ [rather than ‘feeling’] orientation than the population as a whole.”) (citations omitted).

211. Graham B. Strong, *The Lawyer's Left Hand: Nonanalytical Thought in the Practice of Law*, 69 U. COLO. L. REV. 759, 761–62 n.14 (1998) (citing presentation).

212. *Id.* at 761 (citing studies).

213. See, e.g., 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 framing effects had a similar impact on lawyer and non-lawyer subjects); Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 979 (1994) (finding that bankruptcy judges and lawyers were prone to egocentric biases); Craig R. Fox & Richard Birke, *Forecasting Trial Outcomes: Lawyers Assign Higher Probabilities to Scenarios that Are Described in Greater Detail*, 26 LAW & HUM. BEHAV. 159, 159 (2002) (demonstrating decision-making biases when assessing probabilities).

214. See *supra* text accompanying notes 90–96.

the other partner for four annual payments of \$5,000 per year. Consistent with prior studies of contrast, I found that twice as many students preferred option one in the three-option condition versus the two-option condition (70% versus 35%).<sup>215</sup> This difference is statistically significant.<sup>216</sup>

Jeff Rachlinski and I presented this very same problem to a group of lawyers attending a Continuing Legal Education presentation and obtained quite different results: 50% of the lawyer-subjects selected option one in the two-option condition,<sup>217</sup> and 46.7% did so in the three-option condition.<sup>218</sup> The difference between the two lawyer groups was *not* statistically significant.<sup>219</sup> Although twice as many of the *student*-subjects selected option one in the three-option condition (70% versus 35%), the *lawyer*-subjects appeared impervious to the contrast effect in this negotiation problem (46.7% versus 50%).<sup>220</sup>

Likewise, Russell Korobkin and I conducted studies of settlement behavior and found that lawyers were less likely than their clients to be influenced by other, well-known psychological phenomena when making settlement decisions.<sup>221</sup> Specifically, we found that lawyer-subjects were largely unaffected by framing (whether settlement options appeared to represent “gains” or “losses” relative to an arbitrary reference point), anchoring (the influence of an arguably irrelevant opening offer on acceptance/rejection of final offer), and equity-seeking (relational concerns unrelated to the economic value at issue in the dispute) in the settlement problems we gave them. Based on our experimental work, we concluded 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.”<sup>222</sup>

Finally, because lawyers are “repeat players”<sup>223</sup> in negotiation, they are likely to have familiarity with the subject matter of the negotiation as well as the negotiation process itself; familiarity, in turn, appears to ameliorate the effects of some of the phenomena described in this Article. In their work on decision making, for example, David Grether and his colleagues argue that familiarity with the subject matter of a transaction increases the likelihood

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215. *See id.*

216. *See supra* note 94.

217. n=18.

218. n=15.

219. p=.56 (one-tailed).

220. Note that though I observe a statistically significant difference between the two student groups and the absence of a statistically significant difference between the two lawyer groups, I have not sought to compare statistically the student groups to the lawyer groups.

221. Korobkin & Guthrie, *supra* note 203, at 77.

222. *Id.* at 137.

223. For the classic treatment of “repeat players,” see generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

that a decision maker will use a rational, compensatory strategy, at least with respect to the options the decision maker considers viable: “Consumers are believed to use only the compensatory choice strategy for products that are purchased frequently. In this case, consumers know what the market offers and focus directly on the subset of market options—‘the evoked set’—that is most likely to yield a satisfactory product.”<sup>224</sup> Likewise, James Bettman and his colleagues observe that “[p]eople are most likely to have well-articulated preferences when they are familiar and experienced with the preference object.”<sup>225</sup> Thus, “rational choice theory may be most applicable in such situations,”<sup>226</sup> like the situations lawyers often confront in negotiation.<sup>227</sup>

Collectively, then, this work suggests that lawyers are more likely than their clients to evaluate decision options in a rational manner.<sup>228</sup> Because

224. David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 282 (1986).

225. Bettman et al., *supra* note 24, at 188.

226. *Id.*; see also Simonson & Tversky, *supra* note 24, at 292. The authors explain how familiarity and experience with the preference object can ameliorate context effect:

Both tradeoff contrast and extremeness aversion are expected to have less impact in situations in which consumers have well-established preferences. If a consumer habitually purchases the same brand in a category, for example, context effects are unlikely to play a major role. In contrast, when people are uncertain about the values of options, they are more likely to use the context in determining the “best buy.”

