

## Preparation

Negotiating a deal is like painting a room. It's all about the prep. The part where you put the paint on the walls is easy. It's the scraping and sanding and taping that take the time and effort.

Negotiating without preparation — trusting your instincts or “going with the flow” — is a dreadful mistake. But just what is it you are supposed to prepare?

Obviously you need to know your file. As the former NPR radio personality John Hockenberry once said, “The best way to sound like you know what you're talking about is to know what you're talking about.” Even a negotiation book as helpful as this one is not going to overcome that brutal fact of life.

Obviously it is in your interest to gain as much market knowledge as you can and to learn as much as possible about your negotiation opponent and the circumstances of your negotiation. If you are selling axolotls you need to know about the axolotl market in general and about your axolotl buyer in particular. Not just his position in the axolotl market, his current need for axolotls, and so on, but also his negotiating style.

You need to know your bottom line, the price at which you will walk away. This is usually called your **reservation point** in the negotiation literature. It is named after the auctioneer's practice of setting a reserve price below which an auctioned item will not be sold.

Your reservation price, in turn, is based on your **BATNA** — your best alternative to a negotiated agreement. If you have read any other books on negotiation written in the past 20 years, you probably know that Roger Fisher and William Ury coined that term in their famous 1983 book *Getting To Yes*.

Knowing your BATNA, the best deal you could get elsewhere, is key to evaluating the deal on the table. If you don't know your BATNA you are flying blind and you are likely to get your pocket picked. Worse, you are likely never to know you were robbed. If your opponent is skillful he will make you feel that you got a terrific deal so you will cheerfully return another time to let yourself be robbed again.

You can strengthen your negotiating leverage by improving your BATNA. If you are negotiating for a raise, the most effective way you can improve your leverage is to get another job offer at an increased salary elsewhere. Come back to the table with that job offer in your pocket, and your negotiating position has improved dramatically. If your opponent can beat your BATNA, take the deal on the table. If not, take the BATNA deal and you're still ahead of the status quo.

Notice that this important work takes place away from the table, with a party other than your negotiation opponent. Often negotiators concentrate so much on the deal in front of them that they forget what they might accomplish by pulling back to look at the larger context. You improve your leverage at the negotiating table by improving your alternative away from the table, your BATNA.

Ury and Fisher are right about BATNA: It would be foolish to enter a significant negotiation without having researched it carefully and improved it where possible. But it is not the most important concept in determining optimum negotiation outcomes. That concept is your **aspiration point** — your high-end goal.

The problem with concentrating on your BATNA is that when you reach it, you relax. If your mind is fixed on the point at which you exceed the status quo, the tendency is to stop. But

the negotiator who stops negotiating may never learn that there was significantly more potential gain in the deal if he had kept looking for it. This is leaving money on the table and it is bad.

The trick is to devote your mental energy to pursuing your maximum potential outcome, not your minimally acceptable one — your aspiration point, not your BATNA. People who set high goals achieve better results than people who set low goals. It's just a fact.

\* \* \*

This might be a good time to talk about Happiness and the Meaning of Life. It will only take a moment. If you are getting what you set out to get in most of your negotiations, you are probably leaving money on the table. You could have done better; that is, you could have gotten more stuff if you had bargained harder. From a purely *Homo economicus* point of view, the prescription for that condition is to raise your aspiration points. Ask for more. You won't always get what you ask for, but you will get more if you ask for more. High outcomes correlate with high aspiration points.

Note, however, this is the opposite of the advice you would get from, say, the Buddha about how to achieve happiness. That can be achieved, Buddha taught us, only by wanting less, by lowering our aspiration points. The desire for things cannot be satisfied with things. The desire for things is like a fire. The more things you feed it, the bigger it grows.

“Who is rich?” the *Talmud* asks. “He who is satisfied with what he has.” (*Ethics of the Fathers* 4:1.)

This is a book about negotiation and about using psychology to get more stuff. I don't want anybody coming back to me complaining that they got more stuff but it didn't make them happy. That's another book.

\* \* \*

So, you want to prepare for your negotiation by doing the usual homework, by increasing your market knowledge, by improving your BATNA, and by developing a high aspiration point.

One way to get your aspiration point burned into your thinking is to write it down. This sounds like superstition, but the evidence is that it works. There is something about the act of writing that commits us to our goals more strongly than the same goal held by the same person but not written down. There is even evidence that the process is neurological, that the process of writing something down has an observable physical effect on the brain. The literature suggests that after writing down your aspiration point you should carry it with you and take it out to look at periodically during negotiations.

You are supposed to do this at auctions too. Write down the maximum you will pay for an object before the bidding starts, and do not let the excitement of bidding change your mind.

You can see why this makes sense. Before the auction starts you are calm and dispassionate. You want that Louis Philippe commode and you have a rational idea of what you are willing to spend to get it. An hour later when the bidding starts you are still you and the commode is still the commode, but you find you want it more than you thought and you are willing to raise your bid. Why?

