COMMENT

HEADS I WIN, TAILS YOU LOSE: THE PSYCHOLOGICAL BARRIERS TO ECONOMICALLY EFFICIENT CIVIL SETTLEMENT AND A CASE FOR THIRD-PARTY MEDIATION

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Nearly ninety-five percent of all civil suits are settled outside the courts. Thus, a vast majority of litigation is resolved outside a system with controls for fairness and equity. Judges and legislators rely on standard economic theory, which suggests that litigants are rational actors seeking to optimize their self-interest, and assume that litigants will negotiate an efficient, equitable result outside the confines of the judiciary. While this seems rather intuitive, this simple assumption is largely unfounded.

This Comment, utilizing prospect theory, suggests that litigants are subject to a wide range of decision-making biases that affect their ability to reach economically rational and efficient settlements. These inherent psychological biases result in suboptimal, and ultimately unfair, civil settlements for all parties involved. This Comment proceeds to suggest that the use of third-party mediation promotes fairness and economic efficiency and eliminates many of the inherent biases that plague traditional civil settlement negotiations. As such, courts and legislatures should attempt to increase the use of mediation in settling civil disputes.

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INTRODUCTION

Less than five percent of all civil cases will result in a court-issued verdict.[1] This may be due, in part, to the liberal pleading standards and protracted discovery processes under the Federal Rules,[2] which "have produced skyrocketing litigation expenses" and provoked litigants to "settle lawsuits based on tactics and expenses as much as—if not more than—their predictions on how a judge would apply law to fact."[3] Or perhaps, as court systems across the country struggle to manage their ever-growing dockets, many judges and state legislatures have turned to mediation and other methods of alternative dispute resolution (ADR) as means of reducing litigation and streamlining the legal process.[4] However, regardless of the cause, an overwhelming majority of today's civil cases are resolved through the settlement process.

The traditional legal archetypes hold that settlement negotiation is characterized by coherent, objective, and rational decision-making processes.[5] However, an abundance of evidence indicates that this notion is largely misguided.[6] Recent developments in the fields of prospect theory and behavioral psychology suggest that traditional civil settlement negotiations are rife with economically irrational decision-making practices.[7]

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1. *See, e.g.*, Susan C. Del Pesco & Richard K. Herrmann, *The Second Face of Toxic Tort Litigation: Claims for Insurance Coverage*, 2 WIDENER L. SYMP. J. 205, 219 (1997); Marc A. Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 n.2 (1994) (citing Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161, 162–64 (1986)) (citing a study that suggests approximately seven percent of cases filed in federal courts proceed to a verdict); George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 541 (1989).

2. *See generally* Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 979–1010 (1998).

3. *Id.* at 979; *see also* Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) (arguing that "the nature of our civil process drives parties to settle so as to avoid the costs, delays, and uncertainties of trial, and, in many cases, to agree upon terms that are beyond the power or competence of courts to dictate").

4. *See, e.g.*, Steve C. Briggs, *ADR in Colorado: Past and Present*, 26 COLO. LAW., June 1997, at 103, 104–07; Jessica Pearson, *Court Services: Meeting the Needs of Twenty-First Century Families*, 33 FAM. L.Q. 617, 621 (1999).

5. *See* GARY BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976) ("[A]ll human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information . . . .").

6. *See, e.g.*, Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1116 (2003).

7. *Id.* at 1116–19.

Law and economics scholars conventionally utilize decision-making theories such as "rational choice theory" or "expected utility theory" in their analysis of real-world legal behavior.[8] These theories assert that litigants are inherently rational actors who employ risk-neutral, logical analyses so as to achieve the best possible disposition of their cases.[9] Thus, the rational economic theory posits that "all human behavior, including decision making and dispute resolution, can be understood in the context of rational individuals having perfect information about available alternatives and likelihoods of outcomes, a perfect and stable understanding of their own preferences, and a perfect ability to always act in their best interest."[10] Behavioral psychologists view these maxims of law and economics theory as weighty assumptions.[11]

Law and psychology scholars and behavioral psychologists ascribe to a competing school of thought known as "prospect theory"[12] in their analysis of litigant behavior. Pioneered by Daniel Kahneman and Amos Tversky, prospect theory "do[es] not question the basic premise [of the

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8. *See, e.g.*, Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 436 ("The single most important contribution that law and economics has made to the law is the use of a coherent theory of human decision-making ('rational choice theory') to examine how people are likely to respond to legal rules.").

9. *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 4 (1984) ("According to our model, the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement. The most important assumption of the model is that potential litigants form rational estimates . . . .").

10. Gregory Todd Jones, *Fighting Capitulation: A Research Agenda for the Future of Dispute Resolution*, 108 PENN ST. L. REV. 277, 298 (2003).

11. *See* Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 118–19 (1996).

12. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979) [hereinafter Kahneman & Tversky, *Prospect Theory*]. For additional work by Kahneman and Tversky on prospect theory, see Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341, 341–43 (1984) (explaining prospect theory and risky choice); Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, 246 SCI. AM. 160 (1982) (analyzing how individuals evaluate risky options); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297, 298 (1992) [hereinafter Tversky & Kahneman, *Advances*] (extending prospect theory from risky decisions to uncertain decisions); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981) (providing an overview of prospect theory); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S257–60 (1986) [hereinafter Tversky & Kahneman, *Rational Choice*] (contrasting prospect theory and rational choice theory).

standard economic theory] that litigants *try* to achieve the best possible outcome,"[13] but rather "question[s] their ability to identify the most favorable options when risk and uncertainty are involved."[14] This behaviorally based theory asserts that, while litigants endeavor to maximize their economic well-being, their innate, subconscious predilections prevent them from acting in an economically rational manner.[15] As such, primal psychological and behavioral tendencies generate barriers to efficient settlement outcomes.

This Comment asserts that many of the inherent, subconscious miscalculations that manifest in traditional civil settlement disputes are absent in alternative dispute resolution practices, most prominently mediation. Accordingly, the absence of these biasing factors renders mediation a more economically efficient and thus a more rational means of settling civil cases. Part I of this Comment provides a more detailed overview of the psychological and behavioral biases stemming from the application of traditional economic ideologies to civil settlement practices. The effects of mediation and arbitration on the civil settlement process in light of these biases are discussed in Part II, which also asserts that mediation practices have the potential to limit the biases that afflict traditional settlements. Part III discusses other means by which the mediation process effectuates more economically efficient settlement outcomes and urges courts and legislatures to more actively implement these programs.

I. BEHAVIORAL AND PSYCHOLOGICAL BIASES STEMMING FROM TRADITIONAL LAW AND ECONOMICS THEORY AND THEIR EFFECTS ON CIVIL SETTLEMENT

This Part is divided into three Sections. Section A begins by outlining the underpinnings and assumptions made by standard economic theory. Section B discusses the implications of prospect theory and demonstrates the ways in which certain behavioral biases undermine the standard assumptions of law and economics theories. Finally, Section C discusses the implications of both standard economic theory and prospect theory in light of procedural fairness and procedural justice principles.

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13. *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 164–65 (1994); Rachlinski, *supra* note 11, at 118.

14. Rachlinski, *supra* note 11, at 118; *see also* Linda Babcock et al., *Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289 (1995).

