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HOW PROSPECT THEORY CAN IMPROVE LEGAL COUNSELING

*John M.A. DiPippa**

I. INTRODUCTION

Rational choice is the law's predominate model.¹ The law believes that (1) clients are rational, and (2) they will act rationally by choosing the path that leads to maximum utility, and (3) lawyers act professionally when they base their professional behavior on these assumptions. Clients need the information that will allow them (or their lawyer) to calculate the costs and benefits of each decision. In essence, law transplants the assumptions of classical economics into the realm of lawyer-client decision making.²

Recent research casts doubt on the rational choice model of decision making. This research shows that not all people make decisions by carefully listing options and thoroughly discussing them.³ Real

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1. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (5th ed. 1998) (noting humans are rational maximizers of ends in life); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060 (2000) (noting rationality at heart of modern economic theory). See generally Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 324 (1995) ("Our legal education system is predicated on unstated and generally unexamined assumptions about what lawyers do. For each of us, including lawyers and law professors, the concept of 'lawyer' draws upon a prototypical lawyer engaged in a prototypically lawyerly endeavor.").

2. See, e.g., Jeffrey J. Rachlinksy, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 114-15 (1996) (suggesting that economics is the dominant model for studying litigation and settlement behavior); Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 475 (stating that "[m]uch of the sociology of law (like much of social science in general) rests on certain implicit or explicit assumptions about how people make decisions . . . [.]" one of which is an economic or instrumental approach that assumes compliance with law is a calculated assessment of costs and benefits). Law and Economics as a movement is not concerned with the techniques of legal interviewing. Rather, it concerns itself with "how actors in and subject to the legal system respond to legal directives." Korobkin & Ulen, *supra* note 1, at 1055. Nevertheless, the idea that clients would make decisions based on a rational framework and that these decisions would be based on maximizing client self-interest have permeated the legal interviewing and counseling literature. *Id.*

3. See generally IRVING L. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* (1978); see also Korobkin & Ulen, *supra* note 1, at 1057 (describing the "anomalies" researchers have discovered about rational choice theory and proposing a new movement called "Law and Behavioral Science" that will take into account the insights of both rational choice

people use perceptual shortcuts, cognitive end runs, and “irrational” factors to make important and not so important decisions.⁴ The rational choice model does not give an accurate picture of how actual clients make litigation decisions.⁵ One commentator notes that “[c]urrent theories of litigation fail to account for the possibility that litigants’ decision making under risk and uncertainty may not comport with rational theories of behavior, and they therefore fail to paint a complete picture of litigation.”⁶

Incorporating these insights can improve legal counseling. The insights of one theory, known as “prospect theory,” has proven particularly useful in explaining lawyer and client decision making. Prospect theory shows that the decision a person makes will be greatly influenced by the way he frames his options. At the same time, however, the presence of lawyers seems to mitigate the effect of these frames. This article builds on these findings to suggest that legal counseling⁷

theory and its critics).

4. RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGEMENT* (1980); Amos Tversky & Daniel Kahneman, *Judgement Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124 (1974); see also Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777 (2001) (reporting results of empirical study showing that cognitive illusions had significant impact on judicial decision making); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation*, 79 *OR. L. REV.* 61 (2000) (showing a pattern of judicial ignorance of or adaptation to cognitive illusions); W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 *J. LEG. STUD.* 107 (2001) (containing study showing cognitive illusions influencing jurors’ decisions).

5. Rachlinski, *supra* note 2, at 116.

6. *Id.* at 114. But see Richard A. Posner, *Rational Choice, Behavioral Economics and the Law*, 50 *STAN. L. REV.* 1551 (1998) (noting rational choice theory is morally and empirically superior to behavioral economics); Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 *S. CAL. L. REV.* 329, 330-31 (1986) (stating that the difference that rational choice critics found is the difference between “the real and the ideal”).

7. Legal Counseling closely resembles “Decision Counseling.” See IRVING L. JANIS, *SHORT TERM COUNSELING* (1983). This short-term counseling seeks to be effective “in just a few sessions with clients who seek help when they are making vital decisions concerning their health, career, marriage, or other aspects of their personal lives.” Irving L. Janis, *Problems of Short-Term Counseling*, in *COUNSELING PERSONAL DECISIONS* 3 (Irving L. Janis ed., 1979). For an approach to legal counseling based on a decision counselor model, see ROBERT F. COCHRAN, JR., JOHN M.A. DIPIPPA, & MARTHA M. PETERS, *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 109-13 (1999); see also Suchman, *supra* note 2, at 495-96. That author stated:

Moral sentiments, one might argue, can simply be assimilated into people’s utility functions, alongside more conventionally self-serving motives. Thus,

should be less ideological and more pragmatic.⁸ Effective legal counselors should be aware of their own and their client's cognitive obstacles to fully rational decision making. Once aware, they should adjust their approaches to counter these obstacles.⁹

II. AN OVERVIEW OF DECISION THEORY: THE DESCRIPTIVE AND NORMATIVE APPROACHES

There are two approaches to studying decision-making:¹⁰

Normative (The way it should be)

Descriptive (The way it is)

The normative approach is the classic way to look at decision making. It studies the process of decision making to detect flaws that prevent people from making the best decision under the circumstances.¹¹ It makes several assumptions that parallel the assumptions of classical economics:

(1) Humans are rational,

we make rational decisions based not only on material costs and benefits, but also on an assessment of how particular lines of action will affect our social interactions with others and our psychological interactions with ourselves.

Id.; see also COCHRAN, DIPIPPA, & PETERS, *supra*, at 146-50 (outlining a decision process that explicitly considers the consequences to other people, to the client's self-image, and to the client's reputation).

There has, however, been a recent movement toward "Therapeutic Jurisprudence." DAVID B. WEXLER & BRUCE WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS THERAPEUTIC AGENT* (1990); Susan Daicoff, *Making Law Therapeutic for Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCHOL. PUB. POL'Y & L. 811 (1999); Marc W. Patry, David B. Wexler, Dennis P. Stolle, & Alan J. Tompkins, *Better Legal Counseling Through Empirical Research: Identifying Psycholegal Soft Spots and Strategies*, 34 CAL. W. L. REV. 439 (1998); Dennis B. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering*, 34 CAL. W. L. REV. 15 (1997).

8. See Korobkin & Ulen, *supra* note 1, at 1073. Korobkin and Ulen identify this approach as related to legal pragmatism. That is, it "consciously chooses to emphasize its external usefulness in analyzing legal problems rather than either its internal elegance or universal applicability." *Id.* at 1057-58.

9. See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1 (1999); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997); Richard W. Painter, *Irrationality and Cognitive Bias at a Closing in Arthur Solmssen's The Comfort Letter*, 69 FORDHAM L. REV. 1111 (2000).

10. See, e.g., MAX H. BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* 3-5 (3d ed. 1994).

11. JANIS & MANN, *supra* note 3, at 11-12.

- (2) Humans act to maximize their interests, and
- (3) The best decision maximizes the decision maker's interests under the circumstances.¹²

These assumptions dictate a decision process of listing, evaluating, and choosing.¹³ People are advised to make a list of the available options, to evaluate each option by measuring the gain and loss if that option is pursued, and to choose the option that results in the most gain or the least loss.¹⁴ Most people are familiar with this process from the ordinary method of drawing a line down the middle of the page and listing the "pros" of the decision on one side and the "cons" of the decision on the other.¹⁵

Classical economics assumes that, given accurate information in sufficient quantities, each person will make the same decision. The classical approach assumes not only that people are rational and that they will follow a rational process, but also that they will have unbiased information available to them on which to base their decisions. People will always choose the option that maximizes their gains or minimizes their losses. Any deviations from this norm are explained either by showing that the decision maker did not have sufficient information by which to calculate her best option or that the decision maker's thinking was faulty.

These assumptions work well at general levels. For example, they seem to explain macroeconomic behavior, i.e., behavior on the largest scale. They allow economists to create models of the national economy on which to base large-scale economic policy.

Studies in the fields of social psychology and economics have called each of these assumptions into question.¹⁶ These findings argue

12. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263 (1979).

13. See, e.g., BAZERMAN, *supra* note 10, at 3-4; JANIS & MANN, *supra* note 3, at 11.

14. JANIS & MANN, *supra* note 3, at 11. The authors list the following components of optimal decisionmaking: consider a large number of factors; the goal is to consider as many as possible; generate as many alternatives as possible; delay decision in favor of more alternatives; test best alternatives repeatedly, arranging them in multiple ways to allow comparative judgements; take account of magnitude of all the pros and cons; look for tradeoffs between high values on some and low values on others. *Id.*

15. See DAVID A. BINDER, PAUL BERGMAN, & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 307 (1991).

16. See Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1478 (1998) ("[E]xpected utility theory is not a good description of actual decisionmaking."); Cass R. Sunstein, *How Law Constructs Preferences*, 86 *GEO. L.J.* 2637, 2637 (1998) (observing that normative account of rational choice lacks "descriptive accuracy").

that the normative approach and classical economics fail to provide an accurate picture of how people actually make decisions. These theorists argue that a more effective approach would be to study and describe actual human decision making.¹⁷

III. AN OUTLINE OF THE DESCRIPTIVE APPROACH

People make decisions all the time, but for most of these decisions, they have neither the time nor the resources to engage in an optimal search and evaluation process.¹⁸ Research shows that people have developed cognitive shortcuts to make ordinary decisions easier.¹⁹ These cognitive shortcuts or schemas are essential to daily life.²⁰ People could not function efficiently if every decision required complete analysis, no matter how often they may have faced the same choice in the past or how inconsequential the decision may be.²¹

Even when confronted with important decisions and given sufficient information, people still rely on these shortcuts.²² People may have a limit to the amount of information that they can process at any one time.²³ This limits their ability to discover and process information

17. Jolls, Sunstein, & Thaler, *supra* note 16, at 1476 (stating that task of behavioral economics is to study actual human behavior and its implications for law); Sunstein, *supra* note 16, at 2637. Although real people depart from rational choice model, their decision making is not "unpredictable, systematically irrational, random, rule-free, or elusive to social scientists." *Id.* Rather, their departures can be "described, used and sometimes even modeled." *Id.*

18. JANIS & MANN, *supra* note 3, at 22; Jolls, Sunstein, & Thaler, *supra* note 16, at 1471; Korobkin & Ulen, *supra* note 1, at 1077-78 (stating that the decision to use a simple decision process "might be sensible given the marginal benefits and costs of making an optimal decision relative to a satisfactory one; in other words, the decision not to maximize utility when solving a single problem might in fact maximize the actor's overall utility"); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyer's Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 99 (1993) ("Attorneys are confronted with immense amounts of intellectual stimuli each day and must implicitly or explicitly make thousands of decisions and judgements through inductive reasoning.").

