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THE IMPACT OF THE IMPACT BIAS ON NEGOTIATION

CHRIS GUTHRIE* & DAVID SALLY**

The defining feature of “principled”¹ or “problem-solving”² negotiation is its emphasis on “interests” rather than “positions.” In negotiation parlance, “positions” are what disputants declare they want.³ “Interests,” on the other hand, “are the silent movers behind the hubbub of positions.”⁴ They are the “needs, desires, concerns, and fears”⁵ that underlie stated positions.⁶

Disputants routinely negotiate over positions. “Each side takes a position, argues for it, and makes concessions to reach a compromise.”⁷ Unfortunately, however, “[c]ompromising between positions is not likely to produce an agreement which will effectively take care of the human needs that led people to adopt those positions.”⁸

Proponents of problem-solving negotiation thus argue that disputants should strive not merely to assert positions but rather to identify and satisfy their underlying interests. Indeed, according to the proponents of this approach to negotiation, “the object of a negotiation is to satisfy underlying interests.”⁹ On this view, disputants should try to get what they *really* want at the bargaining table.

But what if they do not know what they *really* want?

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1. See, e.g., ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

2. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754 (1984).

3. FISHER ET AL., *supra* note 1, at 41 (“Your position is something you have decided upon.”).

4. *Id.*

5. *Id.* at 40.

6. *Id.* at 41 (“Interests motivate people; they are the silent movers behind the hubbub of positions. Your position is something you have decided upon. Your interests are what caused you to so decide.”).

7. *Id.* at 3.

8. *Id.* at 11.

9. *Id.*

I. IMPACT BIAS

Researchers from an emerging movement within psychology—variously labeled “positive psychology”¹⁰ or “hedonic psychology”¹¹ or “affective forecasting”¹²—have learned a great deal in recent years about what people really want. Of greatest relevance to this essay, researchers studying affective forecasting have discovered that people are often mistaken about what they want or what will make them happy. In more technical terms, people often find that what they predict they want or how they predict they will feel—i.e., their “predicted utility”—is different from their actual experience—i.e., their “experienced utility.”¹³

It is not that people are entirely unaware of what they want or how they will feel. In fact, people are generally quite skilled at predicting whether they will feel positively or negatively about some event or item.¹⁴ People accurately predict, for example, that they will feel favorably about a promotion and unfavorably about a demotion. Similarly, people are generally pretty good at predicting the specific emotion(s) they will experience upon obtaining some item or experiencing some event.¹⁵ People anticipate, for instance, that they will feel pride and joy upon being promoted and anger and embarrassment upon being demoted.

What people struggle with, however, is predicting both the *intensity* and *duration* of their emotional reactions to an event or outcome. One’s sense of well-being turns significantly on this kind of prediction:

10. See, e.g., Martin E. P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 AM. PSYCHOL. 5, 5 (2000) (“The field of positive psychology at the subjective level is about valued subjective experiences: well-being, contentment, and satisfaction (in the past); hope and optimism (for the future); and flow and happiness (in the present).”).

11. See, e.g., WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY, at ix (Daniel Kahneman et al., eds., 1999) [hereinafter WELL-BEING] (“Hedonic psychology . . . is the study of what makes experiences and life pleasant or unpleasant. It is concerned with feelings of pleasure and pain, of interest and boredom, of joy and sorrow, and of satisfaction and dissatisfaction.”); Richard M. Ryan & Edward L. Deci, *On Happiness and Human Potentials: A Review of Research on Hedonic and Eudaimonic Well-Being*, 52 ANN. REV. PSYCHOL. 141 (2001).

12. See, e.g., Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES SOC. PSYCHOL. 345, 346 (2003) (defining “affective forecasting” as “people’s predictions about their future feelings”). For an accessible introduction to this line of research, see Jon Gertner, *The Futile Pursuit of Happiness*, N.Y. TIMES MAG., Sept. 7, 2003, at 44.

13. See Daniel Kahneman, *New Challenges to the Rationality Assumption*, 3 LEGAL THEORY 105, 107-16 (1997).

14. Wilson & Gilbert, *supra* note 12, at 347 (observing that “[i]n general . . . people make accurate predictions about which side of the neutral point their emotional experiences will fall, especially if they have had experience in that domain”).

15. *Id.* at 401 (observing that “[p]eople are also skilled at guessing the specific kinds of emotional reactions they will have”).