*Id.*

227. Studies of judicial decision making provide additional support for the proposition that lawyers are more resistant than others to psychological biases that can undermine decision making. In one recent study, for instance, Jeff Rachlinski, Judge Andrew Wistrich, and I tested for the effects of five cognitive illusions—framing, anchoring, hindsight bias, representativeness, and egocentric biases—on federal magistrate decision making. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816–18 (2001). Although we found that each of these phenomena influenced the judges’ decisions, we also found that judges were less susceptible to two of the phenomena—framing and representativeness—than other lay and expert decision makers. We concluded that the judges “were much more attentive than other experts to base-rate statistics,” *id.* at 818, and were better able to “consider a case from multiple frames.” *Id.* at 822. In two other recent studies, Reid Hastie and Kip Viscusi, found that judges were less susceptible to the hindsight bias. See Reid Hastie & W. Kip Viscusi, *What Juries Can’t Do Well: The Jury’s Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 904–09 (1998); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26 (1999). Hastie and Viscusi concluded that judges were “better able to deal with risk judgments made in hindsight,” Hastie & Viscusi, *supra*, at 916, and that judges “have a sense of rationality in situations believed to create the most irrationality.” *Id.* at 908. For some questions about the sample of judges used in these studies, see Guthrie et al., *supra*, at 818 n.201.

228. However, there is some evidence that suggests that when people must justify their decisions to others, they may be even more prone to the effects of contrast and compromise. See, e.g., Simonson, *supra* note 79, at 162–66 (finding evidence for amplified contrast effects in two studies and amplified compromise effects in one of two studies where subjects expected that they might have to justify their decisions to the class); Itamar Simonson & Stephen M. Nowlis, *The Role of Explanations and Need for Uniqueness in Consumer Decision Making: Unconventional Choices Based on Reasons*, 27 J. CONSUMER RES. 49, 65 (2000) (arguing that the “expectation of evaluation by others promotes conventional choices, such as compromises”).

lawyers are generally better able than their clients to assess decision options rationally, lawyers are in a position to help their clients make better decisions in negotiation.

### B. FACILITATING CLIENT DECISION MAKING

To help their clients make sound decisions when multiple options are on the bargaining table, lawyers should strive to provide their clients with “relative evaluative context”; to lead their clients through a structured option selection process; and to help their clients justify to themselves the decisions they reach.<sup>229</sup>

#### 1. Providing “Relative Evaluative Context”

Research on decision making demonstrates that people seek comparative information when making choices. In other words, people search for a relative evaluative context<sup>230</sup> within which to assess the merits of the options under consideration. Often, other options in the choice set will serve this role. When those other options provide relevant information about the options already under consideration, this is quite sensible; unfortunately, however, even irrelevant options can induce clients to make suboptimal decisions.

Fortunately, other options are not the only source of contextual information. Indeed, lawyers often have at their disposal information that can provide clients with a better relative evaluative context within which to assess decision options.<sup>231</sup> Lawyers negotiating a dispute, for instance, have access to data published in legal newspapers and computerized databases on jury verdicts and settlements. Business lawyers seeking to assist clients with transactions have ready access to information on local market values, similar deals, etc. To minimize the likelihood that irrelevant options in a choice set will lead their clients astray, lawyers should actively seek to discuss with their clients not only the available options but also this other contextual information.