15. Rachlinski, *supra* note 11, at 118.

A. Standard Economic Theory

The standard law and economics doctrine, touting rational choice theory, rests upon three pillars of assumption. It assumes that a litigant's preferences are (1) knowable, (2) stable, and (3) context independent.[16] Knowable preferences require that a litigant develop his own system of profit-maximizing decisions in light of the choices presented.[17] The second major assumption, that preferences are stable, is predicated on the idea that a decision maker will consistently choose the options that he prefers.[18] For example, if the litigant prefers option A over option B, he cannot and will never simultaneously prefer option B over option A.[19] Finally, rational choice theory assumes that a decision maker will make consistent decisions independent of context. Using the example of options A and B, context independence holds that the introduction of an irrelevant factor, option C, will not affect the decision maker's preference for A over B.[20]

At first glance, these assumptions appear to be the negligible corollaries to a much larger theory of law and economics and rational choice. However, without these three simple assumptions, the vast weight of traditional law and economics theory is baseless. If a litigant did not always know his preferences, if these preferences were not always stable, or if these preferences shifted due to the introduction of a third, irrelevant factor, then the litigant's ability to act rationally, and thus within his best interest, would be largely undermined.

Prospect theorists and behavioral psychologists assert that these basic canons of traditional law and economics thinking are too detached from the realities of law in practice.[21] However, these are not claims that rational choice theory is an inadequate model on which to analyze litigant behavior, nor are they meant to argue that individuals consistently behave in an irrational manner. Rather, the analysis of litigants' complex decision-making processes should not be narrowly circumscribed to an economic examination when other theories offer

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16. *See* Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1120–21 (2010).

17. *Id.* at 1121.

18. Tversky & Kahneman, *Rational Choice*, *supra* note 12, at S252–53.

19. *See* Joel Huber et al., *Adding Asymmetrically Dominated Alternatives: Violations of Regularity and the Similarity Hypothesis*, 9 J. CONSUMER RES. 90, 90 (1982) (describing the basic premises of regularity).

20. *See* Tversky & Kahneman, *Rational Choice*, *supra* note 12, at S253.

21. See Kahneman and Tversky's works on prospect theory, *supra* note 12.

plausible explanations.[22] Thus, "[t]he goal of the law-and-behavioral-science movement is not . . . to replace rational choice theory with an inconsistent paradigm but to modify the implausible elements of rational choice theory and supplement the inadequate elements in order to create a tool with more predictive power in specific situations."[23]

B. Prospect Theory and a Litigant's Inability to Create Objective Valuations of a Case

Standard law and economics theory posits that litigants have the unwavering ability to objectively evaluate the various components of a case and determine the most efficient economic outcome given their bargaining positions. However, several basic principles of prospect theory confound this standard assumption. This Section details several of these subconscious behavioral tendencies that skew a litigant's seemingly "rational" decision-making process.

1. ANCHORING AND AVAILABILITY HEURISTICS

Behavioral theorists use the terms "anchoring" and "availability heuristics" to describe the "phenomenon by which available values—even irrelevant values—provide a starting point (or 'anchor') for a judgment."[24] The information that one possesses or can easily recall has an ability to skew a rational actor's ability to make an objective, unbiased decision.[25] For example, consider whether there are more words in the English language with "n" as the second-to-last letter or more words ending in "ing." Asked independently, most individuals will respond that there are more words ending in "ing," although this is a logical impossibility.[26] This is because the mind uses a mental

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22. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1074 (2000).

23. *Id.* at 1074–75.

24. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437, 466–467 (2008).

25. *Id.*

26. *See* Jason J. Kilborn, *Behavioral Economics, Overindebtedness & Comparative Consumer Bankruptcy: Searching for Causes and Evaluating Solutions*, 22 EMORY BANKR. DEV. J. 13, 13 (2005) (citing Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 663 & n.141 (1999)).

shortcut or heuristic. "[P]eople automatically assume that when it is easier to recall examples of something, it tends to be more common."[27]

"[J]uror judgments and settlement decisions have been shown to be influenced by anchors provided by *ad damnum* requests[28] and damage caps, and the media."[29] Thus, inconsequential numeric reference points have the ability to influence a rational litigant's ability to objectively assess the merits of a case.[30] For example, an allusion that other cases dealing with similar facts settled for $100,000 might lead a plaintiff to seek at least $100,000 or a defendant to refuse to negotiate above $100,000, notwithstanding any particularities in the case at hand that could substantively alter valuations. This can lead a litigant to believe that a case is worth more or less than it actually is, and thereby prolong or even derail the traditional civil settlement process. Moreover, studies show that "expertise alone fails to provide protection from this tendency."[31] Accordingly, anchoring and availability heuristics present a clear barrier to the objective valuation of a case and open the door for inefficient decision-making practices in traditional civil settlement negotiations.

2. RISK AVERSION AND LOSS AVERSION

Prospect theory also proposes that individuals will evaluate decision options relative to a reference point.[32] If the individual is presented with a gain relative to that reference point, he will be risk-averse.[33] Similarly, if the individual is facing a loss relative to the

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27. Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 8 (1999).

28. "*Ad damnum* requests" are tort law requests made by the plaintiff in the pleading stage for specific compensation in return for the harms suffered. *See* BLACK'S LAW DICTIONARY 43 (9th ed. 2009). For example, a plaintiff injured in a car accident may submit a complaint requesting $100,000 in pain and suffering, or negligent infliction of emotional distress.

29. Sternlight & Robbennolt, *supra* note 24, at 467–68 (citation added); *see also* Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 522 (1996); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 802–03 (2001) (anchoring effect of diversity amount on judges' damage awards); Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991, 1005, 1010, 1013–15 (1995); Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 359 (1999).

30. Robbennolt & Studebaker, *supra* note 29, at 359, 361.

31. Birke & Fox, *supra* note 27, at 10.

32. *See* Kahneman & Tversky, *Prospect Theory*, *supra* note 12.

33. *See, e.g.*, Tversky & Kahneman, *Advances*, *supra* note 12, at 306.

gain, he will be risk-seeking.[34] For example, when facing the gain of a prize or award, people will generally choose a definite $100 prize over a 50% chance of securing a $200 prize. Conversely, when facing a 50% chance of a $200 loss or fine or a definite $100 fine, the majority of individuals are willing to gamble.[35] Standard economic theory holds that a rational decision maker should have no preference between either option in these two scenarios, as the expected utilities remain the same.[36]

In conjunction with this notion, decision makers tend to value losses more heavily than gains of the same amount.[37] "The aggravation that one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount."[38] In the civil settlement context, the framing effects of risk aversion and loss aversion have the potential to further skew litigants' rational decision-making capacities. One civil-settlement-based study revealed that, consistent with framing theory, 77% of plaintiffs preferred settlement (the risk-averse option) while 69% of defendants preferred to go to trial (displaying risk-seeking behavior) when the expected values of settlement and trial were identical.[39] Thus, these biases towards risk and loss aversion have the potential to skew a litigant's cognitive decision-making matrices and form a barrier to economically efficient settlement outcomes.

3. OVERCONFIDENCE, EGOCENTRISM, AND CONFIRMATION BIASES

In the course of predicting the outcome of an uncertain event, individual decision makers have a distinct and measureable tendency to overestimate their chances of success and underestimate their chances of failure. One study even calls this inclination "[a]mong the most robust findings in research on social perceptions and cognitions over the last two decades."[40] Moreover, this perceptual fault is further aggravated when the decision maker perceives the event to be controllable.[41] An individual is increasingly likely to overestimate his

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34. *Id.*

35. *See, e.g.*, *id.* at 305–08.

36. Guthrie, *supra* note 6, at 1118.

37. *See, e.g.*, Kahneman & Tversky, *Prospect Theory*, *supra* note 12, at 279.

38. *Id.*

39. *See, e.g.*, Rachlinski, *supra* note 11, at 128–29.

40. Marie Helweg-Larsen & James A. Shepperd, *Do Moderators of the Optimistic Bias Affect Personal or Target Risk Estimates? A Review of the Literature*, 5 PERSONALITY & SOC. PSYCHOL. REV. 74, 74 (2001).

41. Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCH. PUB. POL'Y & L. 133, 136 (2010).

chances of success when that success is predicated on the individual's own efforts or actions. This means that litigants and lawyers are even more susceptible to this biasing factor because they perceive themselves as having a direct impact on the outcome of the case. In fact, "a lawyer's need for a highly confident professional persona may perpetuate a tendency toward overconfidence over time rather than diminish it."[42]

While some may champion confidence as a positive character attribute, in the contexts of anchoring and framing tendencies and reliance on misleading heuristics, these self-serving biases tend to magnify the already flawed reasoning of the supposed rational actor.[43] "Overconfidence in one's own judgment magnifies the undesirable consequences of erroneous judgment . . . [because] placing a high degree of confidence in a judgment made in heavy reliance on a misleading heuristic compounds matters."[44] For example, parties may be overly confident that they can secure favorable outcomes at trial and thus set unrealistic concessions and bargaining ranges in settlement negotiations.[45] Similarly, "[d]isputants who were informed of the bias expected their bargaining counterpart to exhibit the bias but seemed to think that they themselves were immune."[46] As such, overconfidence biases present barriers to debiasing techniques, giving them even greater potential to skew decision-making processes.

These egocentric tendencies are only worsened by the effects of confirmation biases. "Confirmation bias" describes the phenomenon that a decision maker is more likely to seek information that confirms rather than questions his initial thoughts and opinions.[47] In other words, an individual tends to construe information in a way that it supports his already affirmed beliefs.[48] This means that not only might a litigant tend to believe that his chances of success are greater than they are in

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42. *Id.* at 149.

43. Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1173 (2003).

44. *Id.*

45. *See, e.g.*, ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 93 (Bruce Patton, ed., 2d ed. 1991); Eric Talley, *Liability-Based Fee-Shifting Rules and Settlement Mechanisms under Incomplete Information*, 71 CHI.-KENT L. REV. 461, 493 (1995).

46. Linda Babcock et al., *Creating Convergence: De-biasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 921 (1997).

47. *See* Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

48. *See, e.g.*, Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1481 (2003).

reality, but he will tend to seek out information corroborating this theory and subsequently discount information to the contrary. Thus, egocentric tendencies exacerbate the already present overconfidence, framing, and anchoring biases.

4. REACTIVE DEVALUATION

Closely related to egocentric and confirmation biases is the notion of reactive devaluation. "Reactive devaluation" is the tendency for an individual to evaluate concessions and settlement proposals less favorably after they have been offered by the adverse party.[49] To illustrate this principle, consider a tort case where the plaintiff is seeking $100,000 in damages. The plaintiff might initially agree that he would be willing to settle for $75,000. However, when the defendant later offers to settle for $75,000, reactive devaluation predicts that the plaintiff will place a hostile frame on the defendant's offer and reject it as less desirable. This behavioral bias has the potential to directly inhibit standard settlement negotiations because parties are less likely to reach a mutually agreeable outcome when they devalue each other's offers and concessions.

Taken in sum, reactive devaluation, self-serving tendencies, framing issues, and anchoring heuristics create a web of decision-making biases waiting to ensnare the unsuspecting litigant. Thus, prospect theory offers several examples of inconsistent, irrational economic behaviors and biases that possess the real potential to influence decision making in civil settlement negotiations. However, it would be imprudent to fail to consider that other factors besides purely economic incentives influence the legal decision-making process.

C. Behavioral Psychology and Principles of Fairness

Virtually every practicing attorney has encountered the infamous "principled" client—the one who declares that the case is not about the money but "about the principle of the thing." These same practicing attorneys are also probably quick to note that these so-called "principles" seem to wane rather promptly as legal bills start piling up. Nonetheless, this does not detract from the fact that certain intrinsic principles can, and have been proven to be, of substantial importance to

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49. *See* Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 394–95 (1991); Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION 26, 26–43 (Kenneth J. Arrow et al., eds., 1995).

many litigants. Among these moralistic principles, concepts of fairness reign king.[50]

Research in the field of behavioral psychology proposes two means by which litigants evaluate the fairness of a case: procedural justice and distributive justice.[51] Studies suggest that procedural justice, or the fairness of the process used in the disposition of a case, is a significant factor in how decision makers assess the overall success of a lawsuit.[52] In fact, "individuals were more satisfied with dispute resolution mechanisms when they perceived that the *process* of dispute resolution was fair, irrespective of the fairness of the outcome or the favorability of the outcome."[53] Conversely, "distributive justice" analyzes fairness based on the *disposition* of the settlement process.[54] But the question remains: how do principles of fairness effect the economic dispositions of a case?

An abundance of research suggests that the development of rapport between opposing parties can "pay dividends in the surplus allocation process."[55] As such, "higher levels of procedural justice [are] significantly related to a more even distribution of the surplus that [is] created" during the bargaining process.[56] This means that the disputants' perceptions of fairness in the negotiation process have a direct and measurable impact on whether they achieve the most equitable economic outcome. The differing procedural frameworks underlying mediation and standard negotiation practices thus lead to disparate levels of procedural and distributive justice, in turn affecting the fairness perceived by the parties.

II. THE EFFECTS OF MEDIATION ON TRADITIONAL CIVIL SETTLEMENT BIASES

This Part is divided into three primary Sections. Section A more fully describes the mediation process. Section B examines the propitious impact of mediation on the behavioral and psychological

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50. *See generally* Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010).

51. *See generally id.*

52. *Id.* at 384.

53. *Id.* at 386–87 (emphasis added).

54. *Id.* at 416 (citing Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 483–85 (2008)).

55. *See, e.g.*, Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1830 (2000).

56. Hollander-Blumoff, *supra* note 50, at 417.

biases that plague standard negotiations. It also asserts that mediation provides a more stable, fair, and bias-resistant method of dispute resolution. Finally, Section C discusses, and subsequently rebuts, the potential disadvantages of mediation through the lenses of prospect theory and behavioral psychology.

A. Defining Mediation

Mediation, the most common form of alternative dispute resolution, involves the use of a neutral third party who "helps disputants negotiate a mutually acceptable settlement of their dispute."[57] Generally termed a "facilitated negotiation,"[58] mediation guides opposing parties through a series of steps with the goal of achieving a mutually beneficial outcome. Parties begin by agreeing on rules of procedure that will govern the process, after which the mediator leads them through a discussion of disputed issues.[59] Next, the mediator seeks to identify any agreed-upon facts and, ideally, begins to formulate the structure of an agreement.[60] As a whole, the mediation process provides litigants with an informal, casual process, which carries the potential to ellicit increased levels of cooperation and courtesy between the disputing parties.[61] While this schema appears similar to traditional negotiation practices, save for the addition of a neutral third party, mediation has the real potential to subvert many of the psychological and behavioral biases that afflict the conventional civil settlement process.

B. The Implications of Alternative Dispute Resolution Practices on the Behavioral and Psychological Biases Afflicting Civil Settlement

The construct, setting, and procedural characteristics of mediation allow it to avoid many of the psychological and behavioral biases that plague the conventional adversarial settlement process.[62] This Section examines the various behavioral and psychological biases that afflict litigants in standard negotiation settings against the backdrop of

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57. Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. & CONCILIATION CTS. REV. 335, 335 (1999).

58. Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 967 (2000).

59. *See id.* at 967–68.

60. *See id.*

61. *See id.*

62. *See, e.g.*, Rachlinski, *supra* note 43, at 1225.

mediation, ultimately asserting that mediation provides a more stable, fair, and bias-resistant method of dispute resolution.