Often people predict correctly the valence of their emotional reactions (“I’ll feel good if I get the job”) and correctly predict the specific emotions they will experience (e.g., joy). Even when achieving such accuracy, however, it is important for people to predict what the initial intensity of the reaction will be (how much joy they will experience) and the duration of that emotion (how long they will feel this way). It is useful to know that we will feel happy on our first day at a new job, but better to know how happy and how long this feeling will last, before committing ourselves to a lifetime of work as a tax attorney. It is helpful to know that it will be painful to end a long-term relationship, but better to know how painful and whether the pain will last half a second or half a decade.¹⁶

Unfortunately, people have a tendency “to overestimate the impact of future events on their emotional lives.”¹⁷ Psychologists Daniel Gilbert and Timothy Wilson refer to this phenomenon as the “impact bias.”¹⁸

Researchers have found that the impact bias influences reactions to all kinds of life events, including “romantic breakups, personal insults, sports victories, electoral defeats, parachute jumps, failures to lose weight, reading tragic stories, and learning the results of pregnancy and HIV tests.”¹⁹ With few exceptions, people tend to overestimate the emotional impact such events will have on their lives.

Researchers are not entirely sure why people overestimate the emotional impact of various life events and outcomes, but they have identified at least two phenomena that systematically point people in this direction.²⁰ First, when predicting reactions to a future event, people tend to ignore the impact that *other* events are likely to have on their sense of well-being. People, in other words, are prone to “focalism”²¹ or a “focusing illusion.”²² Second,

16. *Id.* at 349.

17. *Id.*

18. *Id.* at 351.

19. *Id.* at 353.

20. In their article, Wilson and Gilbert discuss other phenomena that may contribute to the impact bias—such as “framing effects,” “expectation effects,” and “intrapersonal empathy gaps”—but these phenomena do not lead systematically to overestimation. *See id.* at 354-66; *see also infra*, notes 26-27 and accompanying text.

21. Wilson & Gilbert, *supra* note 12, at 366 (“Events do not occur in a vacuum of course, but in the rich context of many other events in people’s lives. By neglecting to consider how much these other events will capture their attention and influence their emotions, people overestimate the impact of the focal event.”).

22. David A. Schkade & Daniel Kahneman, *Does Living in California Make People Happy? A Focusing Illusion in Judgments of Life Satisfaction*, 9 PSYCHOL. SCI. 340 (1998).

people underestimate the extent to which they process an experience or outcome psychologically to dampen its emotional impact. Upon experiencing some event or outcome, people engage in what Wilson and Gilbert call “sense-making processes”;²³ that is, they “inexorably explain and understand events that were initially surprising and unpredictable, and this process lowers the intensity of emotional reactions to the events.”²⁴ In advance, however, they fail to “anticipate how much they will transform events psychologically in ways that reduce their emotional power.”²⁵

Other phenomena undoubtedly contribute to the impact bias. For example, people may fall prey to the impact bias because they fail to recognize that they have something akin to a happiness “set point” which does not fluctuate too much regardless of life events.²⁶ Also, research suggests that people in a “hot” emotional state have a hard time anticipating how they will react when they are in a “cold” emotional state, again suggesting that they may overestimate the emotional impact of future events and outcomes.²⁷

Whatever its source, the existence of the impact bias means that people often “miswant.” Writing in a *New York Times Magazine* article, Jon Gertner explains this as follows:

[W]e might believe that a new BMW will make life perfect. But it will almost certainly be less exciting than we anticipated; nor will it excite us for as long as predicted Gilbert and his collaborator Tim Wilson call the gap between what we predict and what we ultimately experience the “impact bias”—“impact” meaning the errors we make in estimating both the intensity and duration of our emotions and “bias” our tendency to err. The phrase characterizes how we experience the dimming excitement over not just a BMW but also over any object or event that we presume will make us happy. Would a 20 percent raise or winning the lottery result in a contented life? You may predict it will, but almost surely it will not turn out that way. And a new plasma television? You may have high hopes, but the impact bias suggests that it will almost certainly be less cool, and in a shorter time, than you imagine. Worse, Gilbert has noted that these

23. Wilson & Gilbert, *supra* note 12, at 371.

24. *Id.*

25. *Id.* at 374.

26. See DAVID LYKKEN, HAPPINESS (1999) (relying largely on studies of twins to argue that we possess a “happiness set point” but that there are things we can nonetheless do to increase our level of well-being).