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229. This prescriptive advice assumes that lawyers have communicated with their clients to ascertain their clients' interests in negotiation. It also assumes that lawyers are negotiating without their clients present, but the prescriptions are applicable even where the client takes a more active role in the negotiation. For a thoughtful account of the benefits and detriments of active client participation in settlement conferences, see generally Leonard D. Riskin, *The Represented Client in a Settlement Conference: The Lessons of G. Heileman Brewing Co. v. Joseph Oat Corp.*, 69 WASH. U. L.Q. 1059 (1991).

230. Don A. Moore, *Order Effects in Preference Judgments: Evidence for Context Dependence in the Generation of Preferences*, 78 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 146, 163 (1999).

231. See generally William Meadow & Cass R. Sunstein, *Statistics, Not Experts*, 51 DUKE L.J. 629 (2001) (arguing that the legal system should rely more on statistical evidence than individual judgments); Cass R. Sunstein, Book Review, 115 HARV. L. REV. 1119 (2002) (reviewing PAUL SLOVIC, *THE PERCEPTION OF RISK* (2000) and arguing generally that policy should be driven by statistical evidence of risk rather than human judgments about risk).

Recall, for example, the option devaluation problem I described above in which subjects sought to purchase a Toyota Corolla or other small sedan.<sup>232</sup> For simplicity's sake, suppose that a client unfamiliar with the small sedan market in the U.S. hires a lawyer to represent him in his attempt to select and purchase a sedan. When the lawyer discusses the available options with the client (e.g., Toyota Corolla, Honda Civic, or Mazda Protege), she should provide benchmark information from *Consumer Reports* or some other reliable reference source about the quality, reliability, invoice prices, dealer prices, etc. of the various cars. By providing the client with this statistical information about the various options, she increases the likelihood that he will identify a "willingness to pay" (or WTP) price for the Toyota Corolla based *not* on the availability of the Honda Civic and Mazda Protege (as in the problem above), but on the relevant statistical information his lawyer has provided about the car.

This example, though admittedly simplistic, nonetheless illustrates the basic point. Lawyers, who often have access to statistical data that are more reliable than the "noise" provided by the additional options in a choice set, can help their clients make better decisions by sharing this information with them. By providing this information to their clients, lawyers can dampen, if not eliminate, the effects that irrelevant options can have on client decision making.

## 2. Guiding Clients Through the Option Selection Process

Decision researchers generally agree that clients should use compensatory strategies when making choices because such strategies incorporate all information that the decision maker deems relevant.<sup>233</sup> Unfortunately, however, there is reason to believe that clients faced with a lengthy list of options will adopt simplifying, non-compensatory strategies rather than thorough, compensatory strategies.<sup>234</sup>

Lawyers should guide their clients through a compensatory decision process to help them select options.<sup>235</sup> To illustrate, recall the compromise problem described above in which a developer seeks to purchase a plot of land for apartments.<sup>236</sup> Suppose that the developer hires an experienced lawyer to represent him. Suppose, further, that the lawyer has identified three options—BlueAcre, RedAcre, and YellowAcre—and that he has discussed each of those options with the developer. Having identified

232. See *supra* text accompanying notes 57–62.

233. See, e.g., *supra* text accompanying notes 134–36.

234. See generally *supra* Part I.C.

235. This is akin to scholars who advocate that lawyers help their clients construct "decision trees" in negotiation and settlement. See BEYOND WINNING, *supra* note 5, at 232–40.

236. See *supra* text accompanying notes 121–27.

relevant options, the lawyer should then help the developer select his preferred option as follows.

First, the lawyer should ask the developer to identify the attributes that matter to him in the decision. Assume that the client informs the lawyer that the only attributes that matter to him are location and price.

Second, the lawyer should ask the developer how important each of those attributes is to him. After some discussion, suppose that the developer indicates that location is somewhat more important to him than price. Thus, the lawyer and developer decide that the location attribute should make up 60% of the decision and price 40%.