Because auctions are exciting, and when we are excited we think less clearly. Auctions are designed precisely to generate this effect. You bid and the commode is yours. Then someone else bids and the commode is not yours. That bastard took my commode! You bid again and the process repeats. The feeling of loss is completely manufactured by the auction process itself but, as we shall see in §3.03(h), manufactured or not the feeling of loss is a powerful motivator.

Think about the conversation you are likely to have with yourself as an auction or negotiation proceeds. The excited side of you says, “We need to re-evaluate and raise our

maximum bid.” The prudent side of you reminds the excited side that this is what we anticipated and it is precisely why we settled on a maximum bid. The excited side says, “But things have changed!” It is at this point that the rational side must ask, “What things, exactly, have changed?”

The excited side can have no answer. Nothing has changed *with respect to the deal*. The only change has been in the emotional context of the deal. And you are not buying an emotional context. You are buying a commode.

Note that this is different from other occasions when it may be appropriate to re-evaluate your earlier commitments. The great strategic thinker and Nobel Prize winner Thomas Schelling tells a story about himself as a youngster that makes the point. The young Schelling decided he wanted to be a polar explorer. To prepare himself for his adventures he determined to sleep without a blanket.

It was a warm boy who made the decision to sleep without a blanket. But it was a cold boy who had to decide whether to follow through (Schelling, 1984, p. 58). In that case there was a meaningful difference between planning and execution. There was important new information about the deal. What was previously an abstract idea became a physical reality. The warm boy did not understand what he was committing to. In the case of the auction, however, there is no change in physical reality and no new information about the deal. There is only a change in emotional context.

I don't deny that the pull of emotions is strong, or that a change in emotional context *feels* like a change in physical reality. But when the prudent negotiator gets the feeling that things have changed, he tries to remember to ask himself what has changed. He pauses to isolate changes in emotional context from changes in objectively relevant information. One way to bind

yourself to the mast so you don't get swept away by emotional context is to carry a written copy of your previous, well-reasoned goal and to look at it from time to time. Your planning is pointless if you ignore it.

## **§2.01 EVALUATING YOUR CASE**

Having just argued that you should set a high aspiration point and keep it actively in mind, now I want to emphasize the opposite. (I said this would happen.) It is equally necessary to keep your expectations under control.

Several psychological features tend to pull our valuations upward into unrealistic territory. We need to understand them and adjust for them.

First, we need to spend a few minutes talking about your attitude.

### **§2.01(a) The Lake Wobegon Effect**

“About 80 percent of us believe that our driving skills are better than average.... [A] large majority of people believe themselves to be smarter, more attractive, and more talented than average...” (Kahneman & Renshon, 2007).

“In one study, 94% of men ranked themselves in the top half of male athletic ability” (Burnham & Phelan, 2000, p. 91).

In a lovely book called *Don't Believe Everything You Think*, Thomas Kida (2006) cites a study of a million high school seniors. Seventy percent regarded themselves as above average in leadership ability, with only 2 percent rating themselves below average. *All* the students thought they were above average in their ability to get along with others. In fact, 25 percent of the students believed their skill in getting along with others was in the top 1 percent. Ninety-four percent of college professors in another study believed they were better than the average professor. (p. 109)

This tendency to exaggerate our virtues and abilities relative to others is called the **Lake Wobegon effect**, after the little town made famous by Garrison Keillor. In Lake Wobegon “All the men are strong, all the women are good-looking, and all the children are above average.”

It appears we are so taken with this impossible state of affairs that the contrary frightens us. An apocryphal story has it that former President Dwight Eisenhower “was appalled to learn that about half of our children had below average intelligence, thinking that something had to be done about such poor performance” (Kida, 2006, p. 17).

We don’t tend to think we are better than average in areas where actual measurement is possible, free-throw shooting for example. But if the criteria are sufficiently fuzzy, most of us give ourselves the benefit of the doubt. “People believe that, on average, they are more honest, capable, intelligent, courteous, insightful and fair than others” (Bazerman & Neale, 1992, p. 61).

Thomas Schelling explains how it’s done. We can all believe we are better than average drivers because:

[E]verybody ranks himself high in qualities he values: Careful drivers give weight to care, skillful drivers give weight to skill, and those who think that, what ever else they are not, at least they are polite, give weight to courtesy, and come out high on their own scale. This is the way that every child has the best dog on the block. (Quoted in Gilovich, 1991, p. 84)

Our susceptibility to The Lake Wobegon effect is one of the psychological factors that tend to skew our case evaluations upward.

## **§2.01(b) Base Rates**

It is also true that we do not see our own situation as related to the **base rate**. If we ask a roomful of randomly chosen people how many of them believe they will die of heart disease or

get divorced, almost no hands go up. If we ask a roomful of new business owners how many of them will succeed, we get unanimity. The base rates, of course, tell a different story. Many of us will die of heart disease, half of all marriages end in divorce, and most new businesses fail.

Here's another approach to the same problem. Respondents were given this description of a 30-year-old American named Steve: "very shy and withdrawn, invariably helpful but with little real interest in people or the social world. A meek and tidy soul, he has a need for order and structure and a passion for detail." Respondents were then asked if they thought Steve was more likely to work as a farmer or as a librarian.