27. See George Loewenstein & David A. Schkade, *Wouldn't It Be Nice? Predicting Future Feelings*, in WELL-BEING, *supra* note 11, at 85 (explaining the hot and cold empathy gap as one source of hedonic prediction errors).

mistakes of expectation can lead directly to mistakes in choosing what we think will give us pleasure. He calls this “miswanting.”²⁸

II. “MISWANTING” IN NEGOTIATION

The potential impact of the impact bias on negotiation is straightforward. If people in general are likely to have difficulty determining what they really want because of a tendency to overestimate how attaining that item will affect their sense of well-being, disputants are also likely to have difficulty identifying what they really want in negotiation for the very same reason. Just like the consumer who erroneously believes he will be much happier if he purchases a new BMW, the disputant seeking to obtain vindication from the other side or financial security or whatever else may very well overestimate how much obtaining it will contribute to her sense of well-being. Indeed, it seems reasonable to speculate that the added complexity of a negotiation—in particular, the tension and conflict between the negotiators—will make it even more difficult for disputants to discern what they really want.

This has important implications for lawyers (and other agents) who represent disputants in negotiation. Under the prevailing model of the lawyer-client relationship—the so-called “client-centered” counseling model²⁹—the client is viewed as a fully competent and autonomous actor who retains full decisional authority over her case.³⁰ The lawyer, by contrast, is a largely passive and objective advisor who strives to avoid encroaching on client autonomy in the decision-making process.³¹

This model of the lawyer-client relationship is arguably embodied in many of the ethical rules that govern lawyer conduct. For example, Rule 1.2 of the Model Rules of Professional Conduct provides that “[a] lawyer shall abide by a client’s decision whether to settle a matter,”³² and shall “consult with the client as to the means by which [his objectives] are pursued.”³³ Similarly, Canon 7-7 of the Model Code of Professional Responsibility provides that “it is for the client to decide whether he will accept a settlement

28. Gertner, *supra* note 12, at 46.

29. DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS* (2d ed. 2001).

30. *Id.* at 282.

31. *Id.* at 288-89. This is not the only model, of course. Others include the “traditional” or “directive” model and the more recently promulgated “collaborative” model. For a discussion, see Robert F. Cochran, Jr., et al., *Symposium: Client Counseling and Moral Responsibility*, 30 PEPP. L. REV. 591 (2003).

32. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2004).

33. *Id.*

offer,”³⁴ and Canon 7-8 provides that “the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.”³⁵

The client-centered approach to lawyering—both in theory and as reflected in various ethical rules—is both sensible and respectful. After all, the client is the principal, and the lawyer is merely the agent hired by the client. The client “owns” the problem, and she will reap the primary benefit (or bear the primary brunt) of the outcome. Thus, it seems appropriate to vest decision-making power solely in her hands.

Research on the impact bias gives one pause, however, because it suggests that clients may have great difficulty predicting accurately what they want out of a negotiation. Even given this difficulty, the client will generally know better than anyone else what she wants. But in some circumstances, her lawyer may have insight into her wants that even she does not. Namely, in those cases where the client is a “one-shotter”³⁶ (perhaps in a divorce case or a personal injury suit), and the lawyer is a “repeat player”³⁷ who has represented dozens or even hundreds of similarly situated clients in like cases, it seems *possible* that the lawyer might know better than the client what the client really wants.

Suppose, for example, that a lawyer named “Linda” represents a client named “Clint.” Clint used to be an executive with Company X. He enjoyed working at Company X, and several close friends remain there. Unfortunately, Company X fired him a year ago despite good performance evaluations. Clint believes, based on a couple of e-mails his former boss sent to a friend, that he was terminated due to his race. After investigating Clint’s claim, Linda filed suit against Company X on Clint’s behalf, asserting myriad violations under Title VII.

Upon receiving a copy of the complaint, the lawyer for Company X indicated that the company would like to meet to discuss settlement of Clint’s claim. Linda agreed. Before the settlement talks, she arranged a meeting with Clint to make sure she understood his interests. At this meeting, Clint told Linda he wanted “a lot of money.” When pressed to explain why he wanted “a lot of money,” Clint explained that he wanted the money to provide a luxurious lifestyle for himself and his family and to provide him with the financial resources that would enable him to retire.

34. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-7 (2001).

35. *Id.* at EC 7-8.