Third, the lawyer should ask the developer to assign a subjective value to each of the options—BlueAcre, RedAcre, and YellowAcre—on each attribute. On the location attribute, suppose the developer rates BlueAcre (located seven miles from campus) a three on a ten-point scale, RedAcre (located one mile away) a six, and YellowAcre (located one half mile from campus) a ten. On the price attribute, suppose the developer rates BlueAcre (\$150,000) a ten, RedAcre (\$250,000) a seven, and YellowAcre (\$580,000) a four.

Fourth, the lawyer should calculate the weighted added value for each attribute of each option by multiplying its subjective value by the importance weighting the developer assigned. On the location attribute, BlueAcre would get a weighted added value of 1.8, RedAcre 3.6, and YellowAcre 6; on the price attribute, BlueAcre would get a weighted added value of 4, RedAcre 2.8, and YellowAcre 1.6.

Finally, the lawyer should calculate a total by adding up the weighted added value for each of the attributes for each of the options. As shown in Table 6, BlueAcre obtains a total score of 5.8, RedAcre 6.4, and YellowAcre 7.6. Thus, the lawyer should explain to the developer that YellowAcre is his preferred option based on the attributes, importance weights, and subjective values he provided.

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TABLE 6  
LAND PURCHASE DECISION

	BLUEACRE	REDACRE	YELLOWACRE
LOCATION (60%)	3 (1.8)	6 (3.6)	10 (6)
PRICE (40%)	10 (4)	7 (2.8)	4 (1.6)
TOTAL	5.8	6.4	7.6

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The client, of course, is not bound by the outcome obtained through this compensatory process. However, the virtue of this process is that it



enables lawyers to help their clients identify the option—in this example, YellowAcre—that “reflect[s] the desirability and likelihood of all of the different consequences of different possible actions.”<sup>237</sup>

### 3. Helping Clients Justify Their Decisions

Decision researchers have found that clients’ assessments of options are often based not only on the value of the options themselves but also on the emotions triggered by rejected options. After selecting one option at the expense of others, clients are likely to experience at least some feelings of regret; this regret, in turn, is likely to have a negative impact on the way clients feel about the process and outcome of the negotiation.<sup>238</sup> Lawyers can, and should, help their clients make peace with the decisions they have reached at the bargaining table.

The first strategy available to lawyers is to work with their clients to construct a rationale supporting the choices they have made. Decision researchers have long theorized that people seek reasons or justifications for their decisions.<sup>239</sup> Recently, researchers have argued—and provided evidence supporting the argument—that “decisions supported by good reasons should attenuate postdecision regret.”<sup>240</sup> To the extent lawyers can help their clients develop arguments supporting the decisions they have reached, they may be able to help their clients overcome their initial feelings of regret.

In addition to helping their clients justify their decisions to themselves, lawyers should inform their clients (at least those who admit to feelings of regret) that there is often a “temporal pattern to the experience of regret.”<sup>241</sup> Specifically, researchers have found that “[a]ctions produce

237. Frisch & Clemen, *supra* note 23, at 51. For a different view of how experts, like lawyers, might make complicated decisions, see, for example, Ettenson et al., *supra* note 152, at 237 (suggesting that experts skillfully avoid using certain information); James Shanteau, *Psychological Characteristics and Strategies of Expert Decision Makers*, 68 ACTA PSYCHOLOGICA 203, 207–08 (1988) (describing decision strategies experts use).

238. See generally *supra* Part I.D.

239. Eldar B. Shafir et al., *Reason-based Choice*, 49 COGNITION 11 (1993) (providing a logical explanation of reason-based choice); Simonson, *supra* note 79, at 159 (arguing that there is “much research in the social psychological and decision making literatures indicating that people have a variety of motives for justifying their decisions to themselves and to others”).

240. J. Jeffrey Inman & Marcel Zeelenberg, *Regret in Repeat Purchase Versus Switching Decisions: The Attenuating Role of Decision Justifiability*, 29 J. CONSUMER RES. 116, 117 (2002).