Steve, of course, neatly fits the profile of the stereotypical librarian and he's far from the stereotype of a farmer. So most people commit what is known as the **representativeness fallacy** and assume he's more likely to be a librarian. The problem with this analysis is that it ignores the base rate. America has many times more farmers than librarians (at least 100:1 by Piatelli-Palmarini's estimate, p. 74). We all know that, but few of us even consider how that fact might affect our answer. We ignore base rates. It is another example of the way we make decisions based on simple heuristics and not on evidence from the real world.

### **§2.01(c) Overconfidence**

Evolutionary psychology suggests that one reason we ignore the base rate with respect to our own success is that confidence is sexy; people who appear confident have more mating opportunities and therefore more reproductive success. In a sense we have been selectively bred for overconfidence. Consequently, I am convinced that I'm successful. If I make a lot of money, I define success in terms of money. If I don't make much money but I get a lot of requests for pro bono speaking engagements, I define success in terms of public respect. If I have neither money nor respect, I define it in terms of the satisfaction I get from my garden or my

grandchildren or my collection of Hummel figurines. And if I have none of the above, I define success in terms of my knowledge that there is a place prepared for me in heaven. Not for me the fleeting pleasures of this world. I lay my treasures up “where neither moth nor rust doth corrupt” (*Matthew 6:20*). However it is reached, the conclusion is foregone. I am doing fine.

There is some evidence that the only people who have a realistic view of their true talents and true likelihood of success are the clinically depressed (Fine, 2006, p. 23).

Here’s a classic test of overconfidence. Ten questions appear below. Your goal is to supply an answer to each question in the form of a range. Select a range so that you have 90 percent confidence that the true answer to each question lies within the range you selected. Since there are 10 questions and you are answering each with a confidence of 90 percent, you will have done perfectly on the test if you get 9 correct.

1. Martin Luther King’s age at death
2. Length of the Nile River
3. Number of countries that are members of OPEC
4. Number of books in the Old Testament
5. Diameter of the moon
6. Weight of an empty Boeing 747
7. Year in which Wolfgang Amadeus Mozart was born
8. Gestation period (in days) of an Asian elephant
9. Air distance from London to Tokyo
10. Deepest known point in the oceans.

(Russo & Schoemaker, 1990/1989, p. 71)

Answers appear in the footnote below.<sup>1</sup>

Most people are wildly inaccurate in this kind of test, but they are not randomly inaccurate. If people were just no good at judging how confident they should be in their estimates, we would see as much under-confidence as overconfidence. But that is not what the test shows. Overwhelmingly it shows overconfidence, in experiment after experiment. It would be a mistake to suppose that this is just some harmless anomaly having to do with judgments of confidence in trivia answers. The test reveals a much more serious problem.

For reasons that appear to be deeply rooted in our evolutionary biology, we are more confident in our judgments and knowledge than objective facts give us any right to be. This leads to results that couldn't be more serious. For a particularly sobering view of the problem see Johnson, *Overconfidence and War* (2004).

For our purposes, overconfidence leads to negotiators who overestimate their talent and their likelihood of success. Sometimes, if there is only one overconfident competitor in a negotiation, that trait can be an asset: It intimidates opponents and makes bluffs more effective. But when there are two, the risk is an expensive and time-consuming deadlock even when mutually beneficial outcomes would have been possible.

There is a difference between being overconfident and appearing overconfident, and there are two views on the question of which is better. One view, held by Shell and explained in *Bargaining for Advantage*, is that it is fine to appear totally confident when your task is to rally

---

<sup>1</sup> **Answers:** (1) 39 years. (2) 4,187 miles. (3) 13 countries. (4) 39 books. (5) 2,160 miles. (6) 390,000 pounds. (7) 1756. (8) 645 days. (9) 5,959 miles. (10) 36,198 feet.

the troops or to intimidate the enemy. But, in private, Shell says, cool calculation of cold reality is best.

Johnson, in *Overconfidence and War*, has a different view. He says the effective kind of overconfidence, the kind that really convinces opponents you are stronger than they are and gets them to back down, is self-deceptive overconfidence. In order to tell a really convincing lie, in other words, you need to believe it yourself. Johnson believes evolution has shaped our thinking in conflict situations in just this way.

I once saw an example of this in a negotiation class. I divided the students in pairs, gave them a simple sale-and-purchase negotiation exercise, and told them to make a deal. One seller came back with a deal that was many times better than any of the others. Instead of a sales price in the thousands of dollars, his was in the tens of thousands. It turned out he had misread the instructions and set his target price an order of magnitude higher than he was supposed to. His opponent, who was reading her instructions correctly, was so intimidated by his confidence that she believed she must have misunderstood something. She allowed his inflated opening price to anchor her subsequent bargaining, and she gave away the store. “He seemed so sure,” she said.

While it may have led to a desirable outcome for the seller in this exercise, I do not suggest that inability to read and understand simple instructions is a good long-term strategy. The ability to appear more confident than you are is certainly an asset. But Johnson’s point and mine is that self-deception, even if it was adaptive in the Pleistocene and even if it might be helpful today in that moment just before a fight breaks out in a bar, is not an adaptive strategy in most of the contexts likely to confront readers of this book.