36. See Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculating on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

37. *See id.*

Armed with this information, Linda met with the lawyer from Company X to discuss settlement. After lengthy discussions about the alleged facts, the applicable law, Clint's interests, and Company X's interests, the lawyer for Company X offered to settle the case by paying Clint a modest sum of money reflecting his "back pay" and by rehiring him at Company X. He also informed Linda that Company X had already fired Clint's former boss.

Linda told him she would discuss the offer with Clint. When she met with him, she described some of the advantages associated with the offer, and she also acknowledged some of the advantages associated with foregoing settlement and proceeding to trial. Clint told her that he would rather go to trial than accept the offer because he wanted the flexibility, financial security, and lifestyle that a substantial award would bring.

Having represented several similarly situated clients in the past and having familiarized herself with the research on affective forecasting, Linda is skeptical that Clint truly understands what he wants. She worries that even if he prevails at trial and recovers a sizeable award, his contentment with that award will be short-lived. Indeed, she is familiar with a number of fairly well-established research findings that lead her to believe that Clint will ultimately be happier if he accepts the settlement offer and returns to work at Company X. She knows, for example, that money (beyond a comfortable, middle-class amount) contributes minimally to happiness.³⁸ She knows that friendships and social interaction, on the other hand, do increase one's sense of well-being,³⁹ and Clint has several close friends at Company X with whom he will interact on a much more regular basis if he were to return. Finally, she knows that people are happier when they are fully engaged in some productive activity,⁴⁰ and Clint seems to have had this kind of engagement at

38. See, e.g., Mihaly Csikszentmihalyi, *If We Are So Rich, Why Aren't We Happy?*, 54 AM. PSYCHOL. 821, 822-23 (1999) (summarizing studies showing that material wealth has little impact on subjective well-being); Marilyn Elias, *Psychologists Now Know What Makes People Happy*, USA TODAY, Dec. 9, 1992 (quoting psychologist Ed Diener) ("Materialism is toxic for happiness."); Gertner, *supra* note 12, at 86 (reporting that researchers have found that "wealth above middle-class comfort makes little difference to our happiness"); David G. Myers, *The Funds, Friends, and Faith of Happy People*, 55 AM. PSYCHOL. 56, 59 (2000) ("Happiness tends to be lower among the very poor. Once comfortable, however, more money provides diminishing returns on happiness."). See generally ROBERT E. LANE, *THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES* (1996) (demonstrating empirically that increased wealth beyond a poverty level has little to do with a sense of happiness).

39. See, e.g., LANE, *supra* note 38, at 6 ("[W]e get happiness primarily from people . . ."); Gertner, *supra* note 12, at 86 (reporting that researchers have found that "[s]ocial interaction and friendships have been shown to give lasting pleasure"); Myers, *supra* note 38, at 62 (reporting results that "confirm the correlation between social support and well-being").

40. See, e.g., MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* 3 (1990). Csikszentmihalyi notes:

Company X.

So what is Linda to do? She can certainly raise these issues with Clint. She could tell him what she knows about the research on affective forecasting. She could tell him, for example, that people often make poor predictions about what they want and how happy they will be if they get it. “I think you ought to know, Clint,” she could say, “that no matter what they hope for when they buy a ticket, many lottery winners end up being no happier than they were before they won.”⁴¹ (Obviously, Linda would be more confident about her advice—and her advice would be more relevant—if she could speak specifically to the impact of the impact bias on litigants.)

But besides providing this information to Clint, how hard can Linda push him to settle the case on the proposed terms? Under the client-centered view of the lawyer’s role, and perhaps even under the applicable ethical rules, she probably cannot push too hard.⁴² Research drawn from the emerging movement of hedonic psychology or affective forecasting suggests,⁴³ however, that she should be allowed—and maybe even encouraged—to play a much more active role in Clint’s decision-making.⁴⁴

Contrary to what we usually believe, moments like these, the best moments in our lives, are not the passive, receptive, relaxing times—although such experiences can also be enjoyable, if we have worked hard to attain them. The best moments usually occur when a person’s body or mind is stretched to its limits in a voluntary effort to accomplish something difficult and worthwhile.

Id. LYKKEN, *supra* note 26, at 73-77, 101-16 (exploring how “productive labor” contributes to our sense of well-being).

41. For a study corroborating this statement, see Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERSONALITY & SOC. PSYCHOL. 917 (1978).

42. *See supra* notes 29-35 and accompanying text.