241. Thomas Gilovich & Victoria Husted Medvec, *The Temporal Pattern to the Experience of Regret*, 67 J. PERSONALITY & SOC. PSYCHOL. 357, 357 (1994) [hereinafter Gilovich & Medvec, *Temporal Pattern*]; see also Thomas Gilovich & Victoria Husted Medvec, *The Experience of Regret: What, When, and Why*, 102 PSYCHOL. REV. 379, 381 (1995) (reviewing evidence of this pattern of regret); Richard T. Kinnier & Arlene T. Metha, *Regrets and Priorities at Three Stages of Life*, 33 COUNSELING & VALUES 182, 183 (1989) (documenting “the most often cited regrets” of people at three different stages of life); Kenneth Savitsky et al., *Remembering and Regretting: The Zeigarnik Effect and the Cognitive Availability of Regrettable Actions and Inactions*, 23 PERSONALITY & SOC.

greater regret in the short-term, whereas inactions generate more regret in the long run.<sup>242</sup> If true, this means that clients who select an option from among many options may feel short-term regret associated with the foregone options; but in the long run, they may feel less regret than they would have if they had opted *not* to generate and select from multiple options.<sup>243</sup>

Finally, lawyers should inform their clients that any regret they might feel is likely to diminish due to several empirically established psychological mechanisms. Researchers have found, for instance, that people have a “psychological immune system” that enables them to minimize post-decision dissatisfaction (particularly where decision outcomes are irrevocable).<sup>244</sup> Moreover, after a decision has been made, people tend to remember favorable information about a selected option and unfavorable information about rejected options.<sup>245</sup> And people use other mechanisms, such as “dissonance reduction,”<sup>246</sup> “feature matching,”<sup>247</sup> “post-decision differentiation,”<sup>248</sup> and “cognitive buffering,”<sup>249</sup> to come to terms with feelings of post-decision regret.

To be sure, lawyers are not (or at least not usually) psychotherapists, but they should not ignore their clients’ emotions. As noted above, rejecting

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PSYCHOL. BULL. 248, 249 (1997) (proposing differential recall of completed and uncompleted tasks as a mechanism underlying the temporal pattern of regret).

242. Gilovich & Medvec, *Temporal Pattern*, *supra* note 241, at 361. For another take on the effects of actions versus inaction on regret, see Marcel Zeelenberg et al., *The Inaction Effect in the Psychology of Regret*, 82 J. PERSONALITY & SOC. PSYCHOL. 314, 314 (2002) (arguing that prior outcomes can influence whether actions or inactions lead decision makers to experience greater regret).

243. *But see* Len Lecci et al., *Life Regrets and Current Goals as Predictors of Psychological Adjustment*, 66 J. PERSONALITY & SOC. PSYCHOL. 731, 737 (1994) (proposing generally that regrets experienced earlier “may turn more decidedly negative as the individual ages”).

244. *See* Daniel T. Gilbert & Jane E. J. Ebert, *Decisions and Revisions: The Affective Forecasting of Changeable Outcomes*, 82 J. PERSONALITY & SOC. PSYCHOL. 503, 504 (2002).

245. *See* Mara Mather et al., *Misremembrance of Options Past: Source Monitoring and Choice*, 11 PSYCHOL. SCI. 132, 136 (2000); *see also* Denise Dellarosa & Lyle E. Bourne, Jr., *Decisions and Memory: Differential Retrievability of Consistent and Contradictory Evidence*, 23 J. VERBAL LEARNING & VERBAL BEHAV. 669, 679 (1984).

246. *See, e.g.*, LEON FESTINGER, *Introduction, CONFLICT, DECISION, AND DISSONANCE* 1, 5–6 (Leon Festinger ed., 1964) (discussing actions reducing dissonance after a difficult decision); Thomas R. Shultz et al., *Free Choice and Cognitive Dissonance Revisited: Choosing “Lesser Evils” Versus “Greater Goods,”* 25 PERSONALITY & SOC. PSYCHOL. BULL. 40, 40 (1999) (discussing “differences in the specific form of dissonance reduction as a function of the general level of attractiveness of the choice options”).