People in general are overconfident. My guess is that lawyers are more overconfident than others. We are paid to support our clients and our client’s views of the world. Our clients

depend on us. Our incomes depend on our success in representing their interests. These facts distort our view of our client's cases. Part of correctly evaluating a case in preparation for settlement negotiations includes adjusting for that distortion.

### **§2.01(d) Self-Serving Bias**

Think of a horse barn. Suppose there is a stall in that barn that badly needs to be mucked out. Someone has to shovel out all the nasty old straw or sawdust, cart it off in a wheelbarrow, and put down a fresh new layer. What would be a fair price to pay someone to do that?

Now, how much would someone have to pay *you* to do it?

If there is a difference between those two numbers, and I suspect there is, how do you explain it?

The difference between what you think is a fair price to pay "someone" to perform a task and what you think is a fair price for *you* to perform it is a member of a family of psychological features. Overconfidence and the Lake Wobegon effect are also members. We can call the family **self-serving bias**. As we will see, it is a large family.

The degree to which our thinking is biased in our own favor is hard to exaggerate. We judge the letters that appear in our names to be more attractive than the letters that don't (Fine, 2006, p. 4). One study asked hypertension patients, "Can people tell when their blood pressure is high?" Eighty percent gave the medically correct response: no. But asked whether they could judge their own blood pressure — "What about you? Can you tell?" — 88 percent said yes (Myers, 2002, p. 78).

Ninety percent of Americans believe their peers are too fat, but only 40 percent believe they themselves are too fat. This amazing statistic comes about in part because when we calculate our body mass index we add "phantom height." Women, on average, add an inch. Men

add two (“Everyone’s fat but me, Americans say in poll.” April 13, 2006 *Sydney Morning Herald*).

“In a final irony,” Cordelia Fine says in *A Mind of Its Own: How your brain distorts and deceives*, “people think that others are more susceptible to the self-serving bias than they are themselves” (2006, p. 8).

Another aspect of self-serving bias is a psychological tendency for each of us to see himself as representative of the norm. My use of “himself” in that last sentence is itself an example of what I’m talking about. I am male. I see the world from a “male perspective.” We could argue for a long time about what that means, but it means at least this: that I think of being male as being the norm. When I say there is a psychological tendency for each of us to do something, the “each of us” I have in mind is male like me.

I mention this not because I’m interested in making a case for non-sexist language or political correctness. I mention it because the tendency to see ourselves as the norm is a potentially dangerous mistake in thinking.

I remember being in the locker room at the Y and talking to a guy who had what I considered to be a perfectly developed body. I’ve been working out for years, but I still carry around several pounds I would rather not. I would rather look like this guy, so I asked him what his workout regimen was. He said it was “nothing excessive.” Swim a few miles in the morning, lift weights at lunch, bicycle for a few hours after work, run 10 or 15 miles on weekends. Nothing excessive.

We tend to believe “less than me is not enough, more than me is too much.” If you change your oil or clean your bathroom or tip your waitress more than I do, you’re overdoing it.

If you exercise or read the paper or call your mother less than I do, you're slacking. We all have a tendency to think that way, and it leads to problems.

The guy who designed your DVD player knows a great deal about DVD players. No doubt he has been programming them and designing them and tinkering with them for years. The steps you have to go through to record a show next Wednesday at 6 PM are perfectly self evident to him. That's fine unless he makes the mistake of thinking that what is self evident to him is self evident to the rest of us. It isn't. (For a brilliant discussion of the infuriating consequences of this mistake, see Donald Norman's *The Design of Everyday Things*.)

This combination of psychological tendencies — self-serving bias, overconfidence, and ignoring of base rates — causes a phenomenon I have seen over and over again with students in my negotiation classes. Replicating a famous experiment, I pass out sheets describing the fact pattern in a hypothetical lawsuit. Then I ask my students to assess the plaintiff's chance of winning and to estimate the likely recovery. All the fact patterns are identical. I don't tell them, however, that half the sheets begin with "You represent the plaintiff in this matter" while the other half say "You represent the defendant in this matter." What result?

My rigorously trained, logical, analytical law students, who have nothing at stake and who have been conditioned to suspect a trap whenever I give them an exercise, nevertheless average a greater recovery for the plaintiff when they are told they represent the plaintiff than when they are told they represent the defendant. Invariably.

If I get such a robust effect under those conditions, imagine how large the effect is in the real world where people are playing for real money.

### **§2.01(e) Endowment Effect**

Human beings tend to overvalue anything perceived as "mine."

It is in the nature of a man's mind. A thing which you enjoyed and used as your own for a long time, whether property or opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.

- O. W. Holmes (quoted in Thaler, 1992, p. 76)

This is called the **endowment effect**. An easy way to see how it works is to pick something that belongs to you and ask yourself two questions about it. Pick your house, your car, or your laptop — any non-trivial object will do. Ask yourself, What is the least amount of money I would accept to sell this thing? Then ask yourself, If I didn't already own it, what is the greatest amount of money I would pay to buy it?