19. NISBETT & ROSS, *supra* note 4, at 7.

20. Korobkin & Ulen, *supra* note 1, at 1076 (observing that without cognitive shortcuts, "the task of making even relatively simple decisions would become so complex that daily life would almost certainly grind to a halt"); Langevoort, *supra* note 18, at 99 (noting that without cognitive shortcuts, "life would be unbearably chaotic").

21. NISBETT & ROSS, *supra* note 4, at 7; Langevoort, *supra* note 18, at 99-100 (noting cognitive shortcuts work well in everyday life because they are "curiously functional" and more precise mechanisms are not practical).

22. JANIS & MANN, *supra* note 3, at 22-25.

23. ROBIN M. HOGARTH, JUDGEMENT AND CHOICE: THE PSYCHOLOGY OF DECISION 4 (2d ed. 1987); *see also* Korobkin & Ulen, *supra* note 1, at 1078 (noting complexity of

and to project future consequences from that information.²⁴ Decision theorists call this “bounded rationality.”²⁵

A person very often will simplify the decision process by using the “just good enough” criteria to seize upon the first alternative that satisfies this simplified criteria. This is called “satisficing.”²⁶ When coupled with other psychological processes, people can make decisions that may appear “irrational” when judged by the normative or classical view.²⁷ Satisficing is an especially common strategy when people make complex decisions under stress.²⁸

Satisficing seems to involve the use of cognitive shortcuts known as “heuristics” or “schemas.”²⁹ These are easy-to-use templates that allow people to make ordinary decisions. They “produce vastly more correct or partially correct inferences than erroneous ones, and they do so with great speed and little effort.”³⁰ These heuristics allow people to learn from their experiences and to make consistent decisions over

decision leads to systematic departures from rational model).

24. Korobkin & Ulen, *supra* note 1, at 1085 (stating that use of cognitive shortcuts causes people to be “systematically biased in their predictions of the probable results of various events”).

25. See generally HERBERT A. SIMON, *MODELS OF MAN* (1957). Simon describes bounded rationality in this way: “The capacity of the human mind for formulating and solving complex problems is very small compared to with the size of the problems whose solution is required for objectively rational behavior in the real world—or even for a reasonable for a reasonable approximation to such objective rationality.” *Id.* at 198; see also Jolls, Sunstein, & Thaler, *supra* note 16, at 1477 (noting that bounded rationality describes the systematic ways that people try to cope with their “limited computational skills and seriously flawed memories”).

26. SIMON, *supra* note 25, at 204-05.

27. See Korobkin & Ulen, *supra* note 1, at 1085 (“[W]hether or not the well-documented collection of heuristics and biases are rational adaptations in a global sense, they have the consequence of causing actors to make decisions that violate the predictions of rational choice theory in individual circumstances.”).

28. JANIS & MANN, *supra* note 3, at 51; Korobkin & Ulen, *supra* note 1, at 1077 (“Complexity beyond human cognitive capacity is a sufficient condition for an actor to substitute a simplified decision strategy . . . but it is not a necessary condition.”). This may also be a result of too many choices. See Sheena S. Iyengar & Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCHOL. 995 (2000) (noting subjects suffering from choice overload are less satisfied with choice and less motivated to engage in the full decision process).

29. NISBETT & ROSS, *supra* note 4, at 17-42; see also Korobkin & Ulen, *supra* note 1, at 1076 (noting that bounded rationality is the “unintentional consequence of an unconscious use of heuristics in judgment and decision-making tasks.”); Rachlinski, *supra* note 4, at 61 (observing that human brain has a limited ability to process information and uses shortcuts that allow it to perform most tasks well).

30. NISBETT & ROSS, *supra* note 4, at 18.

time.³¹ They save time and resources by preventing duplication of effort, by keeping recent decisions in the foreground, and by providing an objective reference point against which to measure decisions.³²

Social psychologists and decision theorists have identified a number of these cognitive shortcuts.³³ The one that has gotten the most attention in the legal literature is the “anchoring and adjustment heuristic.” This model shows that people tend to anchor decisions to some initial reference point.³⁴ That is, people need baselines against which they can evaluate their choices or from which they can make initial estimates.³⁵ They then adopt revisions to their position in light of this reference point.³⁶

31. *Id.* at 7.

32. *Id.* The authors note:

Few, if any, stimuli are approached for the first time by the adult. Instead, they are processed through preexisting systems of schematized and abstracted knowledge—beliefs, theories, propositions, and schemas. These knowledge structures label and categorize objects and events quickly and, for the most part, accurately. They also define a set of expectations about objects and events and suggest appropriate responses to them.

Id.

33. Besides anchoring and adjustment, social scientists have identified the following:

Availability Heuristic: Making judgements based on recently available information.

Representativeness Heuristic: Relying on the similarity of current objects or events to past objects or events. That is, expecting a current event that is similar to a past event to have the same qualities as the past event.

Illusory Correlations and Causation Biases: Finding causal patterns and relationships in matters that are randomly produced.

Fundamental Attribution Bias: Overestimating the influence of personal factors in explaining another’s behavior while underestimating the influence of personal factors in explaining one’s own behavior.

Biases in Risk Perceptions: Ignoring low probability risks.

The Hindsight Bias: Overestimating the extent to which a person could have predicted some future event once they learn what actually happened.

Intertemporal Biases: Discounting future risks and rewards more heavily.

Egocentric Biases: Engaging in self-serving explanations.

False Consensus Effect: Overestimating the extent to which people share the same attitudes and beliefs.

See BAZERMAN, *supra* note 10, at 7-9; Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

34. NISBETT & ROSS, *supra* note 4, at 41; Tversky & Kahneman, *supra* note 4, at 1128.

35. Tversky & Kahneman, *supra* note 4, at 1128.

36. *Id.*

Prospect theory is a particular application of the anchoring and adjustment heuristic.³⁷ It holds that people tend to weigh losses more heavily than gains. Accordingly, they will be more willing to assume risk when facing the loss of something they have than when potentially gaining something they do not have.³⁸ Thus, prospect theory suggests that whether decisions are framed in terms of gains or losses will affect the way decisions are made even though the status quo may be completely arbitrary and manipulable.³⁹

The pioneering work in this field was done by Amos Tversky and Daniel Kahneman.⁴⁰ Through a series of experiments, they showed that the normative model did not accurately describe how people actually make decisions.⁴¹ The deviations from the normative model are "too widespread to be ignored, too systematic to be dismissed as random error, and too fundamental to be accommodated by relaxing the normative system."⁴²

Prospect theory has two phases: "framing/editing" and "evaluation."⁴³ A person conducts a preliminary analysis of the decision problem. This preliminary analysis frames the rest of the process. It may control the manner in which the choice is presented as well as what the decision maker expects from the decision. It may also influence the amount and the kind of information produced to evaluate the decision.⁴⁴

In the evaluation phase, the decision maker seeks the highest value among the prospective alternatives.⁴⁵ When one option predominates,

37. Korobkin & Ulen, *supra* note 1, at 1104 (noting that prospect theory incorporates empirical findings about decision making under uncertainty that contradicts rational choice models).

38. *Id.* at 1104-05.

39. *Id.* (noting that choices do not necessarily depend on the absolute values of items but rather on the direction in which the items deviate from a fluid and easily manipulated baseline).

40. See Kahneman & Tversky, *supra* note 12, at 263.

41. Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. 251, 251-52 (1986). What makes this claim striking is that logic suggests that people should prefer a rational model:

- People are effective in pursuing their goals, especially when they have significant monetary or reputational incentives and can learn from their experience; and
- Competition should favor rational individuals and organizations because those groups who make the best (i.e., the most optimal) decisions should survive in a competitive environment.

Id.

42. *Id.* at 252.

43. Kahneman & Tversky, *supra* note 12, at 274.

44. Tversky & Kahneman, *supra* note 41, at 257.

45. *Id.*

decision makers tend to use the conventional, rational process.⁴⁶ When one choice does not stand out, the decision maker must make a decision based on the relative values of the available choices.⁴⁷ Options do not exist in a vacuum, however. Unless there is some objective reference point that will govern the choice, the outcomes will be measured from a neutral reference point. Choosing the reference point provides the frame in which the alternatives are evaluated.⁴⁸

Tversky and Kahneman showed that a decision maker's response to loss is greater than the response to gains.⁴⁹ For example, people will charge more to part with an item than they will pay for it.⁵⁰ Defying the assumptions of conventional economic theory, selling an already paid-for item is perceived as a loss while purchasing a new item is seen as a gain.⁵¹

Whether or not a person perceives his choices as losses or gains influences or frames his willingness to take risks.⁵² Tversky and Kahneman's experiments showed that decision makers are risk-averse in gain frames and risk-seeking in loss frames.⁵³ That is, people are more

46. Dominance happens when "one option is better than another in one state and at least as good in all other states." *Id.* at 253.

47. *Id.* at 272.

48. Kahneman & Tversky, *supra* note 12, at 274.

49. Tversky & Kahneman, *supra* note 41, at 258. This effect is exaggerated even more by the different subjective value people assign to essentially the same loss. For example, the difference in value between a gain of \$100 and \$200 is perceived as greater than the difference between a gain of \$1100 and \$1200. *Id.* Even though the actual amount of the gain is the same in both instances, a person's subjective perception of the value is different. The same is true for losses. The difference between a \$100 and a \$200 loss is seen as greater than the difference between an \$1100 and a \$1200 loss. *Id.* See Sunstein, *supra* note 16, at 2646 (noting that people are roughly twice as displeased with losses).