247. *See* David A. Houston et al., *Feature Matching, Unique Features, and the Dynamics of the Choice Process: Predecision Conflict and Postdecision Satisfaction*, 27 J. EXPER. SOC. PSYCHOL. 411, 411 (1991).

248. *See* Ola Svenson, *Differentiation and Consolidation Theory of Human Decision Making: A Frame of Reference for the Study of Pre- and Post-Decision Processes*, 80 ACTA PSYCHOLOGICA 143, 144 (1992).

249. *See* Shelley E. Taylor et al., *Emotions as Psychological Achievements, in* EMOTIONS: ESSAYS ON EMOTION THEORY 219, 219 (Stephanie H.M. Van Goozen et al. eds., 1994).

options can be painful. When clients reject attractive options, they are likely to experience feelings of regret. Lawyers can, and should, help them come to terms with the emotional consequences of the decisions they have made.

### C. BARGAINING STRATEGICALLY

Because lawyers are more likely to evaluate options rationally, they can help their clients make better decisions in negotiation. Additionally, lawyers can use options strategically in negotiation to gain advantage over their counterparts. Although well-informed lawyers on the other side may be able to thwart these efforts, lawyers negotiating with less savvy lawyers or non-lawyers may be able to present options in ways that induce their counterparts to select a particular option.<sup>250</sup>

Retailers do this to their customers. For example, Simonson and Tversky describe how Williams-Sonoma increased the sales of one of its bread-makers by capitalizing on the context-dependent decision-making of their customers:

Williams-Sonoma, a mail order and retail business located in San Francisco, used to offer one bread-baking appliance priced at \$275. Later they added a second bread-baking appliance, which was similar to the first but was somewhat larger. The price of this item was \$429, more than 50% higher than that of the original appliance. Not surprisingly, perhaps, Williams-Sonoma did not sell many units of the item. However, the sales of the less expensive appliance almost doubled.<sup>251</sup>

Likewise, Thomas Nagle, a prominent consultant, reports that “Xerox Corp. boosted sales of its high-volume copier to large corporations only after it brought out a higher-priced model with a few extra bells and whistles that purchasing managers could feel good about rejecting.”<sup>252</sup> Indeed, “[a] common tactic used to convince consumers to purchase a given product is to present another product and argue that the former is a bargain in comparison with the latter.”<sup>253</sup>

Similarly, real estate agents use these phenomena to induce potential home buyers to purchase selected homes. Consider, for example, Robert Cialdini’s account of contrast in the real estate industry:

I accompanied a salesman on a weekend of showing houses to prospective home buyers. The salesman—we can call him Phil—

250. See, e.g., Kelman et al., *supra* note 66, at 305 (observing that a lawyer’s “knowledge of contrast effects permits her to increase the probability that her adversary will accept her preferred offer”).

251. Simonson & Tversky, *supra* note 24, at 293–94.

252. Steven Pearlstein, *The Compromise Effect . . . And the New Thinking About Money Is that Your Irrationality Is Predictable*, WASH. POST, Jan. 27, 2002, at H01.

253. *Id.*

was to give me tips to help me through my break-in period. One thing I quickly noticed was that whenever Phil began showing a new set of customers potential buys, he would start with a couple of undesirable houses. I asked him about it, and he laughed. They were what he called “setup” properties. The company maintained a run-down house or two on its lists at inflated prices. These houses were not intended to be sold to customers but only to be shown to them, so that the genuine properties in the company’s inventory would benefit from the comparison. Not all the sales staff made use of the setup houses, but Phil did. He said he liked to watch his prospects’ “eyes light up” when he showed the places he really wanted to sell them after they had seen the rundown houses. “The house I got them spotted for looks really great after they’ve first looked at a couple of dumps.”<sup>254</sup>