43. It is worth noting that at least some of the leaders in this field are reluctant to propose policy prescriptions based on the underlying research. *See Gertner, supra* note 12, at 90. Gertner explains:

We’re very, very nervous about overapplying the research Just because we figure out that X makes people happy and they’re choosing Y, we don’t want to impose X on them. I have a discomfort with paternalism and with using the results coming out of our field to impose decisions on people.

Id. (quoting George Loewenstein).

44. It is certainly not unprecedented to argue that the lawyer should play a more active role in her client’s decision making than that envisioned by the proponents of the client-centered approach to lawyering. For one example, see William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 486, 488 (1984) (observing that his vision of lawyering acknowledges “that people might have interests of which they are not aware” and that “[t]he precept that the lawyer further the client’s interests, as she understands them, is qualified by the precept that she also try to enhance the client’s capacity to express her own interests”). In this instance, however, the argument rests on a different basis—i.e., the research on affective forecasting.

Linda's dilemma is but a microcosm of the broader dilemma faced by policy makers, regulators, and others trying to facilitate efficient decision-making in society. The impact bias and other departures from purely "rational" decision making may warrant intervention by outsiders or regulation by authorities.⁴⁵ Open consideration of paternalism of this sort raises hackles in the legal community at large, and the law and economics field in particular, because it is deemed taboo to impinge on individual autonomy and freedom of choice.⁴⁶

As important as individual autonomy and freedom of choice are, however, the concerns about paternalism may be misguided for several reasons. First, as the earlier review of the research on the impact bias demonstrates, freedom of choice does not necessarily lead to an increase in subjective well-being. In one illustrative experiment not reported above, researchers found that subjects who had to make an irrevocable selection between two photographs they had previously snapped were more satisfied with their choice than were those who had the option of switching prints later,⁴⁷ yet when the researchers asked another group of students whether they would prefer *ex ante* to make a revocable or irrevocable choice, two-thirds of them expressed a preference for the revocable choice.⁴⁸ This suggests that in at least some circumstances we think we want freedom of choice, but we may be happier when our choices are constrained.

Second, freedom of choice is often illusory because decision making is rarely independent of a social context shaped by cultural norms, organizational rules, and the decisions of prior decision makers. Sunstein and Thaler write:

In many situations, some organization or agent *must* make a choice

45. See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for 'Asymmetric Paternalism,'* 151 U. PA. L. REV. 1211 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, U. CHI. L. REV. (forthcoming).

46. That such a taboo exists suggests the legal system may elevate a logic of *appropriateness* over a logic of *consequences*. See JAMES G. MARCH, A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN 57 (1994). March explains:

When individuals and organizations fulfill identities, they follow rules or procedures that they see as appropriate to the situation in which they find themselves. Neither preferences as they are normally conceived nor expectations of future consequences enter directly into the calculus . . . Rule following is grounded in a logic of appropriateness.

Id.; see also Camerer et al., *supra* note 45, at 1222 (referring to the "faith-based antipaternalism practiced by some legal scholars").

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

48. See *id.* at 510.

that will affect the behavior of some other people. There is, in those situations, no alternative to a kind of paternalism—at least in the form of an intervention that affects what people choose The point applies to both private and public actors, and hence to those who design legal rules as well as to those who serve consumers.⁴⁹

From a practical perspective, then, paternalism is inevitable, so the real risk is that paternalism might become coercive.

Third, it may be possible, however, to design non-coercive interventions that facilitate “better” decision making while preserving autonomy at the same time.⁵⁰ Although the research is still at an early stage of development, researchers have identified three minimally intrusive devices: defaults, framing, and cooling-off periods.⁵¹

People tend to prefer the status quo, so default options have real force in choice.⁵² (Note that defaults cohere exactly to the idea that paternalism is inevitable—somebody somewhere has decided what will happen if an individual makes no decision.) For example, employers can increase employee retirement savings rates by changing the default from non-enrollment to automatic participation in 401(k) plans.⁵³ This is clearly a paternalistic intervention, but it is hardly coercive.

People are also influenced by the way options are framed, so society might try to frame options to induce optimal decisions. In the context of Linda’s representation of Clint, for instance, Linda might emphasize that settlement reflects a sure gain, while Clint’s expected judgment at trial is only a probabilistic gain. When choosing between a sure gain and a probabilistic gain with a comparable expected value, most people will choose the sure thing. By casting Clint’s decision as a choice between a sure gain and an

49. Sunstein & Thaler, *supra* note 45, at 7.

50. See Camerer et al., *supra* note 45, at 1212.

A regulation is asymmetrically paternalistic if it creates large benefits for those who make errors, while imposing little or no harm on those who are fully rational. Such regulations are relatively harmless to those who reliably make decisions in their best interest, while at the same time advantageous to those making suboptimal choices.