Classical economics says the answer to the two questions will be the same. The value of an object to you is the price at which you would be equally willing to buy it or to sell it — the **indifference point**. It's related to the way we assure that the division of one cookie between two children is fair. If one child cuts the cookie and the other chooses first, the cutter will try to cut at the point where she is indifferent to which piece she winds up with. The indifference point is, by definition, the fair point of division. But it turns out that isn't the way people think about objects that belong to them. The way we actually think, the indifference point moves.

If you are like most people, there is a difference between the amount you would sell your laptop for and the amount you would pay to buy it. The smallest amount you would accept to sell it is greater than the largest amount you would pay to buy it. Because of the endowment effect you would not be able to make a deal with yourself!

This is not rational. A rational economic actor places a value on an object. He does not first have to ask, Is it mine?

The classic endowment effect experiment was done by Richard Thaler and colleagues at Cornell (Thaler, 1992, p. 63). Thaler did his experiment with Cornell mugs and pen sets. I have done a simplified version using sleeves of golf balls. As people come into the room, half of them are randomly given a sleeve of golf balls as a gift. I explain that there wasn't enough in the budget to give golf balls to everyone but that there will be a chance to rectify matters. I ask the people who got the golf balls to write down the smallest amount they would accept to sell them, and ask the people who didn't get them to write down the largest amount they would be willing to pay to buy them.

What would we expect to happen? Since the golf balls were distributed randomly, we would expect that some people who got golf balls don't want them and some people who didn't get golf balls do want them. We would expect there to be a market. But when I average the prices demanded by the sellers and compare it to the average price the buyers are willing to pay, I consistently find no overlap. Just as Thaler found in his experiments, my sellers tend to want roughly twice as much to sell their golf balls as buyers are willing to pay to get them.

Note that the effect is almost immediate. Only seconds after receiving their golf balls, the subjects in my experiments placed roughly twice the value on them that the people who did not receive golf balls did.

Not long ago I was giving a talk on this subject, and I realized I had neglected to bring anything to demonstrate the effect with. I was inspired to give half the audience members an imaginary school sweatshirt. The effect was the same as with golf balls. People who received an imaginary sweatshirt demanded, on average, twice the amount of money to sell it that those who did not get one were willing to pay. They had become attached to an imaginary object they had pretended to own for two minutes.

I had a chance to observe this effect in my own life. I opened the mail one day and found a check for \$3,000 from my friend Lawyer B. I thought it was a mistake and called Lawyer B to ask about it. He said it was a referral fee. It seems many months earlier my wife told me about someone she knew who had been badly hurt in a biking accident. This person was looking for a lawyer to sue the bike manufacturer. I suggested my friend Lawyer A. Lawyer A, in turn, suggested our mutual friend Lawyer B. Lawyer B filed suit and got a substantial settlement with a one-third contingent fee. He sent Lawyer A and me each half of one third of his fee. (This is kosher in Michigan. We are a peer referral state.) I thanked Lawyer B enthusiastically and hung up the phone. But about 10 seconds later I wasn't so delighted. How come I had to share my money with Lawyer A? He didn't do anything.

When my wife got home I told her all about it, including how interesting it was that the endowment effect attached so quickly. Money I didn't know about and wasn't expecting one minute became *my* money the next minute, and I resented having to share it.

"Share it?" she said. "It doesn't have anything to do with you." And with that she picked up the check, put it in her pocket, and I never saw it again.

\* \* \*

Here's an easy endowment-effect thought experiment. Consider the contents of the top drawer of your desk. If your desk is like mine, it contains several unidentified keys, scraps of paper with names and phone numbers from unknown people, business cards from forgotten meetings, a number of pieces of plastic that must have broken off of something or other, some pens that don't work, some pen parts, a cheapo key ring, assorted nuts and bolts, a piece of ancient candy, and so on. A buncha crap, to use the technical term.

Suppose there was a knock at your door and someone stood there with a box containing all that stuff and he offered to sell it to you. “Hi there, wanna buy a box of crap?” You’d probably call a cop.

But suppose your spouse decided to tidy up the place and cleaned out your drawer and threw your crap away. What result?

This little thought experiment shows the power of the endowment effect. People value things that belong to them. It doesn’t matter what it is or how long they have had it. Things that are theirs are valuable.

We can do some speculative evolutionary psychology to provide an explanation for why this effect exists. In the ancestral environment it was likely an adaptive strategy to care deeply about your stuff and to resist forcefully anyone who wanted to take it from you. Given a population that cared deeply about its stuff and another population that was more blasé, the blasé folks likely did not survive long enough to reproduce and become our ancestors.

That’s fine. But our evolutionary ancestors are not the ones negotiating the settlements of our lawsuits. The effective negotiator (let’s call him or her “EN” for short) would be aware of that and adjust for it. The endowment effect causes people to put undue value on things that belong to them. It accounts for some of the value your opponent puts on his case, and it accounts for some of the value you put on yours.

As we shall see, the principle applies not just to physical stuff. As Mr. Justice Holmes said in the quotation above, it also applies to opinions.