1. MEDIATION'S ABILITY TO RESIST THE BIASING FACTORS THAT AFFLICT CONVENTIONAL SETTLEMENT NEGOTIATION PROCESSES

This Subsection examines the specific mechanisms by which mediation marginalizes the biasing effects of anchoring and availability heuristics, risk and loss aversion, overconfidence, egocentrism and confirmation biases, and reactive devaluation.

a. Conquering anchoring and availability heuristics

Mediation has the ability to marginalize the biases stemming from availability and anchoring heuristics. Both availability and anchoring heuristics arise from an individual's tendency to favor those ideas or numeric values, known as "anchors," that are more readily available or more easily recallable.[63] As discussed in Part I.B, these heuristics spur litigants to attach themselves to seemingly irrelevant valuations, with the potential to derail any attempts towards achieving an efficient outcome.[64]

Behavioral psychologists and prospect theorists note that information alone is not enough to remove these biasing factors.[65] In the context of standard litigation, lawyers are likely to be equally biased to the same heuristics and thus are not able to provide objective, informed suggestions as to the potential valuations of a case or settlement offer.[66] Moreover, merely informing the subjects of these biasing factors is not sufficient and does little to deter their ultimate effect.[67] Rather, these biasing factors can only be eradicated when parties are forced to "view the facts of the dispute through the eyes of their opponents."[68]

A profound body of research suggests that the attorneys representing litigants in an adversarial negotiation process are unable to avoid these availability and anchoring heuristics[69] due to their own

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63. Sternlight & Robbennolt, *supra* note 24, at 466–67; Korobkin & Ulen, *supra* note 22, at 1100–02.

64. *See, e.g.*, *supra* notes 24–26 and accompanying text.

65. Korobkin & Ulen, *supra* note 22, at 1094.

66. *See generally id.* at 1092–94.

67. Baruch Fischhoff, *Hindsight Is Not Equal to Foresight: The Effect of Outcome Knowledge on Judgment under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE, 288, 288–99 (1975).

68. *See* Korobkin & Ulen, *supra* note 22, at 1094.

69. *See, e.g.*, Birke & Fox, *supra* note 27, at 10.

tendencies towards confirmation and polarization biases.[70] However, mediators and nonbiased arbitrators do not have this same vested interest that an attorney shares with his or her client and thus are removed from these polarizing effects. Consequently, a mediator is in the best position to inform adversarial parties of their biased reasoning by forcing them to take the necessary time to consider the arguments of the other side in an objective manner. A mediator can "provide the parties in private caucus [with] a plausible explanation of their adversary's actions that emphasizes situational constraints."[71] Thus, the mediator has the unique capacity to diffuse biasing heuristics by questioning a party's certainty without exposing him to the embarrassment of questioning his judgment in front of the opposing party.[72]

This same effect cannot be accomplished by the lawyer representing the opposing client for a number of reasons discussed previously.[73] Consequently, conventional settlement negotiations cannot provide a means for eliminating anchoring and availability heuristics, whereas the very construct of mediation achieves this feat.

b. Minimizing risk aversion and loss aversion

Similar to its effect on the anchoring and availability heuristics, mediation has the potential to diminish the adverse economic effects of risk and loss aversion through a process of providing unbiased, third-party information.[74] Risk and loss aversion cause litigants engaged in conventional settlement disputes to settle for less (in the case of plaintiffs, who are often risk-averse towards potential gains)[75] and opt for trial when settlement would be the economically rational choice (in the case of defendants, who are typically risk-seeking towards potential losses).[76]

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70. *See* Goodman-Delahunty et al., *supra* note 41, at 136; Lord et al., *supra* note 47, at 2102.

71. Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 OHIO ST. J. ON DISP. RESOL. 281, 307 (2006).

72. *See id.*

73. The tendency towards reactive devaluation leads lawyers to discount the (potentially reasonable) opinions of the opposing counsel. *See* Ross & Stillinger, *supra* note 49, at 394–95. Moreover, the adversarial nature of conventional litigation results in the polarization of the parties. *See generally* Ross, *supra* note 49, at 26–43; Lord et al., *supra* note 47, at 2098. These polarizing effects, coupled with the concepts of reactive devaluation, only diminish the likelihood that an attorney would give credence to his adversary's suggestion that his own reasoning was in some way biased or flawed.

74. *See* Korobkin, *supra* note 71, at 314–16.

75. *See, e.g.*, Rachlinski, *supra* note 11, at 128–29.

76. *See, e.g.*, Tversky & Kahneman, *Advances*, *supra* note 12, at 306.

"In order to avoid an impasse that results from the framing of a risky choice, the mediator [can] attempt to change the reference point from which the disputant evaluates the possibility of settlement, such that settlement appears to be a gain rather than a loss."[77] Research suggests that presenting this "loss" as a "gain" has a substantive effect on a litigant's ability to overcome risk and loss aversion biases, and ultimately results in more economically efficient outcomes.[78]

Thus, a mediator, unlike a lawyer involved in adversarial negotiations, can speak with parties in private with the goal of informing them of their predilections towards risk and loss aversion. This not only has the ability to mitigate the effects of the biasing factors, but it also allows this information to be conveyed outside the negotiating table and in a way that respects the dignity of the parties. Consequently, mediation provides an effective means for eliminating risk and loss aversion biases that arise in traditional civil settlements.

c. Limiting overconfidence, egocentrism, and confirmation biases

Mediation also has the unique ability to mitigate the economic inefficiencies arising from overconfidence, egocentrism, and confirmation biases. Each of these factors leads both litigants and their attorneys to overestimate the strength of their cases, the chances of success, and the control which they possess over that ultimate success.[79] And while conventional negotiation discussions offer little protection from these biases,[80] the presence of an unbiased, neutral third party has the potential to offer a substantive solution.

Litigants who are informed of the existence of overconfidence bias by a neutral party are less likely to fall prey to similar biasing tendencies.[81] A mediator, as an impartial third party to the dispute

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77. Korobkin, *supra* note 71, at 314. For example, consider a defendant who is choosing between paying a $25,000 settlement or a $50,000 potential loss at trial. Assuming that the chances of success at trial are fifty-fifty, 69% of defendants will choose to go to trial because they are loss-averse (or risk-seeking towards potential losses). *See* Korobkin & Guthrie, *supra* note 13, at 130 n.95. Consequently, a knowledgeable mediator will not frame this situation as a decision between losses, but rather as a decision between gains. Korobkin, *supra* note 71, at 314. In other words, he will ask the defendant to choose between a 100% chance of saving $25,000 or a 50% chance of saving nothing.

78. *See* Irwin P. Levin et al., *All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects*, 76 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 149, 176–78 (1998).

79. *See, e.g.*, Rachlinski, *supra* note 43, at 1192–93; Talley, *supra* note 45, at 493.

80. *See supra* Part I.

81. *See* Korobkin, *supra* note 71, at 294–95.

resolution process, has just such a capability. Moreover, as in the case of anchoring heuristics, a mediator possesses the ability to ask the parties into a private caucus to discuss or enumerate the weaknesses of their case. Studies have shown that this can successfully reduce overconfidence, egocentrism, and confirmation biases.[82] By asking litigants to list weaknesses associated with their positions or by having them consider reasons why they might wrongfully predict the case outcome, mediators can force disputants to consider the other side of their arguments, ultimately helping rid the negotiation process of these biasing factors.