Id.

51. *Id.*

52. For more on this “status quo bias,” see William Samuelson & Robert Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988). For an exploration of its potential impact on negotiation, see Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795 (2004).

53. See B.C. Madrian & D.F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. ECON. 1149 (2001).

uncertain gain, Linda implicitly invokes “prospect theory”⁵⁴ to increase the attractiveness of settlement and decrease the attractiveness of trial.⁵⁵

Society might also employ cooling-off periods between the presentation of the decision possibilities and the final choice. In negotiation, making the final decision away from the bargaining table offers two potential benefits. First, it might reduce the cognitive load on the decision maker at the bargaining table itself, and research suggests that reducing cognitive load can increase the accuracy of individuals’ affective forecasts.⁵⁶ Second, a “time out” might also enable the decision maker to manage his emotions more effectively. For example, if Clint’s motivation in taking Company X to court was vengeance, then he might overvalue his long-term satisfaction from hurting the company, especially when he is in the same room as Company X representatives. Requiring that he wait until he is at a remove might help him make a better quality decision.

III. CONCLUSION

Negotiation scholars and practitioners have long known that disputants may not get what they want at the bargaining table. Perhaps what they want is unreasonable, unavailable, or even unlawful; perhaps they will commit decision errors in the negotiation process due to “heuristics and biases”;⁵⁷ perhaps their counterparts will simply “out-negotiate” them using successful “hard-ball” negotiation tactics⁵⁸ or the more subtle but still effective “principles of influence” employed by advertisers and retailers;⁵⁹ perhaps any number of “barriers” might prevent them from getting what they want.⁶⁰

What negotiation scholars and practitioners have generally assumed, however, is that disputants know what they want. The work reported in this essay calls this assumption into question. In his interview with the *New York*

54. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979) (introducing prospect theory).

55. For more on this, see Korobkin & Guthrie, *supra* note 52.

56. For a variety of cooling-off periods provided by consumer protection and family law, see Camerer et al., *supra* note 45. For one example of a study in which researchers found that cognitive load had a negative impact on affective forecasting, see Daniel Gilbert et al., *The Future Is Now: Temporal Correction in Affective Forecasting*, 88 *ORG. BEHAV. & HUM. DECISION PROCESSES* 430 (2002).

57. See Korobkin & Guthrie, *supra* note 52.

58. For lists of these tactics, see, for example, ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 24-25 (2000); Michael Meltsner & Philip G. Schrag, *Negotiation Tactics for Legal Services Lawyers*, 7 *CLEARINGHOUSE REV.* 259, 259-62 (1973).

59. See Chris Guthrie, *Principles of Influence in Negotiation*, 87 *MARQ. L. REV.* 829 (2004).

60. See generally *BARRIERS TO CONFLICT RESOLUTION* (Kenneth Arrow et al. eds., 1995).

Times Magazine, Gilbert explained it this way, “You know, the Stones said, ‘You can’t always get what you want.’ [But] I don’t think that’s the problem. The problem is you can’t always *know* what you want.”⁶¹ Likewise, the most significant problem plaguing disputants may very well be that they cannot always know what they want.

The dilemma for lawyers (who are susceptible to the impact bias in their own right, of course)⁶² is what to do with this insight. In our view, the lawyer who is truly client-centered will neither substitute her judgment for that of her client, nor will she turn a blind eye to the very real possibility that her client is mistaken about what he really wants. Client-centeredness requires her to eschew extreme paternalism on the one hand and extreme anti-paternalism on the other in favor of a more balanced approach to legal counseling.

61. Gertner, *supra* note 12, at 46.

62. In fact, it seems possible that many of the well-documented problems affecting lawyers and the legal system might be a product of poor affective forecasting. Lawyers who sacrifice personal relationships, sleep, and outside interests and who care more about their billings than the needs of their clients or the values they espouse may simply be “miswanting” due to a poor understanding of the real sources of subjective well-being. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1996); ANTHONY T. KRONMAN, *THE LOST LAWYER* (1995); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Researching on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337 (1997).