50. Tversky & Kahneman, *supra* note 41, at 258.

51. Korobkin & Ulen, *supra* note 1, at 1107-08. Rational choice theory predicts that "[w]hether [a person] owns the loaf of bread, the glass of wine, or neither, should make no difference as to which item he would prefer. [H]owever, . . . individuals often place a higher monetary value on items they own than on those that they do not own." *Id.*; see also Sunstein, *supra* note 16, at 2646 ("Contrary to economic theory, people do not treat out-of-pocket costs and opportunity costs as if they were equivalent.").

52. Tversky & Kahneman, *supra* note 41, at 259. "[T]he effective carriers of values are gains and losses, or changes in wealth, rather than states of wealth as implied by the rational model." This may be due to our basic psychological makeup. The authors note:

Our perceptual apparatus is attuned to the evaluation of changes or differences rather than to the evaluation of absolute magnitudes. When we respond to attributes such as brightness, loudness, or temperature, the past and present context of experience defines an adaptation level, or reference point, and stimuli are perceived in relation to this reference point.

Kahneman & Tversky, *supra* note 12, at 277.

53. Tversky & Kahneman, *supra* note 41, at 258.

likely to “play it safe” to retain a perceived “gain” but are more likely to take risks when they might suffer a perceived “loss.”⁵⁴ Which frame a person uses depends on a number of contextual factors but the status quo is frequently the initial reference point and the frames are fluid and easily manipulated.⁵⁵

IV. USING PROSPECT THEORY TO EXPLAIN LITIGATION AND SETTLEMENT BEHAVIOR

Legal scholars have used prospect theory to explain the litigation behavior of lawyers and clients.⁵⁶ A growing number of legal scholars are using prospect theory to provide a more accurate explanation of how litigation decisions are made. In addition, other scholars are using prospect theory to explain and predict the behavior of transactional lawyers.

Prospect theory predicts that plaintiffs and defendants will frame litigation decisions in different ways.⁵⁷ In general, plaintiffs are more likely to frame settlement offers as choices among gains while defen-

54. See Cass R. Sunstein, *Human Behavior and the Law of Work*, 87 VA. L. REV. 205 (2001) (critiquing current employment law rules as based on an inadequate sense of workers' actual values and behavior because, among other things, workers, like all people, are especially averse to loss).

55. Sunstein, *supra* note 16, at 2647.

Whether an event “codes” as a loss or a gain depends on a range of contextual factors, including how the event is framed. The *status quo* is usually the reference point, so that losses are understood as such by reference to existing distributions and practices; but it is possible to manipulate the frame so as to make a change code a loss rather than a gain, or vice-versa.

Id.

56. This is part of a larger movement to bring the findings of cognitive psychology and behavioral economics to bear on legal analysis. Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1 (2000) (using social psychology to study settlement behavior of plaintiffs); Guthrie, Rachlinski, & Wistrich, *supra* note 4, at 777 (studying the effects of cognitive illusions on judges); Paul Slovic, *Rational Actors and Rational Fools: The Influence of Affect on Judgment and Decision-Making*, 6 ROGER WILLIAMS U. L. REV. 163, 166 (2000) (noting automatic, experiential, and affect-based factors as important as rational/analytic factors); Suchman, *supra* note 2, at 475 (outlining three leading perspectives on decisionmaking and their implications for the social scientific study of law); see also Jolls, Sunstein, & Thaler, *supra* note 16, at 1473 (observing that law-and-economics has resisted insights of behavioral analysis and advancing an approach to the “economic analysis of law that is informed by a more accurate conception of choice, one that reflects a better understanding of human behavior and its wellsprings”); Korobkin & Ulen, *supra* note 1, at 1057 (incorporating findings of behavioral science builds on core law-and-economics insights).

57. Rachlinski, *supra* note 2, at 119-20.

dants are more likely to frame the same offers as choices among losses.⁵⁸ Prospect theory predicts that in these circumstances plaintiffs would be more risk-averse and thus look to settle, while defendants would be more risk-seeking and choose trial.⁵⁹

Prospect theory predicts that the degree of probability will also help frame the choices. It holds that people will be risk-averse when choosing among moderate-to-high probability gains *and* when choosing among low-probability losses.⁶⁰ Conversely, people will be risk-seeking when choosing among moderate-to-high probability losses and low probability gains.⁶¹ In addition, few litigation decisions involve single factors that can easily be characterized clearly as a “gain” or as a “loss.” Plaintiffs, for example, might be concerned with non-monetary aspects of litigation; the different parties might not agree on the chances of the plaintiff winning the case in court; and so on.⁶²

In addition, the frame a person chooses is influenced by “the manner in which the choice problem is presented as well as by [the] norms, habits, and expectancies of the decision maker.”⁶³ At the same time, the economics of lawyer-client decision making may not be subject to the most extreme framing influences.⁶⁴ Tversky and

58. Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 168 (2000). Guthrie points out that Robin M. Hogarth made this connection in the late 1980s. *Id.* at 167 n.16; see HOGARTH, *supra* note 23, at 105.

59. Rachlinksi, *supra* note 2, at 113, 119-20; see also Linda Babcock et al., *Forming Beliefs About Adjudicated Outcomes: Perceptions of Risk and Reservation of Values*, 15 INT’L REV. L. & ECON. 289 (1995) (finding that risk aversion depended on whether subjects played role of defendant or plaintiff).

60. Guthrie, *supra* note 58, at 166-67.

61. *Id.*

62. HOGARTH, *supra* note 23, at 105; see Suchman, *supra* note 2, at 495-96.

Moral sentiments, one might argue, can simply be assimilated into people’s utility functions, alongside more conventionally self-serving motives. Thus, we make rational decisions based not only on material costs and benefits, but also on an assessment of how particular lines of actions will affect our social interactions with others and our psychological interactions with ourselves. *Id.*; see also COCHRAN, DIPIPPA, & PETERS, *supra* note 7, at 146-50 (outlining a decision process that explicitly considers the consequences to other people, to the client’s self-image, and to the client’s reputation).

63. Tversky & Kahneman, *supra* note 41, at 257.

64. Lawyers are paid for their work. The quality of their advice enhances their reputations and, in turn, leads to more legal work from the same or similar clients. Donald Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 397 (1997). Moreover, there is considerable competition among law firms. Clients can “shop around” for firms that will produce the best results. *Id.* at 399-400 (describing the “beauty contest” process where a client shows a project to different law firms to see how each would handle the matter). Conversely, clients, especially institutional clients, may drop a law firm that

Kahneman summarize this point by saying: “[I]ncentives sometimes improve the quality of decisions, experienced decision makers often do better than novices, and the forces of arbitrage and competition can nullify some effects of error and illusion.”⁶⁵

Although these factors may mitigate some of prospect theory’s influence on legal decisions, studies in other disciplines show that errors persist even in the face of significant monetary incentives.⁶⁶ Incentives help focus attention and thus may be most influential when the decision problem results from a lack of attention.⁶⁷ Many poor decisions result from misperceptions of the underlying facts or of the relative risks inherent in the alternatives, however.⁶⁸ In other words, paying a lawyer may not avert cognitive error if both lawyer and client misperceive the underlying level of risk. Moreover, cognitive errors persist even with learning. Learning requires feedback and many decisions do not lend themselves to feedback or are self-fulfilling.⁶⁹ This is especially true in legal counseling when many decisions cannot be revised after assessing the consequences or are not subject to accurate assessment. For example, the decision to settle a case before trial cannot be accurately evaluated because neither party will have the outcome of a trial to use as a benchmark. Thus, prospect theory can provide valuable insights even for well-paid, highly-respected, and experienced lawyers.

Lawyers who understand prospect theory and incorporate it into their counseling styles can gain an advantage over other lawyers. Plaintiffs and defendants may view the problem from generally different viewpoints with consequent different assessments of risk.⁷⁰ Knowing

leads them to a bad decision. Thus, lawyers have economic and non-economic incentives to help clients make the most optimal decision possible. Korobkin & Guthrie, *supra* note 9 at 123-24 (describing how both psychological and financial factors influence the lawyer’s role). Finally, lawyers are repeat players in the legal system. They develop considerable experience in substantive law and in how the system works that gives them substantive and procedural advantages. Cross, *supra* note 56, at 4. See generally Marc Galanter, *Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

65. Tversky & Kahneman, *supra* note 41, at 273.

66. See, e.g., BAZERMAN, *supra* note 10, at 5; JANIS & MANN, *supra* note 4, at 23-34; see also JANIS & MANN, *supra* note 3, at 107-34 (detailing the flawed decision process on a major policy question in the Nixon administration).

67. Tversky & Kahneman, *supra* note 41, at 274.

68. See discussion *supra* Part III.

69. Tversky & Kahneman, *supra* note 41, at 274; see also Langevoort & Rasmussen, *supra* note 64, at 377-78 (discussing the difficulties clients have if they want to monitor or evaluate their lawyer’s advice).

70. HOGARTH, *supra* note 23, at 105.

how this might influence risk assessments could lead to a competitive advantage for one side.⁷¹

V. HOW FRAMING INFLUENCES SETTLEMENT BEHAVIOR

Professors Chris Guthrie and Russell Korobkin demonstrated that framing had a more significant effect on settlement behavior than other psychological variables.⁷² As they put it:

Our results make it clear that frames matter in legal dispute resolution. Disputants may reject a settlement offer economically sufficient to produce a negotiated settlement if they view it in relation to a reference point that suggests accepting the offer would mean accepting a net loss on the transaction. Conversely, an adverse party might perceive an offer framed in its best light as favorable, even if she would reject a frameless presentation of the same substance.⁷³

They predicted psychological barriers would prevent litigants from acting according to the dictates of rational choice theory:

Psychological barriers, which are cognitive and perceptual in nature, prevent disputants from acting in a value-maximizing, utilitarian manner Our general conclusion is that these psychological constructs can cause legal disputes to go to trial even when there is a viable bargaining range and no strategic behavior by the disputants.⁷⁴

71. *Id.* Moreover, understanding the effects of framing on litigation choices could lead to a clearer and, ultimately, more successful approach to reform of lawyer codes of conduct, legal training, and litigation practices. Jolls, Sunstein, & Thaler, *supra* note 16, at 1474 (noting that behavioral economics help explain law's effects, describe how law can be used to achieve desirable social goals, and assess the goals of the legal system); Korobkin & Ulen, *supra* note 1, at 1056 (noting that behavioral economics makes law and economics more relevant to the making of social policy); Rachlinski, *supra* note 2, at 121; *see also* Birke & Fox, *supra* note 9, at 1; Paul Brest & Linda Krieger, *On Teaching Professional Judgement*, 69 WASH. L. REV. 527 (1994); Korobkin & Guthrie, *supra* note 9, at 77; Painter, *supra* note 9, at 1111.

72. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994). Framing effects were tested against (1) equity seeking—the tendency of individuals to seek to correct the relational imbalance brought about by an offense against them, and (2) reactive devaluation—the tendency of an individual to discount an offer made by an adversary. *Id.* at 143-44, 151-52.

73. *Id.* at 137.

74. *Id.* at 117. "Strategic behavior" refers to the strategic bargaining model of settlement. *Id.* at 114. This theory assumes that bargaining failures are caused by miscalculations. *Id.* at 116. The negotiating parties agree that settling out of court would be advantageous; they simply cannot agree on how to divide up the settlement pie. *Id.* at 114-15. Each is aiming to get the most they can from out of the settlement, but each

Their results showed that how litigants framed offers influenced their likelihood to settle more than their perception of the other party.⁷⁵ Offers framed as losses would encourage risk-seeking behavior while offers framed as gains would encourage risk-averse behavior. That is, people avoid risk when they choose between options they understand as gains, but they prefer risk when they choose between options viewed as losses.⁷⁶

A study by Professor Jeffrey J. Rachlinski showed that framing causes plaintiffs and defendants to view the same offer in different ways.⁷⁷ He conducted three controlled studies in which he presented first year law students a litigation scenario and then asked them whether or not they would accept a certain settlement offer.⁷⁸ He told some of the students that they were defendants and he told other students that they were plaintiffs. He put the offers in gain and loss frames.⁷⁹ In one case, the frame suggested that the choices all involved losses while the other frame suggested that the choices involved gains. His subjects typically made risk-seeking choices in the loss frame and risk-averse choices in the gain frame. Plaintiff-subjects consistently chose settlement while the defendant-subjects consistently chose trial.⁸⁰

He concluded that "the role of the plaintiff or defendant in litigation influences the attractiveness of a settlement offer in a way that is consistent with framing theory. Plaintiffs prefer sure, riskless settlements more than defendants."⁸¹ In addition, far more of the loss frame defendants choose the riskier course of action than the gain frame defendants.⁸²

is handicapped by limited information, resources, and time. Thus, they must guess at what the other side will accept and, in the process, may miscalculate. *Id.* at 116.

75. *Id.* at 139-40.

76. *Id.* at 142. They note that "[t]he framing experiments illustrate that people use a reference point to code options as gains or losses and that this coding systematically influences settlement behavior. The anchoring experiment demonstrates that an opponent's opening offer may unduly influence people's expectations and, hence, their decisions about whether to settle." *Id.*; see also Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. DISP. RESOL. 1, 4-5 (1994) (showing that parties who made extreme opening offers were more likely to get higher settlements than parties who made more moderate opening offers).

77. Rachlinski, *supra* note 2, at 135.

78. *Id.* at 135-36.

79. *Id.* at 136.

80. *Id.* at 137; see also Babcock et al., *supra* note 59, at 289 (showing that role influenced how subjects framed choice).

81. Rachlinski, *supra* note 2, at 140.

82. *Id.* at 142. They were also willing to sacrifice ethics in the loss frame. *Id.*

Rachlinski argues that the structure of litigation places defendants in loss frames and plaintiffs in gain frames. Thus, defendants are more likely to pursue risk-seeking options—refusing early settlement or taking a chance at trial—while plaintiffs are more likely to pursue risk-averse choices—seeking settlement in lieu of trial or for less than the desirable amount.⁸³

Guthrie and co-author Russel Korobkin observed how framing influenced the eventual amount of a settlement.⁸⁴ They set out to test a conventional assumption: negotiators who began with an extreme offer were less likely to reach settlement. The normative model predicted this outcome because the extreme offer would make subsequent concessions and compromise difficult.⁸⁵ They found, instead, that negotiators who began with a *moderate* offer were less likely to reach settlement.⁸⁶ This is because “a litigant who opens a negotiation with a moderate settlement offer inadvertently erects psychological barriers—namely, anchoring and adjustment effects and dissonance avoidance—that reduce the likelihood that his adversary will accept a final settlement offer.”⁸⁷

The rational choice model of settlement behavior cannot persuasively explain these results.⁸⁸ The rational choice model suggests that an extreme initial offer would alienate the other party.

[A] rational plaintiff should determine whether a settlement offer or trial has a higher risk-adjusted present value and select accordingly. The fact that a defendant *previously* made a moderate opening offer, rather than an extreme opening offer or no offer at all, should not systematically influence plaintiffs’ responses to the final settlement offer.⁸⁹

83. Rachlinski does not doubt that people seek the best possible outcome. Rather, he argues that people may be hindered in their ability to identify the best outcome. *Id.* at 118. Cognitive factors influence their ability to accurately evaluate available information. *Id.* These are not character flaws. That is, this inability does not stem from a lack of effort or motivation. Rather, “the structure of many choices lures people into making decisions that are suboptimal, from the perspective of a rational model.” *Id.*

84. Korobkin & Guthrie, *supra* note 76, at 1, 4-5.

85. *Id.* at 4.

86. *Id.* at 5.

87. *Id.*

88. *Id.* at 16.

89. *Id.* at 17.

The authors argue that prospect theory explains these results.⁹⁰ Initial offers may anchor the opposing side's expectations. Subsequent offers are measured by their distance from the initial anchor. The distance from an extreme initial offer to a final moderate settlement is greater than the distance from a moderate opening to a final moderate offer. The first settlement will appear more substantial because the other side has "lost" more or the plaintiff will have "gained" more than the second settlement scenario.⁹¹

The foregoing indicates that framing has a powerful effect on clients' litigation decisions. It has more impact than other psychological forces, it causes plaintiffs and defendants to tolerate levels of risk, and it influences the size of the eventual settlement. Framing also seems to play a role when people decide to sue and whether they are willing to pursue long-shot lawsuits.

VI. HOW FRAMING INFLUENCES THE DECISION TO SUE

Prospect theory predicts that plaintiffs will be risk-averse when considering settlement while defendants will be risk-seeking. Plaintiffs must decide to file a lawsuit in the first place, however. Plaintiffs make a decision to sue within a frame in the same way that they must make

90. Korobkin & Guthrie, *supra* note 76, at 18. Besides the anchoring and adjustment heuristic, the authors also suggest that cognitive dissonance plays a role in this context. Their study showed that plaintiffs who had earlier rejected a moderate settlement were reluctant to later accept it. *Id.* at 20-21. They believe this results from an effort to avoid cognitive dissonance. Accepting an offer that the party earlier rejected creates cognitive dissonance: the person has to explain to herself why she now accepts the offer. Because dissonance is a negative state, people are motivated to avoid it. Thus, either the litigant will reject the offer or make an effort to rationalize how the offer or the conditions are different now. *Id.* at 20. In any event, this bolsters the anchoring effect of the initial offer. Since the parties are most likely to settle within the hypothetical bargaining range—the range where the two parties' realistic expectations overlap—an opening moderate offer will be closer to that range than an opening extreme offer. Once a party rejects the opening moderate offer, it will be difficult to overcome the cognitive dissonance created from accepting the same or a reasonably final offer. *Id.* at 20-21.

91. *Id.* at 19. The authors noted:

Subjects in Group A, who received the extreme initial offer of \$2,000, expected to settle for a relatively small amount, so the final offer of \$12,000 appeared generous. Subjects in Group B, who received a moderate initial offer of \$10,000, expected to settle for a relatively large sum, so the final offer of \$12,000 did not appear as favorable by comparison. The moderate opening offer apparently anchored subjects' expectations in a way that tended to discourage settlement.

Id.

decisions about settlement. Whether or not that choice is framed as a gain or a loss will make the plaintiff more or less risk-seeking. Risk-averse plaintiffs may avoid lawsuits while risk seeking plaintiffs may more eagerly pursue lawsuits.

Professor Chris Guthrie suggests that framing may influence the filing of frivolous lawsuits.⁹² Guthrie's hypothesis is that the decision frame in early litigation decisions induces risk-seeking behavior in some plaintiffs and risk-averse behavior in some defendants.⁹³ He suggests that whether or not a person will be risk-averse or risk-seeking depends not only on perceived gains and losses, but also on the probability that the gain or loss will occur.⁹⁴ Thus,

[i]ndividuals are likely to underweight moderate-to-high-probabilities, which enhances risk aversion for moderate-to-high probability gains and risk seeking for moderate-to-high probability losses. Individuals are likely to overweight low probabilities, which induces risk seeking for low-probability gains and risk aversion for low-probability losses.⁹⁵

A long-shot lawsuit, which may or may not be "legally" frivolous, can be seen as a low-probability gain.⁹⁶ At the outset, these plaintiffs see litigation as a low-probability gain and thus will tend toward risk

92. Guthrie, *supra* note 58, at 167-68.

93. *Id.* at 168.

94. *Id.* at 177-78.

95. *Id.*

96. *See id.* at 185-87. Guthrie defines a frivolous claim as one "in which the plaintiff has a low probability of prevailing at trial." *Id.* at 186. The Model Rules of Professional Conduct state that an action "is not frivolous even though the lawyer believes that the client's position ultimately will not prevail." MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2 (2001) [hereinafter MRPC]. Rather, an action is frivolous if it is undertaken

primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Id. Thus, Guthrie's operationalized definition of frivolous claims is broader than the ethical standard. It is not necessary to resolve this difference, however. Guthrie's insight that the frames for plaintiffs and defendants may shift helps explain settlement behavior and gives lawyers a helpful and realistic tool to examine their professional behavior at every stage of litigation.

taking.⁹⁷ Defendants, on the other hand, might see long-shot cases as low-probability losses and, therefore, be inclined toward risk aversion.⁹⁸

Guthrie's experiments support the hypothesis about the plaintiffs' and defendants' initial frames.⁹⁹ Risk-seeking plaintiffs created a "psychological leverage" that gave them power in at least one important dimension during settlement negotiations: a higher risk tolerance than the opponent.¹⁰⁰ Plaintiffs used this power by demanding more than the potential value of their case, while risk-averse defendants responded by offering more than they believed the case was worth. This process creates a settlement or drives up the final settlement amount.¹⁰¹

Guthrie's insights into plaintiffs' risk-seeking behavior may not be limited to frivolous litigation. He does not confine his definition of frivolous litigation to actions that would violate the Rules of Professional Conduct. Thus, many plaintiffs might be initially risk-seeking because plaintiffs will frame their situation as a loss. They have already suffered some "damage." Unless they file a lawsuit, they face the certainty of never recovering anything for that loss. Plaintiffs will not have the legal expertise to accurately evaluate a case. They may see a lawyer and decide to file a lawsuit because they believe that they have "nothing to lose" by filing a suit. Filing a lawsuit is like rolling dice. Unless gamblers roll the dice, they have no chance to gain anything.