Behavioral and psychological studies suggest that "direct evaluation is often necessary to overcoming the overconfidence bias and avoiding impasse when settlement is in the best interests of both parties."[83] In other words, disputing parties' positions must be directly evaluated and confronted with their potentially flawed or biased decision-making processes. In the absence of a neutral third party, the likelihood of this impartial, objective confrontation is unlikely. As such, mediation provides a more efficient means of minimizing the biasing effects of overconfidence and egocentric biases. Accordingly, the elimination of these barriers to economic efficiency suggests that mediation results in a more efficient method of dispute resolution.

d. Overcoming reactive devaluation

Like the overconfidence and egocentric biases, the economic inefficiencies resulting from reactive devaluation are marginalized through the implementation of an effective mediation process. "Reactive devaluation" refers to the process in which a party subconsciously diminishes the significance of an offer or concession if that offer or concession is made by the adverse party.[84] This departure from a sound valuation process subsequently results in economically inefficient outcomes in the dispute resolution process.

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82. *See* Babcock et al., *supra* note 46, at 915–18 (having subjects explicitly consider counterarguments decreases self-serving bias); Lyle A. Brenner et al., *On the Evaluation of One-Sided Evidence*, 9 J. BEHAV. DECISION MAKING 59, 66–68 (1996); Stephen J. Hoch, *Counterfactual Reasoning and Accuracy in Predicting Personal Events*, 11 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 719, 727 (1985); Asher Koriat et al., *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUM. LEARNING & MEMORY 107, 116 (1980).

83. Korobkin, *supra* note 71, at 298.

84. *See* Ross & Stillinger, *supra* note 49, at 394–95; Ross, *supra* note 49, at 28.

Standard economic theory assumes that an actor's preferences are stable, knowable, and context independent,[85] and thus does not contemplate biases like reactive devaluation. Conventional settlement negotiations suffer from the same affliction. Disputing parties cannot effectively evaluate their own biasing tendencies in the heat of negotiation. Moreover, the basic principles of reactive devaluation, coupled with egocentric biases, predict that a disputant will not believe that he suffers from biased reasoning or imperfect decision making.[86] This idea is exacerbated if this suggestion is made by the opposing counsel, as reactive devaluation depicts that the litigant will *further* devalue these opinions.[87] As such, the conventional, adversarial model of civil settlement offers little help in dealing with issues of reactive devaluation.

Conversely, mediation, with its ability to present the opinions of an authoritative, impartial actor, can reduce the effects of reactive devaluation by forcing parties to consider their fallacious perceptions. Forcing decision makers to submit their decisions to organizational review processes can remedy the inefficiencies arising from overconfidence and reactive devaluation.[88] A mediator, unlike in standard settlement practices, has the ability to create such an organizational structure. Consequently, mediation provides a viable method of eliminating reactive devaluation biases whereas conventional adversarial negotiation processes do not. Similarly, mediation also has the ability to increase economic efficiency in the dispute resolution process in that it achieves *greater* levels of fairness for all parties involved.

2. ADEQUATELY ADDRESSING CONCERNS FOR FAIRNESS

Fairness of process is an undervalued yet integral part of an effective dispute resolution. Generally speaking, "fairness" can be considered in two contexts: procedural justice and distributive justice. The former refers to the fairness of the adjudicative procedure (due process, etc.) while the latter refers to fairness of the outcome. Studies

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85. *See* Becker, *supra* note 5; Tversky & Kahneman, *Rational Choice*, *supra* note 12, at S251–54 (summarizing a hierarchy of principles underlying rational choices).

86. *See* Korobkin, *supra* note 71, at 304–05.

87. *See* Ross, *supra* note 49, at 29–36 (describing studies demonstrating "the tendency to devalue the adversary's concessions and proposals").

88. *See* Robert K. Rasmussen, *Behavioral Economics, the Economic Analysis of Bankruptcy Law and the Pricing of Credit*, 51 VAND. L. REV. 1679, 1694–97 (1998) (describing efforts by lending institutions to reduce the role cognitive biases play in lending decisions by restructuring the decision-making process for loans).

suggest that the presence of procedural justice creates a greater bargaining surplus, as parties who judge an adjudicative process to be fair or reasonable are more likely to make the necessary concessions in order to reach an equitable outcome.[89] As such, procedural justice, through the creation of bargaining surplus, can render more economically preferable outcomes for *both* parties.

Conventional settlement involves "bargaining in the shadow of the law."[90] Traditional negotiation does not account for disparate bargaining powers between the parties. For example, in the context of products liability cases, a large corporation or another "repeat player" entering the negotiation process has likely had similar cases, and thus knows what it has settled for in the past, the potential problems or claims that will arise during the course of negotiation, etc. Similarly, the injured plaintiff is likely not privy to this sort of information and thus is disadvantaged from the onset of the bargaining process. Moreover, a repeat player entering negotiations with the individual is likely to demand nondisclosure agreements to maintain this bargaining advantage in the case of future litigation.

In sum, conventional negotiation practices do not adequately address concerns for procedural and distributive justice. Conversely, mediation and other methods of alternative dispute resolution provide for these basic cannons of fairness and thus assist parties in reaching a more equitable dispute disposition.

a. Distributive justice: how mediation and third-party dispute resolution create efficient economic outcomes for litigants

Studies in the field of behavioral psychology suggest that "measures of distributive justice—that is, how fair the negotiated *outcome* was—ha[ve] significant effects on acceptance, good feelings, and collaborativeness."[91] The distributive fairness of a dispute resolution process can be measured using several different metrics, including equity,[92] equality,[93] or need.[94] However, prospect theory and

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89. *See, e.g.*, Korobkin, *supra* note 55, at 1821–26.

90. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

91. Hollander-Blumoff, *supra* note 50, at 416.

92. "Equity" refers to the distribution of resources or the recovery from a settlement in proportion to the relative contribution of the action. *See* Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis of Distributive Justice?*, 31 J. SOC. ISSUES 137, 143–45 (1975). For example, "equity" might be achieved in a marital dispute case if the resources of the couple are divided in a manner consistent with each spouse's contributions to the sum of the assets being divided. *Cf.* Elaine Walster et al., *New Directions in Equity Research*, 25 J.

behavioral psychology suggest that disputants cannot efficiently exercise these metrics in determining exactly what they seek from a negotiation.[95]

For example, one study found that subjects' satisfaction with a negotiated outcome was based more on their adversaries' relative payoffs than by their own absolute payoffs.[96] Subjects were more satisfied with a loss of $600 to themselves but a loss of $900 to their adversary than with an outcome that constituted a gain of $600 to themselves and a gain of $900 to their adversary.[97] This "relative wealth" phenomenon represents yet another economic inefficiency that stems from subconscious fairness preferences. By eliminating or mitigating these biasing factors, litigants on both sides of a dispute can successfully refrain from achieving suboptimal negotiated outcomes.

Mediation offers several unique opportunities that are not present in standard adversarial negotiations and that open the door to greater levels of distributive justice. In the course of mediation, a mediator can speak directly and privately with a single party to better determine their goals of the dispute resolution process. As such, a mediator, working in confidence with a single party, can formulate a list of concessions that might not be very valuable to the giving party (thus constituting a minor loss),[98] but might be valued highly by the receiving party (constituting a

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PERSONALITY & SOC. PSYCHOL. 151, 152–53 (1973) (defining an "equitable relationship" as one in which all participants receive equal relative outcomes).

93. "Equality" refers to distribution or allocation of recovered funds in an equal manner (regardless of any disparate initial contributions). *See* Deutsch, *supra* note 92, at 146. The division of marital property in a fifty-fifty manner, regardless of contribution to the asset pool, would constitute "equality."

94. "Need" refers to the notion that those who need the funds should get those distributions necessary to satisfy all of these needs. *See id.* at 146–47. A "need-based" metric would consider how much support the husband or wife requires and divide the assets in a manner that is sufficient to meet these needs. This list of metrics is neither exhaustive nor exclusive, and decision makers often utilize a number of different metrics in determining what they seek from the dispute resolution process.