Politicians also attempt to manipulate options to obtain their political ends. Indeed, political scientist William Riker developed a theory of “heresthetics”<sup>255</sup> to account for this behavior. Heresthetics is “the manipulation of the structure of tastes and alternatives within which decisions are made.”<sup>256</sup> The “key”<sup>257</sup> heresthetical maneuver is the “manipulation of dimensions” (or options). This maneuver “involves defining an issue such that it forces the opponent to choose among alternatives in terms of perceptions that place the manipulator’s preferred alternative in an advantaged position.”<sup>258</sup> Riker used heresthetics to explain several important political outcomes, including, for example, the decision by participants at the Constitutional Convention of 1787 to elect the president

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254. CIALDINI, *supra* note 204, at 14–16. Cialdini uses the term “contrast principle” to refer to a phenomenon that is broader than the “contrast effect” described in the decision-making literature:

There is a principle in human perception, the contrast principle, that affects the way we see the difference between two things that are presented one after another. Simply put, if the second item is fairly different from the first, we will tend to see it as *more* different than it actually is . . . . The contrast principle is well established in the field of psychophysics and applies to all sorts of perceptions . . . .

*Id.* at 12–13.

255. See, e.g., WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986); William H. Riker, *Heresthetical and Rhetoric in the Spatial Model*, in *ADVANCES IN THE SPACIAL THEORY OF VOTING* 46, 46–54 (James M. Enelow & Melvin J. Hinich eds., 1990); William H. Riker, *Political Theory and the Art of Heresthetics*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 47, 47 (Ada W. Finifter ed., 1983) [hereinafter Riker, *Political Theory*].

256. Riker, *Political Theory*, *supra* note 255, at 55.

257. See Scott C. Paine, *Persuasion, Manipulation, and Dimension*, 51 J. POL. 36, 39 (1989).

258. *Id.* at 42; see also Lee Epstein & Olga Shvestova, *Heresthetical Maneuvering on the U.S. Supreme Court*, 17 J. THEORETICAL POL. 93 (2002) (arguing that Riker’s heresthetics can serve as the basis for a new theory of behavior in political and judicial institutions).

through an electoral system (rather than through other options that were actively under consideration).<sup>259</sup>

Like retailers, realtors, and politicians, lawyers can, and should, present options strategically to gain advantage for their clients. To be clear, I am not advocating that lawyers should behave unethically vis-à-vis their counterparts in negotiation.<sup>260</sup> I am advocating, however, that lawyers should capitalize on potential strategic advantages that may enable them to help their clients obtain better outcomes. To the extent that a lawyer can present options in ways that induce the other side to make decisions that benefit the lawyer's own client, the lawyer should do so.

### CONCLUSION

This Article has focused on the costs that multiple options can impose on decision making in negotiation, but the broader *descriptive* lesson of the Article is that these option costs can influence decision making in any circumstance where people must make complex choices. Take just three examples, one drawn from corporate law, one from family law, and one from criminal law.

First, consider the argument advanced by several prominent law and economics scholars that legislatures should adopt “menus of options” to govern corporate and bankruptcy law.<sup>261</sup> Rather than imposing “mandatory rules” on firms, these scholars contend that legislatures should authorize firms to select options from legislatively enacted menus as a way of promoting efficiency.<sup>262</sup> In the corporate bankruptcy area, for instance, Bob Rasmussen argues that firms should be required to select *ex ante* one of five options—“no-bankruptcy, a revised Chapter 7-only, Chapter 11, the selective stay, and a custom-designed system”—rather than be subjected *ex post* to the current, mandatory bankruptcy regime.<sup>263</sup> Given what we know about the influence of option devaluation, context dependence, and non-compensatory decision making, however, is it clear that the individuals

259. William H. Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice*, 78 AMER. POL. SCI. REV. 1, 1 (1984).

260. See generally Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739 (2001) (arguing that negotiators should not treat their counterparts as means to their own or their clients' ends).

261. See, e.g., Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 757 (1995) (advocating menus for corporate law); Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 51 (1992) (advocating menus for corporate bankruptcy law) [hereinafter Rasmussen, *Debtor's Choice*]; Robert K. Rasmussen, *A New Approach to Transnational Insolvencies*, 19 MICH. J. INT'L L. 1, 1 (1997) (advocating a menu approach to deal with transnational bankruptcies).