At the same time, the nature of the legal system may encourage risk seeking plaintiffs in the first place. Plaintiffs must go through a complicated and difficult psychological and social process even to seek legal advice.¹⁰² It is possible that this process weeds out many risk-

97. Guthrie, *supra* note 58, at 187. They may approach a lawyer in a moderate-to-high probability loss frame. That is, the plaintiffs have already suffered some definite loss that caused them to seek legal advice. This frame should also induce risk-seeking behavior. Thus, the plaintiff may have two risk factors working at the beginning of a case. *Id.*

98. *Id.* at 187-88. As with plaintiffs, defendants may have two factors tending them toward risk aversion at the outset of litigation. In contrast to the plaintiff, the defendant may see the situation that may result in a lawsuit in a moderate-to-high probability gain frame. That is, the defendant's actions may have resulted in some gain already. Presumably, whatever the defendant did that the plaintiff objected to must have been advantageous to the defendant in the first place. Thus, if the defendants perceive the situation in this way they will likely be risk-averse even before a lawsuit is filed so as to consolidate their gain. *Id.*

99. *See id.* at 189-91.

100. *Id.* at 191.

101. *Id.* at 192.

102. *See* William L.F. Felstiner, Richard L. Abel, & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, and Claiming . . .*, 15 LAW & SOC'Y REV. 631, 633-37 (1980-81) (outlining how litigants must first perceive that they have been

averse plaintiffs. They may become frustrated by the arduous process of finding a lawyer and deciding to sue. They may also believe that they will experience more losses in time, status, or money if they file a lawsuit. These plaintiffs may abandon any idea of a lawsuit. Thus, many plaintiffs may initially be risk-seeking because they may have framed the case as a loss and therefore be more willing to go through the difficult process of finding and consulting a lawyer.

Nevertheless, most lawsuits settle and most plaintiffs are perceived as risk-averse as trial approaches. Even risk-seeking plaintiffs in long litigation have to put aside risk-seeking behavior long enough to accept the defendant's settlement offer. Two factors may cause these formerly risk-seeking plaintiffs to become risk-averse. First, the parties may change their frames about lawsuits by "endowing" the status quo so that previously risk-seeking plaintiffs become risk-averse. Second, lawyers may influence settlement patterns either by de-biasing litigants or offering alternative ways of analyzing the settlement options.

With the passage of time, the plaintiff may come to feel entitled to the initial offer (either the amount asked for in the lawsuit or the first settlement offer). This belief "endows" the initial offer with value to the plaintiff. When this happens, the plaintiff shifts to a gain frame, encouraging settlement. Rachlinski points out that

[t]he sheer duration of litigation virtually ensures that the parties will have an opportunity to view the costs and benefits of litigation differently over time. [During the course of the lawsuit] plaintiffs [must] have "endowed" the loss that gave rise to the suit that they have commenced By filing suit, the plaintiff attempts to reallocate a loss to the defendant, and hence the plaintiff might be making choices in the domain of losses. Over time, however, the loss becomes part of the plaintiff's "endowment"; it becomes the status

harmed, then decide that someone else is responsible for their harm, and then seek a remedy from the wrongdoer, and describing the process as "subjective, unstable, reactive, complicated, and incomplete"); Marilyn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 LAW & SOC'Y REV. 105, 105-06 (1990) (describing how litigants maneuver through the "thickets of diversion" to file medical malpractice lawsuits); Phoebe A. Morgan, *Risking Relationships: Understanding the Litigation Choices of Sexually Harassed Women*, 33 LAW & SOC'Y REV. 67, 70-71 (1999) (showing how women who consider filing sexual harassment lawsuits take into account the risk to their maternal, marital, and familial relationships); Rosalie R. Young, *The Search for Counsel: Perceptions of Applicants for Subsidized Legal Assistance*, 36 BRANDEIS J. FAM. L. 551, 571 (1997) (observing that because of institutional, professional, and social obstacles, subjects brought lawsuits only when there seemed to be no other way to solve their problem).

quo. Upon filing the suit, the plaintiff is attempting to gain relative to her status quo. Thus, . . . the plaintiff has recast a loss as a gain.¹⁰³

This endowment process explains how plaintiffs re-frame the case and thereby become risk-averse. At the same time, however, defendants may be re-framing the case to become more risk-seeking. Defendants begin in a gains frame. That is, when lawsuits are filed, the defendants have lost nothing. As the lawsuit advances, the defendants' losses in time and money mount. When these losses become seen as the status quo, defendants shift to a risk-seeking mode. They now may be willing to go to trial because they believe they have nothing to lose.

Because the parties are going in opposite framing directions, settlements should still be difficult to achieve unless some other factor causes the parties to accept a final re-framing.¹⁰⁴ Prospect theory cannot explain how parties who have framed the case in opposite ways can reconcile their perspectives and achieve settlement. The parties have to overcome the pull of their frames to evaluate the case in a different way. Lawyers may allow clients to do this.¹⁰⁵ If a lawyer can help the client re-frame the case, then cases should settle if lawyers get defendants to adopt risk-averse frames. If lawyers help the client evaluate the case outside of the client's natural frame, then cases should settle whenever the benefits of settlement outweigh the costs of going to trial.

103. Rachlinski, *supra* note 2, at 147.

104. It may be that settlement happens because both plaintiff and defendant "endow" the status quo. Even though the parties may be operating in different frames, they both may have invested enough into the status quo to endow it with value. If so, the status quo bias may push both parties to preserve the status quo and cement the value with which each has endowed the status quo. This might be enough to push them toward mutual agreement and out of contrary risk frames. See Birke & Fox, *supra* note 9, at 1 (discussing status quo bias and other psychological factors and ways to remedy their harmful effects); Korobkin & Ulen, *supra* note 1, at 1109-10 (discussing endowment effect and its implications for property rights).

105. Chris Guthrie suggests that the preference for settlement is created by the desire of the parties to avoid regret. Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 64. Guthrie argues that both rational choice and framing theories cannot account for the high rates of settlement and ignore the role of emotion. *Id.* at 45. He proposes the "regret aversion theory of litigation." *Id.* Litigants who reject an offer and go to trial learn the outcome of both courses of conduct while litigants who settle do not learn what would have happened at trial. *Id.* at 72. Thus, settlement "offers litigants an opportunity to avoid, or at least minimize, regret, while trial increases the likelihood litigants will experience regret" and, therefore, some litigants should prefer settlement over trial. *Id.* at 72-73. Even in this scenario lawyers can play an important role by recognizing regret-adverse clients and situations and counseling the client accordingly. *Id.* at 81-88.

There is evidence that lawyers do both of these things. The effects of framing may be mitigated for lawyers as a group because of the way lawyers are trained to analyze and solve problems. Lawyers may encourage clients to evaluate options on the basis of clients' costs and benefits. In addition, defense lawyers may be more risk-averse as a group. Thus, they may ameliorate defendants' natural risk-seeking in settlement.

VII. HOW LAWYERS ENCOURAGE SETTLEMENT BY MITIGATING THE FRAMING EFFECT

Lawyers may be pushing cases toward settlement by mitigating the risk-seeking behavior of the parties. As Jeffrey Rachlinski notes:

Attorneys may mitigate the costly consequence of framing by reconstructing the litigation for the client. Despite motive, opportunity, and assistance, reframing may be difficult and a litigant may spend a great deal of time and money before being able to see the case from a different perspective. But it is certainly possible that passive intermediaries, such as time, and active intermediaries, such as attorneys, can recast litigation in the most sensible light for the litigants, thereby mitigating framing's influence.¹⁰⁶

Lawyers overstate the level of risk, are prone toward a cost/benefit analytical style, and are actors in a system that encourages efficient case processing. These forces serve as a counterweight to a client's risk-seeking behavior. This may encourage risk-seeking plaintiffs to endow the status quo and tend toward risk-aversion. It may offer risk-seeking defendants a reality check when they want to "roll the dice" at trial. And it may subtly coerce criminal defendants into plea bargains when they should take the risk of trial.

One way that lawyers encourage risk-averse behavior and therefore settlement is to overstate the level of risk. Although this is difficult to document empirically, conventional wisdom holds that lawyers frequently overstate the risk.¹⁰⁷ Overstating risk may be a way for lawyers to make more money. The more investigation the case needs,

106. Rachlinski, *supra* note 2, at 147-48; *see also* Felstiner, Abel, & Sarat, *supra* note 102, at 639-49 (showing how people and institutions are the vehicles by which a person transforms a harmful event into a grievance); Morgan, *supra* note 102, at 70-72 (showing how women sought advice from family and friends in making litigation decision).

107. Langevoort & Rasmussen, *supra* note 64, at 375-76.

the more hours a lawyer can bill.¹⁰⁸ Psychological dynamics may also powerfully influence a lawyer's perception of the risk.¹⁰⁹ Lawyers will be tempted to take the safe course and estimate just enough risk for the lawyer to manage.¹¹⁰ Thus, overstating the risk may be a way to avoid the chance of failure present in accurately stating the risk. In either case, the lawyer's overstatement of the risk may counterbalance the risk-seeking client's understatement of the risk.