95. *See generally supra* Part I.

96. *See* George Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. PERSONALITY & SOC. PSYCHOL. 426, 430–32 (1989).

97. *Id.* at 431.

98. Something as minor as an apology can be a significant bargaining factor. There has been increasing recent interest in apology in various legal contexts. *See, e.g.*, Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999); Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135 (2000); Carrie J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 19 BEHAV. SCI. & L. 337 (2002); Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127 (1997); Steven Keeva, *Does Law Mean Never Having to Say You're Sorry?*, A.B.A. J., DEC. 1999, at 64. Take, for example, a provision in the

significant gain). Conversely, an attorney representing one of the disputing parties will not be privy to this same openness due to his lack of neutrality in the bargaining and negotiation process.

In essence, mediation is a method of creating bargaining surplus and leaves both parties in a better position than they would have been otherwise. Consequently, mediation provides a better framework for extracting value from a negotiation process and thus creates more bargaining surplus. This bargaining surplus leaves both parties better off and results in a disposition with greater distributive justice.

b. Procedural justice: how mediation promotes procedural fairness where traditional settlement negotiation cannot

Research in the field of behavioral psychology shows that individuals are more satisfied with a dispute resolution when they perceive that the process of reaching the agreement is fair, irrespective of the fairness or favorability of the outcome itself.[99] Assessments of procedural justice in third-party decision-making processes are guided by perceptions of the opportunity to be heard, the impartiality of a decision maker, the existence of neutral, unbiased adjudicative processes, and courtesy and respect afforded to the parties.[100]

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settlement agreement that states that the defendant must make a letter of written apology to the plaintiff. Such an act results in negligible monetary loss to the defendant, but might be valued very highly by the plaintiff (given the circumstances of the case, etc.). Thus, this simple letter may lead the plaintiff to give a similar concession that the defendant values. This process of mutual concession increases the overall equity gleaned from the dispute resolution process and will likely result in greater amounts of distributive justice.

99. JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 73–74 (1975).

100. *See, e.g.*, Robert Folger, *Distributive and Procedural Justice: Combined Impact of "Voice" and Improvement on Experienced Inequity*, 35 J. PERSONALITY & SOC. PSYCHOL. 108, 109 (1977). Research suggests that the mere opportunity to participate in the decision-making process may be important to some litigants, regardless of whether or not their participation actually affects the outcome. *See, e.g.*, E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990). Thus, even though an actor does not make a substantive difference to the negotiation process, he may nonetheless deem it to be more procedurally fair. *See, e.g.*, *id.*; Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 530 (1989); Tom R. Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice*, *in* APPLIED SOCIAL PSYCHOLOGY AND ORGANIZATIONAL SETTINGS 77, 77–78 (John S. Carroll ed., 1990); Tom Tyler & Steven L. Blader, *Justice and Negotiation*, *in* THE HANDBOOK OF NEGOTIATION AND CULTURE 295, 300 (Michele J. Gelfand & Jeanne M. Brett eds., 2004); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985).

Unlike in mediation and arbitration practices, standard adversarial negotiation does not provide a framework of rules that must be followed.[101] While proponents of standard negotiation tout that it "has all the adversarial potential of litigation . . . but few of the restraints,"[102] these proponents fail to recognize the duality of this phenomenon. Traditional settlement negotiation may benefit, in some respects, from its lack of formality, but it is this very lack of formal infrastructure that undermines the precepts of procedural justice. As such, this unconstrained process opens the door for inequalities in bargaining power and consequently results in the marginalization of litigants' abilities to obtain procedural justice.

Mediation, conversely, allows disputants to obtain a greater level of procedural justice as compared to standard adversarial negotiation practices.[103] For instance, mediation allows disputants to actively participate in the bargaining process, voicing their opinions firsthand rather than through their lawyer's filter. "This participatory or dignitary value of process produces litigant satisfaction and a greater degree of acceptance of and compliance with the ultimate decision reached."[104] If parties can reach their own agreement, they will likely feel better about the overall outcome than if a judge had done it for them.[105] This, in turn, has several important economic and institutional implications.

Litigants that are satisfied with the procedural process of their dispute resolution are less likely to take further action.[106] For example,

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101. Hollander-Blumoff, *supra* note 50, at 410.

102. Norton, *supra* note 100, at 530.

103. *See, e.g.*, Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 171–72 (2005) (noting that bilateral negotiation processes are generally viewed by litigants as providing less procedural fairness than mediation and other alternative dispute resolution methods).

104. Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 106 (2000) (citing David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Research Tool*, *in* ESSAYS IN THERAPEUTIC JURISPRUDENCE 303, 307 (David B. Wexler & Bruce J. Winick eds., 1991)).

105. *See id.* at 113 (citing FISHER & URY, *supra* note 45, at 166). Generally, litigants will feel more comfortable with the ultimate disposition of a suit when they perceive that they make their own choices. *Id.* Similarly, they will view the process negatively if they believe that their decisions were in the hands of an unfair arbiter or their agreement was the result of coercive procedural pressures. *Id.*; *cf., e.g.*, Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1155–67 (1997) (reporting that mental health patients showed lower treatment adherence and less satisfaction with their treatment when treatment was coerced).

106. *See* Winick, *supra* note 105, at 1155–59 (discussing voluntariness and coercion in the context of civil commitment of mentally ill patients).

a plaintiff that is pleased with fairness of the negotiation process is less likely to try to continue litigation through the formulation of other claims. If a litigant is displeased with the process and continues to seek further action, the economic burden flowing from this litigation falls not only on the litigant and the prospective defendant, but also on the justice system as a whole. As such, sufficient procedural justice has the ability to stay unnecessary and fiscally inefficient actions by a begrudged disputant.

Similarly, research suggests that higher levels of procedural justice are significantly related to more even distributions of the surplus created through the bargaining process.[107] This means that the excess economic gains derived from mediation are more likely to be allocated evenly in a system that maximizes procedural justice. Thus, mediation creates a two-fold benefit for litigants as excess surplus is both created *and* allocated in a more equitable manner through mediation's tendency to promote procedural justice. Moreover, these same benefits are not conferred through standard bilateral negotiation processes, which litigants generally view as providing less procedural justice.[108]

C. Possible Disadvantages of Mediation and Alternative Dispute Resolution Practices

Despite the diminishing effect that mediation and ADR practices have on many of the underlying psychological biases that skew conventional, adversarial settlement negotiations, critics note that the potential exists for mediation practices to suffer from similar biases. Subsection 1 addresses critics' claims that mediation is actually more economically inefficient than traditional settlement practices. Subsection 2 addresses critics' attacks on the claim that mediation provides for more procedural and distributive justice.

1. THE ECONOMIC PRESSURES STEMMING FROM MEDIATION IN LIGHT OF RISK AND LOSS AVERSION THEORIES

While mediation has the ability to diminish tendencies towards risk and loss aversion, this benefit is not without its limitations. Although mediation does not require that the parties reach an agreement,

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107. Hollander-Blumoff & Tyler, *supra* note 54, at 488–90.