### **§2.01(f) Illusion Of Control**

Another psychological feature affecting the way we evaluate cases is called the **illusion of control**. Experimenters testing this effect asked subjects how much they would be willing to

bet on horse races. In one experimental condition, the horse race had already taken place but, of course, the winner was not known. In the other condition, the race had not yet been run. People, it turns out, are willing to bet significantly more on a race that has not yet taken place than on one that has. Why? There is really only one answer. We believe that our betting on a race can have an effect on the outcome (Bazerman & Neale, 1992, p. 61).

Evidently, we do not believe that our bet can have an effect on a race run yesterday, though it is hard to understand why not. Once magical powers are accepted, it seems rather arbitrary to limit the effect to races to be run in the future. But there it is. It's a powerful idea. "We want to, and think we can, control chance events" (Kida, 2006, p. 87).

- State lotteries in North America did not become popular until New Jersey introduced a game that allowed players to choose their own numbers (Thaler, 1992).
- People will demand more money to sell a lottery ticket if they picked the numbers than if they didn't (Kida, 2006, p. 87).
- Gamblers are willing to bet more on the roll of dice they themselves throw than on dice thrown by other people or by mechanical devices (Langer, 1975).

We are all, I think, familiar with this kind of magical thinking. Let's use the dice example. We want to roll a seven very badly. We blow on the dice. We talk to them: *C'mon bones, baby needs new shoes!* We concentrate on visualizing our success as our visualization coach instructed us to do. We *will* the dice to land on seven. We rattle, we yell *Hah!* and we throw... *seven!* A winner!

The human brain is very good at seeing patterns and at finding causal relationships. That ability is a good part of why we are here having this conversation. Our ancestors saw patterns of causation that allowed them to avoid poisonous plants and venomous snakes. But we are also

prone to commit the logical fallacy *Post hoc ergo propter hoc* — “After this, therefore because of this.” We see patterns and draw causal inferences where patterns and causation do not exist.

We wanted the seven very badly. We could *feel* how badly we wanted it. When the seven came up, the conclusion the brain wants to draw is that there is a causal connection between the feeling and the seven. I willed the seven.

Actually, our magical ability involves more than force of will and telekinesis. Careful measurement has shown that people roll the dice harder when they want a high number and more gently when they are looking for a low one (Plous, 1993, p. 171).

### **§2.01(g) Belief In A Just World**

In the middle ages, one way lawsuits were decided was by burning both litigants with a hot iron. The wounds would be bandaged and a specially trained man would examine them after a prescribed period. The party who had healed better was believed to be favored by God and was therefore the one telling the truth.

We don't settle lawsuits that way anymore, but the idea persists. Despite centuries of evidence to the contrary, we have a deep-seated desire to see the world as an orderly and rational place and to believe that goodness (especially mine) is rewarded and evil (especially the other guy's) is punished. What goes around comes around. “No man in the wrong can stand up against a fellow that's in the right and keeps on a-comin'.” We were all raised on some variant of that unofficial motto of the Texas Rangers. It isn't true, of course, but that has never been the point. It builds confidence and confidence increases reproductive success.

I recently found myself in a conversation with a young woman who had just learned she was pregnant. It was somewhat problematic, she said, because she had been dating the baby's father for only six weeks. She didn't think she was ready to have a baby. “But,” she told me,

“evidently my body did.” She then explained that the pregnancy was “meant to be” and concluded, “Things happen for a reason.”

She is perfectly correct, of course. Things do happen for a reason. The reason pregnancy happens is, I would have thought, particularly well known.

### **§2.01(h) Fundamental Attribution Error**

When I’m looking for reasons to explain why I did something, the reasons I come up with are different than the reasons I use to explain why you did the same thing. If we have a meeting and you are late, my explanation is that you are careless, unreliable, thoughtless, and disorganized. I was late because there was a traffic jam.

The double standard underlying this kind of thinking is called the **fundamental attribution error**. The reasons for your failures are part of *who you are*. You are a lazy, thoughtless, and untrustworthy person. The reasons for my failures are *external* to the real me. They have nothing to do with the type of person I am. I am a wonderful type of person. When I fail it is because there was a train blocking traffic, or the test was unfair. It is *not my fault*.

Interestingly, with respect to successes the situation is reversed. When you succeed, it is because of situational circumstances external to you. You happened to be in the right place at the right time. You went to school with the boss. You got lucky. When I succeed, it is because of who I am — internal resources, strength of character, that kind of thing. I am completely entitled to the credit.

Athletes attribute their wins to themselves and their losses to bad officiating. Students who perform well think a test is a valid assessment of their ability, while those who perform poorly think the test is unfair. Teachers believe that their students’ successes are due to their teaching

skills, while their students' failures are due to the students' lack of ability or motivation. If the manuscript is rejected for publication, researchers think it's due to the arbitrary selection of a particularly critical reviewer, as opposed to the quality of what they wrote. (Kida, 2006, p. 158)

For many years I worked for Coleman Young, the uniquely colorful mayor of Detroit. The most disparaging (printable) thing the mayor could say about another politician was, "He couldn't get elected if his mama counted the votes." Like several of the other psychological effects we have discussed, the fundamental attribution error is another way we all let our mamas count our votes.