Lawyers are faced with considerable uncertainty when initially asked for advice. They must predict the future actions of people and institutions that are subject to many intervening forces. Under these circumstances, people tend toward "defensive pessimism": dwelling on the potential negative consequences of the possible choices.¹¹¹ Langevoort and Rasmussen state: "[Caution] is particularly likely when the decision-maker faces a risk of loss. A transaction found unlawful involves a distinct loss to the client (not to mention the lawyer). Second, . . . lawyers' norms are likely to generate a decision frame that prompts a diligent search for risk."¹¹²

Thus, it is possible that by persistently overstating the level of risk, lawyers mitigate the effect of risk-seeking clients. Whether this overstatement comes about to increase a lawyer's income or because the lawyer is excessively pessimistic, the result is the same: the excessively optimistic risk-seeking client gets to see the case from a fundamentally different perspective. This may mitigate the risk-seeking effects of a loss frame on the client.

Lawyers may also mitigate framing effects because they are less prone to them. In other words, lawyers may be different or see things differently.¹¹³ Law school myth holds that lawyers are taught to think in

108. *Id.* at 389-90 (showing how the per-hour fee arrangements create incentives toward overstatement of risk).

109. *Id.* at 394-95. The lawyer may want to enhance his or his law firm's reputation with this and other clients. *Id.* at 394. Leading a client astray into a risky venture can cause great reputational damage. At the same time, clients are not in the position to effectively evaluate a lawyer's advice. *See id.* If the lawyer counsels against a course of action there is rarely a way to study the alternative course. On the other hand, if the lawyers counsels action that changes the status quo, the client has a way to evaluate the lawyer's advice. Langevoort & Rasmussen, *supra* note 64, at 394. If the choice is successful, then the advice was essentially self-fulfilling. But if the choice does not lead to success, the client will immediately know that the lawyer's advice was faulty. *Id.* In short, clients can only know the quality of the lawyer's advice after the fact. *Id.*

110. Langevoort & Rasmussen, *supra* note 64, at 394-95.

111. *Id.* at 424 (citing Hillel J. Einhorn & Robin M. Hogarth, *Decision Making Under Ambiguity*, 59 J. BUS. S225 (1986)); *see also* HOGARTH, *supra* note 23, at 101-09.

112. Langevoort & Rasmussen, *supra* note 64, at 424-25.

113. *See* Fernando Colon-Navarro, *Thinking Like a Lawyer: Expert-Novice Differences*

rigorous, objective, and analytical ways. Lawyers in fact do use a rational or objective approach more consistently than their clients do.¹¹⁴ As Guthrie and Korobkin point out, lawyers were less likely than clients to be influenced by psychological factors.¹¹⁵ Lawyers may be more likely to approach settlement using an objective cost/benefit calculus. That is, they are more likely to evaluate settlement decisions on the basis of the expected value of the various options without regard to the frame in which those options are presented.¹¹⁶

These authors suggest that this different analytical orientation begins early and is reinforced in law school and in law practice. Thus,

[t]o gain admission to law school, an applicant must demonstrate a higher-than-average ability to think analytically. Once in law school, legal training reinforces analytical problem-solving. By persistently emphasizing the careful reading of appellate cases, legal training teaches lawyers to analyze legal conflicts carefully and unemotionally rather than to react to them viscerally. Once on the job, this analytical training serves as a lens through which lawyers view and evaluate their experiences.¹¹⁷

Personal factors may also play a role. Lawyers as a group may be made up of people who are more inclined toward a "hard" approach to problems rather than a "soft" approach. Considerable data over the years has highlighted some of the cognitive differences between lawyers and the rest of the population.¹¹⁸ Professor Susan Daicoff has collected all of this data and concludes that lawyers do tend toward a more analytical, objective, and impersonal approach than other people.¹¹⁹

in *Simulated Client Interviews*, 21 J. LEGAL PROF. 107, 127-33 (1997) (concluding that experience leads to more effective interviewing techniques).

114. Korobkin & Guthrie, *supra* note 9, at 82.

115. *Id.*

116. *Id.* at 121-22.

117. *Id.* at 87; see also Colon-Navarro, *supra* note 113, at 120 (noting that clinical students are better able to assimilate interviewing model than inexperienced students).

118. See, e.g., Don Peters, *Forever Jung: Psychological Type Theory, the Myers-Briggs Type Indicator and Learning Negotiation*, 42 DRAKE L. REV. 1 (1993).

119. Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997); see also Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically Derived Attorney Personality Attributes*, 11 GEO. J. LEG. ETHICS 547 (1998). There is some disagreement as to whether or not these differences are gender related. Compare RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989), with Bryna Bogoch, *Gendered Lawyering: Difference and Dominance in Lawyer-Client Interactions*, 31 LAW & SOC'Y REV. 677 (1997).

Lawyers may be more objective than their clients and therefore they may mitigate the risk-seeking behavior of some clients. This would lead cases toward settlement because this objectivity counteracts the effect that loss frames have on clients. A lawyer's objective analysis of settlement options is more likely to point in a risk-averse direction and, thus, lead risk-seeking clients to see the case in a more neutral frame.

In any event, it appears that lawyers may mitigate framing's effects on risk-seeking clients by creating a climate of risk aversion. Whether this happens because of lawyers' inherent risk aversion or a lawyer's complicity in a powerful system, the effect is to push cases toward settlement when prospect theory would suggest that cases should go to trial. Whether this is a good thing depends on whether lawyers can more consciously use prospect theory's insights when counseling their clients. To the extent that lawyers become aware of the power of loss and gain frames, lawyers should be able to better advise their clients. To the extent that lawyers remain unaware of prospect theory's insights, any improvement in lawyer-client decision making will be random. The next section sets out a few suggestions for improving client counseling.

VIII. USING PROSPECT THEORY TO BECOME BETTER LEGAL COUNSELORS

Improvements in legal counseling techniques should proceed from a realistic view of general human psychology and the unique psychological dynamics of law practice.¹²⁰ Because most choices can be framed in both a gain and a loss frame, the lawyer can avoid the most damaging effects of framing by offering alternative ways of viewing choices. Rachlinski notes that

an attorney may have some power to reframe a settlement offer, sparing the client the most costly aspects of framing . . . by pointing out the losses that the defendant is sure to face from continued litigation or by pointing out that a settlement offer is an improvement over previous offers. The attorney is in a position to wrestle the defendant out of the loss frame that would lead the defendant to make risk-seeking choices. The principle benefit that framing theory presents for attorneys lies in the attorney's perspective on the client's choices. Framing asserts, after all, that clients are in a bad position to make decisions in their best interest. To the extent that an attorney is

120. Birke & Fox, *supra* note 9, at 1 (stating that awareness of psychological principles will make lawyers better negotiators); Guthrie, *supra* note 58, at 209; Langevoort, *supra* note 18, at 78 (stating that social science suggests that lawyer norms, like loyalty, may compromise otherwise ethical behavior).

concerned with promoting the client's best interest, framing theory gives them a significant role.¹²¹

First, lawyers may be in a unique position to help clients reframe litigation choices because lawyers may be more likely to evaluate decisions using a rational choice or financial value framework.¹²² This offsets the tendency of clients to be influenced by loss or gain frames. Moreover, a lawyer's overstatement of the risk may counterbalance the unreasonable optimism to which some clients may fall prey.¹²³

Thus, lawyers may be able to mitigate the influence of "irrational" psychological factors in a client's decision if they take an active role in litigation decisions.¹²⁴ Guthrie and Korobkin studied the effect to which information from a lawyer could influence a client toward settlement. They looked at four different ways that an attorney might provide information about a settlement offer.¹²⁵ Although their results are not absolutely conclusive, they generally support the intuition that lawyers have considerable influence on whether clients settle cases.¹²⁶ Clients

121. Rachlinski, *supra* note 2, at 171-72; *see also* Birke & Fox, *supra* note 9, at 46-47 (suggesting that negotiators use an objective system to add up value "across all issues" and thus avoid measuring gains and losses relative to an artificial reference point).

122. Korobkin & Gurthrie, *supra* note 9, at 82.

123. *See* Langevoort & Rasmussen, *supra* note 64, at 422-25 (listing the possible factors that might encourage underestimation of the risk); Richard W. Painter, *Lawyers' Rules, Auditors' Rules and the Psychology of Concealment*, 84 MINN. L. REV. 1399, 1419-20 (2000).

124. Korobkin & Gurthrie, *supra* note 9, at 120. They noted:

[A]t least in some circumstances, lawyers taking an active role in their client's litigation decisionmaking processes *probably* can affect the extent to which psychological factors, as opposed to the comparison of the expected financial values of alternative litigation options, motivate litigants' ultimate decisions.

Id.

125. *Id.* They divided the experiments into two categories. Two groups were given a scenario involving a car accident meant to test the effects of framing. The second group was given a scenario involving a broken promise by their landlord meant to test the effects of equity seeking. In the lawyer-influence experiments, they subdivided these two groups into two more categories. They termed the first the "Lawyer as Educator" and included: (1) "The Psychology Lesson," where lawyer-subjects provided clients with information about how cognitive psychology affects decisionmaking; and (2) "Consider the Opposite," where lawyer-subjects asked clients to look at the problem from the opposite perspective. They called the second category "The Lawyer as Decisionmaker" and included: (1) "Lawyer Recommendation with Explanation," where the lawyer advised the client to accept the settlement offer with an explanation of the financial value of doing so; and (2) "Lawyer Recommendation Without Explanation," where the lawyer advised the client to accept the settlement offer but provided no explanation. *Id.* at 115-18.

126. *Id.* All four of the groups had increased rates of settlement. *Id.* at 119. The

who were given an alternative frame for the decision by learning what the lawyer would choose were more likely to change their minds than other clients.¹²⁷ Nevertheless, the study showed that not only are lawyers less likely to be influenced by psychological dynamics, but also that they can de-bias the decision process of some of their clients.¹²⁸ The most interesting feature of these results shows the vitality of framing effects over other psychological variables.¹²⁹

These findings call for a more balanced approach to legal counseling. First, this analysis makes a strict client-centered position difficult to maintain.¹³⁰ Although there were interviewing texts available before theirs,¹³¹ Binder and Price's 1977 book on the subject quickly became the standard for interviewing and counseling.¹³² Their client-centered approach instructed lawyers to refrain from interfering with client choice as much as possible.¹³³ They argued that lawyers should almost never give their opinion or advice to a client.¹³⁴ Rather, the lawyer

increases were statistically significant for the landlord-tenant group, but not significant for the car accident group. *Id.* at 119-20.