108. Linda D. Molm et al., *In the Eye of the Beholder: Procedural Justice in Social Exchange*, 68 AM. SOC. REV. 128, 149 (2003).

economic pressures may negate the need for this requirement.[109] For example, the State of Alabama charges disputants mediation fees of over $100 per hour.[110] Similarly, judges in Wisconsin have the power to order mandatory mediation and take the costs associated with this mediation process out of any judgments issued by the court.[111]

The economic pressures stemming from these costs have the potential to create similar risk and loss aversion biases as described previously, but to a greater and potentially more destructive extent. As predicted under prospect theory, a risk-averse plaintiff will tend to value mediation fees more negatively than similarly situated potential gains,[112] thus leading to the acceptance of premature and likely prejudicially low settlement offers.[113] However, unlike the risk and loss aversion principles discussed previously,[114] both the plaintiff and the defendant are loss-averse with respect to mediation fees. In other words, while a defendant is generally risk-seeking towards potential losses,[115] mediation fees do not fall within the realm of uncertain, incalculable outcomes. This means that, within the scope of mediation, both plaintiffs and defendants will act in a loss-averse manner.

Stated more simply, both parties are pressured to settle more quickly. This pressure, in turn, results in suboptimal outcomes for *both* parties, as the plaintiffs will likely accept smaller settlement offers and defendants will be prone to settle for higher than expected value. In essence, the economic pressures created by compounding mediation fees widen the bargaining range and thereby reduce the chances that the parties will reach the mutually optimal resolution.

Similarly, critics of mediation and ADR practices argue that premature agreements driven by compounding mediation costs are more likely to be relitigated, resulting in less economically efficient outcomes than if parties had entered traditional settlement negotiations.[116] Moreover, parties are less likely to carry out the terms of an agreement

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109. Bill Ezzell, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 134 (2001).

110. *See, e.g.*, Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375, 394 (1999) (citing ALA. CIV. CT. MEDIATION R. 15(b)).

111. *See id.* at 393–94 (citing WIS. STAT. §§ 802.12(2)(a) to (d), (3)(c) (2009–10)).

112. *See, e.g.*, Kahneman & Tversky, *Prospect Theory*, *supra* note 12, at 279.

113. *See generally* King, *supra* note 110, at 456–57 (finding that as fees associated with the judicial process compound, the pressure to settle worsens).

114. *See, e.g.*, Rachlinski, *supra* note 11, at 128–29.

115. *Id.*

116. *See* Ezzell, *supra* note 109, at 135.

"perceived as expeditious rather than wise."[117] The potential for mediation and ADR to drive litigants into premature, and prospectively unstable, settlement decisions thus serves as a barrier to economic efficiency. These inefficiencies may be greater than the psychological and behavioral barriers spawning from conventional civil settlement negotiations.

2. THE EFFECTS OF MEDIATION ON A LITIGANT'S PERCEPTION OF PROCEDURAL JUSTICE

Aside from its potential to skew litigants' economic decisions, mediation may present a psychological impediment to procedural justice. Merely getting two adversarial parties into a mediation setting often proves difficult, let alone getting them there with open minds.[118] This is due largely to the public perception that fairness is best adjudicated, and thus most efficiently achieved, through an adversarial process.[119] Both the American public and the fundamental underpinnings of American jurisprudence tend to favor the adversarial system, and there is a steadfast belief that anything less than a full trial on the merits may lack procedural validity.[120] Therefore, litigants may be predisposed to avoid mediation for fear that they will not receive a fair adjudication.

Thus, critics claim that mediation is subject to more serious biases than traditional, adversarial negotiation practices. Moreover, they assert that mediation also lacks procedural fairness, which will dissuade litigants from approaching the process with an open mind, leading to relitigation and further economic waste.[121] However, this line of argumentation is frustrated by empirical data showing that litigants are more pleased, ex post facto, with mediation and ADR practices than with conventional civil settlement or litigation.[122] The effects of

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117. *See* King, *supra* note 110, at 455. Also note that a settlement agreement entered into under such pecuniary constraints may open the floodgates to claims of contractual invalidity on the grounds of duress.

118. *See* Elizabeth Barker Brandt, *The Challenge to Rural States of Procedural Reform in High Conflict Custody Cases*, 22 U. ARK. LITTLE ROCK L. REV. 357, 362 (2000).

119. *See* King, *supra* note 110, at 388.

120. *See id.* (describing how American culture cherishes its "long-standing commitment to the adversarial concept of justice").

121. *See, e.g.*, *supra* notes 51–56 and accompanying text.

122. *See, e.g.*, King, *supra* note 110, at 376 n.5 (citing Jay Folberg, *Mediation of Child Custody Disputes*, 19 COLUM. J.L. & SOC. PROBS. 413, 424 (1985) (concluding that nearly ninety-three percent of disputants, analyzing the process ex post facto, would mediate again or would recommend the process to a friend)); *id.* at

procedural justice on disputants' economic decision-making processes is circumscribed to their ex ante perceptions of the process. These concerns and their potential economic implications are nullified once litigants enter the mediation process.[123]

III. MEDIATION AS A MORE ECONOMICALLY EFFICIENT ALTERNATIVE TO TRADITIONAL CIVIL SETTLEMENT

Mediation's utility as an effective means of dispute resolution arises due to its unique ability to systematically "confront a well-documented source of inefficient failure to settle."[124] As discussed previously, mediation has the ability to marginalize or even remove many of the psychological and behavioral biases that afflict litigants in their valuation and decision-making processes.[125] In conjunction with these advantages, mediation possesses a number of other advantages that result in increased overall economic efficiency, both individually, in regards to the litigating parties, and systemically, as pertaining to the costs conferred upon the larger judicial system.

A. Expediency of Process

The process of mediation is, generally speaking, less time-consuming than traditional litigation.[126] Cases sent through mediation or other forms of ADR are generally resolved forty percent faster than cases sent through other methods of dispute resolution.[127] "A quick resolution means less expense, less anxiety . . . and a less burdened court docket."[128] Additionally, settlements reached through the mediation process tend to be more detailed than those agreements negotiated by attorneys alone. Mediation not only allows for more expedient resolution of cases, but it also tends to produce settlement agreements that are better tailored towards the ends desired by the disputing parties.[129]

376–78 (citing Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 9, 19 (Kenneth Kressel et al. eds., 1989)).

123. *See, e.g.*, *id.* at 376–78.

124. Babcock et al., *supra* note 46, at 923.

125. *See* Parts I–II.

126. *See* King, *supra* note 110, at 438–39.

127. *Id.* at 438 n.339.

128. Ezzell, *supra* note 109, at 128.

129. *See* Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 411 (2000).

Furthermore, even if the mediation process is ultimately unsuccessful, the process itself contributes to the expediency of the case disposition as a whole. Mediation programs can streamline a subsequent trial, thereby preventing excess expenditures of both time and money, by helping the parties focus their arguments and narrow the scope of the issue at dispute.[130] Thus, even if the mediation does not resolve the dispute, its latent effects still produce more economically efficient results.

B. Effectiveness of the Mediation Process and the Reduction of Repeat Litigation

Research indicates that satisfaction ratings for mediation are usually high.[131] Additionally, participants, after having completed the mediation process, generally qualify the process and its outcomes as "fair."[132] But, perhaps most importantly, one study found that ninety-three percent of disputants claimed they would use mediation for future dispute settlement.[133] Similarly, another study found nearly seventy-five percent of mediation participants expressed "extreme satisfaction" with the process.[134] These strong indicators of satisfaction with the mediation process have resounding economic implications on the litigating parties and on the greater judicial system.

Mediation appears the best method for combining parties' desires to actively shape their settlement agreements with their desires to achieve a fair and equitable outcome.[135] Its high ex post facto ratings by

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130. *See* Kimberly M. Ruch-Alegant, Note, Markman*: In Light of* De Novo *Review, Parties to Patent Infringement Litigation Should Consider the ADR Option*, 16 TEMP. ENVTL. L. & TECH. J. 307, 308 (1998) (asserting that even when ADR failed to circumvent a trial, it could expedite the trial process overall).