### **§2.01(i) Availability Heuristic**

Ask yourself this question: What percentage of the housework do I do? Write that number down so there can be no cheating. Now go ask the people you live with to answer the same question for themselves and to write their numbers down. Add the numbers up. More than 100 percent, isn't it?

Part of this can be explained by the way the data comes in. Every time I take out the garbage or empty the kitty litter, I have to stay right there for the entire grueling operation. When my wife does it, it seems (to me) to happen by itself. The box was full and now it's empty. Easy. The floor was muddy and now it's not. Like magic. My contributions take up more mental space than hers. I look at the area covered by memories of me working and compare it to the area covered by memories of her working, and I come up with an estimate of our relative contributions. Oddly, it is an estimate with which she disagrees. This process has a fancy name, naturally. The tendency to mistake the most available information for the most relevant information is called the **availability heuristic**.

The availability heuristic is what causes us to fear the wrong risks. Here's a test. From each of these three pairs, choose the one that is the more common cause of death in the United States:

poisoning      or      tuberculosis

homicide      or      suicide

all accidents      or      stroke

Most people choose the first term in each pair. But it is the second cause that is more common.

Remember the central idea of evolutionary psychology: We are the inheritors of minds formed when humans lived in hunter-gatherer bands. We are adapted to living in groups of 100 to 150 people. Once a group gets much larger than that, it becomes difficult for everyone to know everyone else. Since we are likely to work best, work hardest, make the most sacrifices, and take the most risks on behalf of people we know, it makes sense that groups of 100 or so are among the most efficient organizations. Military organizations, for example, have been organized into groups of 100 soldiers since the days of the Roman centurions.

In a group of 100 people, there aren't very many freak accidents. In the ancestral environment, if you hear somebody got eaten by a shark, then: (a) it will be somebody you know, and (b) it makes good sense for you to be afraid of sharks. Today if any one of six billion people gets eaten by a shark, you are likely to hear about it. Because the brain we have is the one we inherited, the brain processes that information the way our hunter-gatherer ancestors would have processed it. We are afraid of being eaten by sharks.

Let's do the math. Suppose on any given day there is a 1 in 100-million chance that someone will accidentally poke his eye out with a stick. In a group of 100 people, that translates

to one occurrence in a million days or roughly 3,000 years. In a world with six billion people, a 1 in 100-million occurrence is likely to happen 60 times a day. And with television and camcorders and YouTube, it's likely that someone will post a picture of it. The ancestral brain doesn't know about YouTube. When it sees something, it reacts as though the thing it's seeing were happening in real time and real space. It thinks it makes sense for you to be afraid. As recently summed up by David Myers: “We fear what our ancestral history has prepared us to fear. ... We fear what we cannot control. ... We fear what is immediate. ... We fear threats readily available in memory.” (Myers, 2007).

### §2.01(j) Probability

We're altogether bad at determinations of probability. Think of the number of people who bet on the California Lottery. The odds of winning are one in 18 million. A person is nine times more likely to die by falling out of bed. It is interesting to notice that the winning lottery ticket is the one that chooses the correct 6 numbers from the integers 1 through 56. Few of us are capable of figuring out the odds of making that selection correctly. And that is precisely the point. If someone said, “I am thinking of a number from 1 to 18 million, see if you can guess what it is,” not many people would bet they could guess right (Burnham & Phelan, 2000, p. 85).

In a delightful 1994 book called *Inevitable Illusions* by a scholar with the delightful name of Massimo Piattelli-Palmarini, the following law appears: “Any probabilistic intuition by anyone not specifically tutored in probability calculus has a greater than fifty percent chance of being wrong” (p. 132).

“In other words,” he explains, “it is always more likely that our probabilistic intuition will be wrong than [that] it is right.” See *Innumeracy* by John Allen Paulos (1990) for a thoroughly engaging discussion of this problem. The difference between our instinctive System 1

reaction to probability problems and our rational System 2 reaction (as well as most of the other ideas discussed in this book and many that are not) is also the central theme of both *Fooled By Randomness* and *The Black Swan* by Nassim Nicholas Taleb.

### §2.01(k) The Conjunction Fallacy

In a famous experiment, Daniel Kahneman described a woman named Linda: “Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear demonstrations.”

As Kahneman’s subjects did, take a moment to rank the following statements about Linda in order of their probability, 1 being the most probable and 8 the least probable.

- a. Linda is a teacher in an elementary school.
- b. Linda works in a bookstore and takes yoga classes.
- c. Linda is active in the feminist movement.
- d. Linda is a psychiatric social worker.
- e. Linda is a member of the League of Women Voters.
- f. Linda is a bank teller.
- g. Linda is an insurance salesperson.
- h. Linda is a bank teller and is active in the feminist movement.

The statements we are interested in here are **c**, **f** and **h**. The rest are included just to make the question less obvious. Most people figure statement **f** is less likely than statement **c**. Linda is less likely to be a bank teller than active in the feminist movement. That’s not surprising. What is surprising is that many people rank statement **h** as more likely than statement **f**. That is, they say it is more likely that Linda is a bank teller and active in the feminist movement than it is likely

that she is a bank teller. A moment's reflection shows this is impossible. Linda can't be a feminist bank teller without being a bank teller.