127. *Id.* at 121. Clients were more likely to have a more favorable attitude toward settlement when the lawyer simply advised them of their choice without any explanation, but the difference was not statistically significant. *Id.*

128. *Id.* But see Cross, *supra* note 56, at 25 (pointing out that preference for settlement ignores the value that judicial precedent has for society); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L. J. 1073, 1076 (1984) (stating that pressure to settle forces litigants without means to accept less than they are entitled to and robs society of potentially far-reaching precedents).

129. Korobkin & Guthrie, *supra* note 9, at 121 ("Cognitive heuristics may be more deeply ingrained in people's minds than socially-constructed desires such as the desire to be treated fairly or to have the validity of one's position acknowledged.").

130. *Id.* at 126.

131. See, e.g., GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS* 124-272 (1978); HARROP FREEMAN & HENRY WEIHOFEN, *CLINICAL LAW TRAINING* (1972); MICHAEL MELTSNER & PHILIP SCHRAG, *PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION* 125-57 (1974); THOMAS L. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* (1976); ANDREW WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS* (1976). With one exception, these books also borrowed heavily from the psychological literature. Bellow and Moulton diverge in that they looked for models in the medical literature on doctor-patient counseling and titled one of their sub-chapters *Client Interviewing as Diagnosis*. BELLOW & MOULTON, *supra*, at 140.

132. BINDER, BERGMAN, & PRICE, *supra* note 15; DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). The authors, now including Paul Bergman, made the connection to client-centered psychotherapy more direct in their 1991 edition by renaming the work *LAWYERS AS COUNSELORS*.

133. Binder and Price, in their 1977 book, suggest that when a client is having trouble making a decision, "providing the client with the option of choice . . . should usually be a last resort." BINDER & PRICE, *supra* note 132, at 154.

134. *Id.* In their 1977 book, the authors said that "we believe the appropriate

should serve as the conduit of the information which the client might need to evaluate his or her options. Binder and Price conclude: "Because client autonomy is of paramount importance, decisions should be made on the basis of what choice is most likely to provide a client with maximum satisfaction."¹³⁵

In their 1991 book, Binder, Bergman, and Price note that "unless a client's decision violates the law or is clearly immoral, principles of client autonomy suggest that client values prevail."¹³⁶ Lawyers facilitate this decision-making by providing clients with a complete list of options and sufficient information on the pros and cons of each option. According to those authors,

counseling is the process by which lawyers help clients decide what course of action to adopt in order to resolve a problem. The process begins with identifying a problem and clarifying a client's objectives. Thereafter, the process entails identifying and evaluating the probable positive and negative consequences of potential solutions in order to decide which alternative is most likely to achieve the client's aims.¹³⁷

response to the client's request for the lawyer's opinion should be an explanation of why the client should decide." *Id.* at 187. When asked for their opinion, they noted that lawyers should "refrain from stating what they would do." *Id.* at 186. The only exception was where the lawyer had a "fairly good sense of the client's value system" because of "the lawyer's past dealings with the client." *Id.* Even when the client will make an "extremely detrimental decision" the lawyer should not intervene "unless the client's mental state will justify the appointment of a general representative." *Id.* at 203, 205. The authors altered this approach slightly in their 1991 edition of the book, sharpening the line between advice about consequences and advice about ultimate decisions. BINDER, BERGMAN, & PRICE, *supra* note 15, at 259-60. Here they argue that lawyers can give advice when requested so long as the advice is framed by reference to the client's values. *Id.* at 348-49. They also give lawyers more leeway to suggest alternatives in situations where the client is incapable or unwilling to make choices or the client makes a bad decision. *Id.* at 350-61.

135. BINDER, BERGMAN, & PRICE, *supra* note 15, at 261. Defining "maximum satisfaction" presents a problem not unlike defining what is a "rational" choice. See Korobkin & Ulen, *supra* note 1, at 1060-67 (showing that definitions of rationality range from accepting whatever choice a person makes as rational to denoting only wealth-maximizing choices as rational). To a certain extent, client-centered advocates substitute autonomy for rationality. That is, they deem the client satisfied if the client makes the decision, no matter what the consequences of that decision may be. In other words, it must be a good decision because the client made it.

136. BINDER, BERGMAN, & PRICE, *supra* note 15, at 282. *But see* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 47-48 (1994) (encouraging lawyers to collaborate with clients in making moral decisions because lawyer and client should be "mutually concerned that both of them be and become good persons"); THOMAS L. SHAFFER & JAMES R. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL 246-47 (3d ed. 1997) (suggesting that the choice of counseling is always "shared choice" between client and lawyer).

137. BINDER, BERGMAN, & PRICE, *supra* note 15, at 259-60 (modifying the authors'

In this view, lawyers are largely conduits of information. They serve their clients well when they allow them to make fully informed and rational decisions. They serve their clients poorly when they usurp their clients' autonomy. Thus,

[a lawyer] cannot determine what decision is likely to lead to maximum client satisfaction through reference to an external standard. A rational choice can be made only by forecasting the likely economic, social, psychological and moral ramifications of a decision and determining their relative importance. While [a lawyer] may help a client identify a decision's likely ramifications only a client can determine their relative importance.¹³⁸

This pure client-centered approach cannot be maintained. Clients expect substantive as well as procedural advice.¹³⁹ In fact, legal competence and personal rapport are equally important elements in client satisfaction.¹⁴⁰ The most satisfied clients were the ones who perceived their lawyers as both socially and legally competent.¹⁴¹ In other words, clients expect lawyers to provide their legal and institutional expertise. They do not expect their lawyers to remain passive when it comes to substantive and procedural advice.

Second, lawyers have an ethical and a moral responsibility to help clients reach decisions that are in the clients' best interest.¹⁴² It would be

definition from their earlier work).

138. *Id.* at 263. The critics of client-centered counseling use the same assumptions. Indeed, the most prominent criticism is that Binder, Bergman, and Price are not client-centered enough or should be client-centered in a better way. Stephen Ellman wants to put more client into it. Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987). He argues that client-centered counseling is fundamentally manipulative. *Id.* at 743 (stating that client-centered counseling allows the attorney to unilaterally and manipulatively impose the goal of full participation). Robert Dinerstein concludes that, on balance, the arguments in favor of client-centered lawyering outweigh those against it. See generally Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990). The net effect of these criticisms suggests that clients need more autonomy, which is another way of saying that they will make rational choices if lawyers stay out of their way.

139. Korobkin & Guthrie, *supra* note 9, at 126 ("A client generally presumes her lawyer will provide substantive advice, rather than just procedural assistance.").

140. See Stephen Feldman & Kent Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 LAW & HUM. BEHAV. 311, 317, 320 (1981). The authors found that high competence and high relational skills were positively correlated to highest level of client satisfaction. *Id.* at 320.

141. *Id.*; see COCHRAN, DIPIPPA, & PETERS, *supra* note 7, at 58-60 (discussing this study and its relation to effective legal interviewing).

142. There is a question of what "best interests" might mean. See Korobkin & Ulen, *supra* note 1, at 1060 (noting that without a single definition of rational choice theory

an unusual ethical world where a lawyer would remain silent when a client pursues a course of conduct that the lawyer knows is not in the client's interest.¹⁴³ Client-centered counseling cautions against intervention even in this scenario.

[C]lients are usually unable to communicate a precise description of the weights which they place on the probable consequences and an accurate sense of the degree to which they are "risk avoiders." In our opinion, without access to this information, the lawyer usually cannot determine what course of action would be best suited for the client. We therefore conclude that usually the lawyer should leave the final decision for the client to make on the basis of the client's own intuitive weighing process.¹⁴⁴

Client-centered counseling uses client values as the decision touchstone. Lawyers are to ensure that clients make decisions that are consistent with their values. But because the lawyer may not be able to accurately discern the clients values, client-centered advocates fear that lawyer intervention and advice will steer clients to decisions that are consistent with lawyer values and not client values.¹⁴⁵

That lawyers and clients often have conflicting interests suggests once again that decisions ought to remain in [the] client's hands. Even if you could determine a client's values and preferences, the temptation to decide the matter in a way which advances your personal interests is reason to allow [the] client to make the ultimate choice.¹⁴⁶

it is difficult to determine when a person has acted "rationally").

143. Korobkin & Guthrie, *supra* note 9, at 126.

144. BINDER & PRICE, *supra* note 132, at 150:

145. BINDER, BERGMAN, & PRICE, *supra* note 15, at 265 ("[E]ven if you could become fully conversant with a client's value and preference structure, you perhaps ought not be trusted to make important decisions because of potential conflicts of interest.").

146. *Id.* There is a difference between allowing the client to make "the ultimate decision" and advising the client along the way. The Rules of Professional Conduct dictate that lawyers must accept the ultimate decisions of clients. See MRPC, *supra* note 96, R. 1.2(a).

A lawyer shall abide by a client's decisions concerning the objectives of representation . . . [and] whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, *after consultation with the lawyer*, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Id. (emphasis added). The issue is not whether lawyers should make these "ultimate decisions" for their clients. They cannot. Rather, the issue is how lawyers conduct the *consultation* that goes into a client's "ultimate decision." The Model Rules define "consultation" as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Id.* Model Rule 1.2(a) requires consultation on the means used to pursue the client's objectives. *Id.* Model

Interestingly, Binder and Price term the difference in lawyer and client transactional risk assessment a "conflict of interest." Prospect theory, however, shows that a client's relative preference for risk-seeking may not be "rational" in those circumstances. A lawyer's risk aversion in that situation is not a conflict of interest, it is sound professional behavior.¹⁴⁷ As Professor Guthrie and Korobkin conclude:

The lawyer who shies away from making recommendations altogether, or who makes them only when pressed, risks abetting client mistakes; the lawyer who makes recommendations without providing sufficient explanation[,] risks persuading clients to abandon good decisions, in the sense that they maximize client utility, for bad ones.¹⁴⁸

Lawyers should not adopt an authoritarian, lawyer-centered model either. That model does not produce satisfied clients.¹⁴⁹ When lawyers dominate their clients¹⁵⁰ it leads to poor representation¹⁵¹ and a break-

Rule 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. *Id.* R.1.4(b). Thus, this author believes the rules seem to require a lawyer to provide information about consequences, psychological dynamics, and decision processes. The danger in the client-centered formulation is that it might make lawyers too passive in situations where their input can help the client considerably.