131. *See* King, *supra* note 110, at 376 (citing NANCY H. ROGERS & CRAIG A. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 4:04, at 25–31 (2d ed. 1994)); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 256–60 (1981); Janice A. Roehl & Royer F. Cook, *Mediation in Interpersonal Disputes: Effectiveness and Limitations*, *in* THE PROCESS AND EFFECTIVENESS OF THIRD PARTY INTERVENTION 31, 33 (Kenneth Kressel et al. eds., 1989).

132. *Id.* (citing McEwen & Maiman, *supra* note 131, at 238 (noting disputants' overall satisfaction and perceptions of fairness in mediation process)); Jeanne M. Brett et al., *The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Service Providers*, 12 NEGOTIATION J. 259, 267 (1996).

133. Folberg, *supra* note 122, at 424 (finding that ninety-three percent of mediation clients would mediate again or recommend the process to a friend).

134. *See* King, *supra* note 110, at 376 n.5 (citing Pearson & Thoennes, *supra* note 122, at 19).

135. *See, e.g.*, *id.* at 376–77.

participants corroborate the notion that mediation offers substantial psychological and economic benefits, in addition to a high level of disputant involvement.[136]

The combination of mediation's debiasing tendencies, as well as the high satisfaction ratings among its participants, leads to one resounding conclusion in favor a more widespread implementation of mediation processes: disputes resolved through mediation lead to decreased rates of relitigation.[137] A reduction in relitigation equates to a reduction in cost to disputing parties and a reduced burden on courts' dockets, and offers a more efficient way for parties to move on with their lives.[138] This means mediation results in a net economic savings to the individuals and to the system as a whole, due to an overall reduction in needless economic waste.

These findings, in conjunction with mediation's overwhelming satisfaction ratings,[139] suggest that direct involvement in the bargaining and settlement processes leads to both greater satisfaction and greater future compliance with the agreed-upon resolution.[140]

C. The Role of Judges and the Legislatures in Promulgating a More Efficient Method of Dispute Resolution

Apart from its tendency to reduce rates of relitigation and dispose of cases more efficiently, mediation offers several other economic benefits. The organizational structure of the mediation process has the potential to achieve more economically efficient outcomes.[141] Merely submitting an issue to a deliberative, rather than an argumentative, process can foster discussion that helps to mitigate biasing factors.[142]

Some courts and legislatures have already realized the inherent value in mediation practices, as evidenced by state statutes and federal appellate court programs permitting judges to order disputants into mandatory mediation.[143] However, despite the extensive value that

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136. *Id.* at 376, 388–89.

137. *See* Brandt, *supra* note 118, at 358.

138. *See generally* King, *supra* note 110, at 376–78.

139. *See supra* notes 115–118 and accompanying text.

140. *See* King, *supra* note 110, at 376–78, 437.

141. *Cf.* Rachlinski, *supra* note 43, at 1214–15.

142. *See id.* at 1216–18.

143. For example, judges in the state of Wisconsin have the power to order disputing parties into mandatory mediation. *See, e.g.*, King, supra note 110, at 393–94 (citing WIS. STAT. §§ 802.12(2)(a) to (d), (3)(c) (2009–10)); Gilbert J. Ginsburg, *The Case for Mediation in the Federal Circuit*, 50 AM. U. L. REV. 1379, 1380 (2001). *See generally* ROBERT J. NIEMIC, FED. JUDICIAL CTR., MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURT OF APPEALS: A SOURCEBOOK FOR JUDGES AND

mediation presents, it is still widely underutilized. By augmenting the framework of current ADR practices, courts and legislators can magnify the favorable effects produced by these practices.

Both courts and legislatures ought to consider publishing the results of mediated settlements, with the chief goal of creating a more open and accessible information stream. At first glance, this might appear to run contrary to negotiated confidentiality agreements. However, courts and legislators could fashion a system in which the parties themselves remain confidential and in which only the relevant facts are published.

Expectations theory asserts that relatively strong or weak cases will settle or conclude prior to trial.[144] The strength of a case is best determined through an ex post facto analysis of the facts in light of the outcome. It thus follows that increased information concerning the disposition of a case ex ante should subsequently produce a more efficient negotiation process and expedite case settlement, as parties are more informed about the strengths and weakness of their case.[145] Factual and legal uncertainties cloud this ex ante analysis of parties' risks at trial, thereby increasing the chances of litigation. Accordingly, published mediation results would decrease these factual and legal uncertainties in the bargaining process and allow for a more efficient and accurate ex ante analysis of a case.

"If little is known about the universe of civil cases that go to trial, much less is known about the comparatively larger universe of cases that settle prior to reaching trial."[146] The wealth of information generated by publishing the relevant facts of mediated settlements would foster more efficient case analysis within the civil justice system and assist legislators in promulgating laws to reduce the disposition time for civil disputes.[147]

CONCLUSION

If nothing else, behavioral psychology and prospect theory ideologies harmonize on one single truth: that the supposed "rational

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LAWYERS (2006), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/MediCon2.pdf/.

144. *See* Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1571 (1989).

145. Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 816 (2000).

146. *Id.* at 848–49.

147. *Id.*

actor" is not all that rational.[148] The economic inefficiencies and negative externalities flowing from behavioral and psychological irrationality fall both on individuals and on the greater society, as the courts are burdened through increased litigation when disputants imprudently fail to settle. In attempts to remedy these inefficiencies, two general solutions arise.

First, those ascribing to traditional law and economics theory assert that lawyers and disputants, when presented with these irrationalities, will correct their behavior to the point of rationality so as to maximize their gains.[149] However, as this Comment has shown, this perspective is wrought with overconfidence, confirmation, and egocentric biases[150] and is thus impracticable. The second solution is to implement a third-party debiasing mechanism to counteract these latent psychological and behavioral pressures that prevent litigants and lawyers from debiasing themselves.

Mediation may be the most effective and economically efficient means of debiasing litigants and therefore ought to be increasingly implemented by the courts. Even if litigants were able to undergo "self debiasing," they would need to repeatedly experience the decision-making process in order to learn how to restructure the choices.[151] In contrast, litigation is generally a one-shot scenario.[152] This means that "[litigants] may make many costly choices on the way to enlightenment."[153] As such, the costs associated with learning to evade biasing factors likely outweigh the costs of a more paternalistic, third-party mediation process.[154]

Finally, in analyzing the effectiveness of mediation, it is necessary to consider other factors besides whether or not a settlement outcome was reached. The ultimate satisfaction of the parties factors heavily into the calculus for predicting rates of recidivistic litigation. Mediation

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148. *See supra* Part I.

149. *See supra* text accompanying notes 17–18.

150. *See, e.g.*, *supra* Part I.B.3.

151. *See* Rachlinski, *supra* note 43, at 1223–24.

152. This is especially true in the context of individual plaintiffs bringing a single cause of action at a single point in time. While large, institutional defendants involved in a series of similarly situated products liability suits are privy to a repeat-player scenario and might therefore have standard bargaining ranges, such ranges are also not free from bias. For example, anchoring and availability heuristics will lead large, institutional defendants to attach greater value to their past settlement outcomes when the facts of the case at hand might differ significantly. This, in turn, potentially leads such defendants to offer settlements that are either above or below the expected value, and thus presents a barrier to efficient settlement.

153. Rachlinski, *supra* note 43, at 1223.

154. *Id.* at 1219.

allows parties to tell their stories and presents opportunities to create bargaining capital through simple gestures such as apologies. Mediation, therefore, presents a sensible means of maximizing litigant satisfaction while concurrently minimizing litigant exposure to innate psychological limitations to profit-maximizing settlement. Accordingly, courts and legislatures should look increasingly towards mediation as a viable means of reducing backlogged court dockets and protecting litigants.