262. See, e.g., Klausner, *supra* note 261, at 839 (“In addition to default rules, corporate law could provide sets of options terms—‘menus’—from which firms could choose the terms that suit them best.”).

263. Rasmussen, *Debtor's Choice*, *supra* note 261, at 100–05.

confronted with such a menu will select the options that actually maximize firm value?<sup>264</sup>

Second, two scholars<sup>265</sup>—and some legislatures<sup>266</sup>—have extended the “menu of options” idea from the corporate boardroom to the marital bedroom. Eric Rasmussen and Jeffrey Stake argue that the states should “offer a menu of legislatively approved, alternative, standard-form contracts”<sup>267</sup> governing marriage and divorce:

Statutes could usefully provide forms with several enforceable and reliable options. In addition to modern, no-fault exit without alimony, premised on both spouses developing careers, the traditional, fault-limited divorce with alimony, premised on efficient division of labor, ought to be an option. The law does not need to provide enforcement for every possible kind of marriage, but it should provide clear and dependable enforcement for a few kinds. . . .<sup>268</sup>

Again, given what we know about option devaluation, context dependence, and non-compensatory decision strategies, is it clear that couples (or individual spouses) will choose the options most likely to maximize marital bliss under the proposed “menu” regime?

Finally, consider the impact that charges to juries can have on criminal convictions. Suppose, for example, that a defendant is being tried for murder. Imagine first that the judge instructs the jury to return either an acquittal or a murder conviction; now imagine instead that the judge instructs the jury to return an acquittal, a murder conviction, or a capital murder conviction. Will the inclusion of capital murder as an option in the latter condition increase the likelihood that juries will choose to convict the defendant of murder (i.e., the compromise option)?<sup>269</sup> Based on their experimental work, Kelman and his colleagues think so:

A legislature that adds capital murder to the list of crimes and attempts to distinguish it from “ordinary” murder (and manslaughter) must understand that it is not only creating a new substantive category—based on the substantive belief that certain killings are morally more reprehensible, or harder to deter in the absence of aggravated punishments, or socially more harmful—but

264. Rasmussen is sensitive to the costs that additional options might impose on the firm’s decision makers. *Id.* at 100 (“At some point the marginal gain of another option is outweighed by the cost of learning the details of that option.”).

265. See Rasmussen & Stake, *supra* note 194, at 453; Jeffrey Evans Stake, *Paternalism in the Law of Marriage*, 74 IND. L.J. 801, 801 (1999).

266. See, e.g., LA. REV. STAT. ANN. §§ 9:224-225 (authorizing an additional marriage option).

267. Rasmussen & Stake, *supra* note 194, at 495.

268. *Id.* at 502.

269. See Kelman et al., *supra* note 66, at 290–92.

it must also understand that it is altering the balance of convictions between murder and manslaughter. This will be true, at least arguably, both because murder will more frequently become a compromise verdict between capital murder and manslaughter and because it may frequently be the case that murder clearly dominates capital murder (or vice versa) and that the “murders” thus benefit (as a result of contrast effects) relative to manslaughter.<sup>270</sup>

In these and other areas of concern to legal policy makers,<sup>271</sup> decision makers choosing from among multiple options may be led astray by the very presence of those options. And in these and other areas, lawyers can play a valuable role for their clients by helping them navigate the labyrinth of multiple options more successfully than their clients could on their own. Thus, the broader *prescriptive* lesson of the Article is that lawyers can, and should, help their clients make better decisions not only at the bargaining table but in these and other decision contexts as well.

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270. *Id.* at 308.

271. *See, e.g.*, Hibbard et al., *supra* note 171 (selection of benefit plans); Nicholas Lemann, *The Options*, THE NEW YORKER, Oct. 1, 2001, at 78 (“What Presidents do all day, when they’re not out in public, is choose among options presented to them by subordinates.”).