147. Sunstein, *supra* note 16, at 2639. Sunstein states:

If people's choices are based on incorrect judgments about their experiences *after choice*, there is reason to question whether respect for choices, rooted in those incorrect judgments, is a good way to promote utility or welfare [O]bjections to paternalism should be empirical and pragmatic . . . ; such objections should not be *a priori* in nature.

Id.

148. Korobkin & Guthrie, *supra* note 9, at 136; *see also* Sunstein, *supra* note 16, at 2639 (questioning how one can override another's preference in light of the on-going psychological and social construction of individual preferences).

149. Feldman & Wilson, *supra* note 140, at 312-13; Sunstein, *supra* note 16, at 2639 ("Recent revisions in understanding human behavior . . . greatly unsettle certain arguments against paternalism in law. They do not make an affirmative case for paternalism, but they support a form of anti-antipaternalism.").

150. There is considerable literature on the ways that lawyers dominate their clients. *See* William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992); Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 SOC. PROBS. 599 (1979); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 BUFF. L. REV. 177 (1986); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989); *see also* COCHRAN, DIPIPPA, & PETERS, *supra* note 7, at 11-20 (discussing these studies in relation to legal interviewing and counseling); Bryna Bogoch, *Power, Distance, and Solidarity: Models of Professional Client*

down in communication between lawyer and client.¹⁵² In addition, psychological factors may influence how lawyers make decisions. They may overstate risk in ways that are self-serving. They may make bad choices that result in more loss to themselves and to their clients. And they may be pressured by institutional factors to undermine even the beneficent effects of framing.

For example, prospect theory cannot explain why so many criminal defendants take plea bargains.¹⁵³ Criminal defendants confronted with plea bargains are in loss frames in ways that are even more obvious than defendants in civil cases. They must choose between certain adverse consequences (a criminal record and possibly jail time) and the possibility of even greater adverse consequences (conviction at trial on more serious charges).¹⁵⁴ Nevertheless, over ninety percent of all criminal cases are settled by plea bargains.¹⁵⁵ Professor Birke believes that bad advice is the only plausible explanation for this phenomena.¹⁵⁶ Defense attorneys may get pleas from their clients either by giving too little information about the value of a trial or by framing offers in ways that cause defendants to perceive more value in them than actually exists.¹⁵⁷ Institutional pressures may influence attorneys to perceive

Interaction in an Israeli Legal Aid Setting, 5 DISCOURSE & SOC'Y 65 (1994).

151. See DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 41-61 (1974) (showing that clients who participated actively in their personal injury cases received better settlements than clients who did not participate). Compare Hosticka, *supra* note 150, at 607 (stating that by controlling the conversation, lawyers channel cases into familiar areas, potentially missing other significant issues) with Neustadter, *supra* note 150, at 207 (noting that bankruptcy lawyer who specialized in one form rarely raised other form with clients).

152. See Felstiner & Sarat, *supra* note 150, at 1497 (documenting how clients asserted power over domineering lawyers by changing their minds, putting off decisions, withholding information, or simply walking away from the representation).

153. Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205.

154. *Id.* at 219. According to Birke:

Defendants who plead guilty are waiving gambles (possible acquittal at trial) and accepting known punishments (the plea bargain). Loss-averse criminal defendants should refuse to accept the certain loss of liberty or property that accompanies a plea bargain in order to avail themselves of the opportunity to go to trial, and be in a state of zero-loss, even where the expected value of trial is somewhat less than the value of a plea.

Id.

155. *Id.* at 207.

156. *Id.* at 247 (stating that defendants take pleas because "they are misinformed about the values of trials and pleas, and because pleas are framed as gains").

157. *Id.* For example, defense attorneys may not be able or willing to give the client a complete analysis of the comparative values of trial and plea. Yet the lawyer is in the best position to make this analysis because the lawyer is a "repeat-player" in the

trials in a personal loss frame.¹⁵⁸ This is consistent with other findings that show that criminal defense lawyers value their role as insiders in the system. Trials make the system inefficient and criminal defense lawyers—especially high-volume lawyers—who insist on trial will make the system inefficient and, therefore they will lose face.¹⁵⁹ He concludes:

Defendants plead because they are misinformed about the values of trials and pleas, and because pleas are framed as gains. Defendants are manipulated into pleading because they possess too little information to overcome framing effects inherent in the valuation of pleas and trials, and because they lack information to accurately value that which they so readily trade away—the right to trial. Naturally, defense attorneys respond to incentives of the court that encourage pleas, and these responses manifest themselves as information that distorts defendants' views of their alternatives. Trial looks worse than it really is, and so the plea looks relatively better.¹⁶⁰

To Birke, these findings show that the “fundamental problem in the criminal plea bargaining process is with the way that defendants get information.”¹⁶¹ Additional information would fix the “information channel,” but the problem is that neither the client nor the lawyer have all of the necessary information.¹⁶² Thus, Birke recommends that the

system. At the same time, the lawyer is an institutional player by virtue of this experience. Thus, the lawyer may give truncated information or information that portrays the plea as a gain. *Id.* at 243, 247.

158. *Id.* at 241-42. Attorneys have economic and reputational pressures. The public defender is paid by the state and must maximize her time while the private attorney is usually paid up front and must conserve the retainer. *Id.* at 239. In addition, attorneys who do not appear to cooperate in the systems efficiencies may be punished in subtle ways. *Id.* at 241-42.

159. See Birke, *supra* note 153, at 239; Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 78 (1993).

160. Birke, *supra* note 153, at 247. This outcome may be exacerbated by defense counsels' tendency to use a strict lawyer-centered approach to legal counseling. See Rodney Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 KANS. L. REV. 1, 6 (1998).

161. Birke, *supra* note 153, at 248.

162. *Id.* at 248-49; see also Korobkin & Ulen, *supra* note 1, at 1106-07 (stating that because of the manipulability of frames, legal reform might involve the presentation of additional information from the government framed to encourage the socially desirable result). *But see* Jolls, Sunstein, & Thaler, *supra* note 16, at 1533-34 (noting that behavioral economics suggests that simply providing additional information may not produce the desired outcome because there is often no neutral way to present information and thus additional information may simply paralyze the decision maker).

information come from the system of justice itself, either in the form of "more thorough colloquies between defendants and judges, or in the creation of a class of neutral individuals whose job is to advise defendants about the value of their case and to talk generally about the trial process . . . [or collect and transmit] trial data to accused defendants."¹⁶³

Simply transmitting this information to the defendant with the instruction to "think about it" would not be sufficient. The defendant may still frame the information inappropriately or use other heuristics to short circuit a fully "rational" decision. At the same time, overbearing lawyers may dominate the process by telling the clients what to think about the information. Lawyers who are aware of the psychological dynamics of decision making can go a long way toward ameliorating the problems of extreme client- or lawyer-centeredness. Both parties, client and lawyer, must be fully engaged in the decisions of the case. There are many dimensions to this participation, but frank recognition of the psychological dynamics of decision making may be one of the most important. Attorneys can minimize the effect of framing if they "can sit down, face-to-face, and explain the psychological barrier to their clients."¹⁶⁴ Even then, overcoming psychological barriers will be difficult, and there is still the chance that lawyers will unnecessarily usurp the client's decision-making authority.¹⁶⁵

Guthrie and Korobkin recommend that lawyers take a "cognitive error" approach to counseling clients.¹⁶⁶ When the lawyer and the client evaluate decisions differently, the lawyer should try to discover the basis for the difference. If the difference is the result of a client's cognitive error that results in a decision that goes against both the client's financial utility and his values, the lawyer should intervene. Korobkin and Guthrie describe their cognitive error approach in this way:

We think it nearly self-evident that a lawyer who knows his client is embarking on a course with a lower expected utility than an alternative course has an ethical obligation to take preventive action. On the other hand, when the client's expressed litigation desires maximize his expected utility, the lawyer should avoid any action that might convince the client to abandon his position The cognitive error approach to counseling, then, requires the lawyer to assess whether an observed difference between the lawyer's and client's analysis of

163. Birke, *supra* note 153, at 249.

164. Korobkin & Guthrie, *supra* note 72, at 162-63.

165. *Id.* at 163.

166. Korobkin & Guthrie, *supra* note 9, at 83.

decision options is due to the client's cognitive error or is merely the manifestation of differences in utility functions. If the difference is due to cognitive error, the lawyer should attempt to change the client's outlook. If the difference is the result of different preference structures, the lawyer should scrupulously avoid any interference.¹⁶⁷

This is not to say that lawyers must become psychologists. Rather, the lawyer should "steer a middle course between indiscriminately attempting to influence settlement decisions and indiscriminately avoiding such a role."¹⁶⁸ Korobkin and Guthrie suggest that lawyers "engage the client in an interactive counseling process" that may eventually lead to the lawyer volunteering advice.¹⁶⁹ This advice should always be "accompanied by an explicit description of the considerations underlying the advice and an explanation of the considerations that suggest that the client might not want to alter" the decision.¹⁷⁰

IX. CONCLUSION

This essay has outlined the basic findings of prospect theory and its implications for legal counseling. These findings suggest that lawyers should take a less ideological, more pragmatic approach to studying and teaching legal counseling. Neither lawyer nor client can take refuge behind a perfectly rational or perfectly autonomous model in light of the consistent "imperfections" in their cognition revealed by social science. Rather, the lawyer must be aware of the flawed rational machinery used by both her and the client and adjust her approach. Lawyers must find a point somewhere between the two extremes of client-centered and lawyer-centered counseling. This middle ground was aptly described over twenty years ago by Irving Janis:

[This kind of counseling] involves the joint work of the counselor and the client in diagnosing and improving the latter's decision making efforts The counselor attempts to help the person resolve realistic conflicts that arise when he or she is facing a difficult choice Much of the counselor's work consists of making clients aware of the decision-making procedures that they are using and of alternative procedures that they are not using. The counselor may be somewhat directive, however, in suggesting where to go for pertinent information, how to take account of knowledge about alternative courses of

167. *Id.* at 130.

168. *Id.* at 136.

169. *Id.*

170. *Id.*

action, how to find out if deadlines need to be taken at face value or can be negotiated, which risks might require preparing contingency plans, and the like.¹⁷¹

171. Janis, *supra* note 7, at 6-7.