If Linda is a feminist activist and has to work as a bank teller to pay the rent, we can tell ourselves a story about her that is consistent with our stereotypes. The story without the feminism is less compelling as a narrative because it clashes with our stereotype of a bank teller. And when logic clashes with stereotypes or other heuristics, logic loses.

People are willing to pay more to buy flight insurance that will cover them for death by terrorist attack than they will pay for coverage for death by any cause. If you ask people how many murders there are annually in Michigan, they say 100. If you ask them how many there are in Detroit, they say 200.

What's going on here? Storytelling is trumping both facts and logic. As is so often the case, System 1 is trumping System 2.

### **§2.01(I) Status Quo Bias**

In a famous experiment by Samuelson and Zeckhauser, subjects were told they had just inherited a significant sum of money and were given a choice of four types of investments. They could choose between investing in tax-free municipal bonds at 6 percent, Treasury bills at 9 percent, a stock with moderate risk and a moderate expected return, or a stock with higher risk and a higher potential rate of return. About a third of the subjects chose to invest in the moderately risky stock, about a third chose the munis, 18 percent chose the risky stock, and 18 percent chose the T-bills.

The experimenters ran the test again, but for the new subjects a status quo was established: They were told the money was already invested in one of the four options. Subjects

were then told they could leave the money where it was or move it (without cost) to any of the other options.

What result? Logically, you would think people would move the funds to the option they preferred, but that isn't what happened. What happened is, "No matter which investment option was presented as the status quo, it was the favorite choice of subjects in each group" (Belsky and Gilovich, 1999, p. 93).

There's an old joke about stock brokers. A guy calls up his broker and says, "What do you think about AT&T?" Broker says, "Do you own it?" The joke is funny, to the extent it's funny, because the broker is supposed to have an opinion about AT&T independent of whether the customer owns it, that is, independent of whether he can make a commission trading in or out of it. The fact is, neither the broker nor the customer think of it that way.

We have a bias in favor of the status quo. Perhaps it is related to our belief in a just world. Many of us feel strongly that things are the way they are for a reason and that change is bad. Partly it is laziness, partly superstition, partly habit, but we feel that it is best to leave things alone to let them work themselves out. Things are the way they are meant to be.

I feel that way about furniture. From time to time my wife will ask what I think about moving a couch or a chair from one place to another. I never think it's a good idea. I think the couch is where God wants it to be. If He wanted it to be somewhere else, it would *be* somewhere else. After it is moved, I quickly come to feel the same way about the new location and resist moving it back.

The **status quo bias** prevents us from settling lawsuits. We believe in letting nature take its course and we are reluctant to interfere.

In a lawsuit, both parties have a status quo: They are on the road to trial. And where there is a status quo, there is a status quo bias. Getting off of the road to trial and working to settle the case requires the parties to abandon the status quo. As we have seen, this can be especially difficult, especially when it is bound up with belief in a just world. Many litigants believe if they can only get their day in court, the wise magistrate will make everything better. It's quite touching, really. EN attempts to manage this perception. He might remind his client, as the immortal Fred Rodell said, "A judge is just a lawyer who knew a governor" (Rodell, 1939/1980, p. 24).

### **§2.01(m) Regret Aversion**

Imagine two brothers, Alphonse and Bocephus. Their Great Aunt Carla died and left them each 1,000 shares of Amalgamated Consolidated valued at \$50,000. Alphonse left the money in Amalgamated Consolidated. The stock went down in price and he lost \$25,000.

Bocephus sold his Amalgamated Consolidated and bought United Affiliated stock instead. United Affiliated also went down in price and he also lost \$25,000.

Who do you think feels worse?

Once more, the answer we get from classical economics is that both brothers should feel exactly the same. They feel like people whose investment decisions lost them \$25,000. But the behavioral economics answer is different. It turns out most people think Bocephus would feel worse. This is because most people place a different value on a case where they do nothing and it turns out badly and a case where they do something and it turns out badly. It is hard to explain why this should be so, but most of us feel that way.

This is called **regret aversion**. Alphonse chooses to leave his inheritance invested where it is because he knows he will regret it more if he acts and loses than if he doesn't act and loses.

He makes his choice to do nothing in order to protect his psychological downside. He “lets nature take its course” because in the end it will be nature and not he who takes the blame.

But see “The Art of the Save, for Goalies and the Investor” Andrew Martin, NYT 3/1/08.

Goalies’ regret increases if they do nothing (stand in the center) and a penalty kick goes to one side or the other, so they jump. Data shows they would do better to stay put.

## **§2.01(n) How To Deal With 2.01(a)-(m)**

First, let’s review the psychological factors that are preventing your opponent from realistically evaluating his case.

- He thinks he is more talented than he is (the Lake Wobegon Effect).
- He thinks he is more likely to prevail than objective reality would indicate (overconfidence, partly as a result of ignoring base rates).
- He believes his case is worth more than it is simply because it is his (endowment effect).
- He believes he can control future events by force of will (illusion of control).
- He believes he will prevail because he is right (belief in a just world).
- He believes he has gone over all the relevant facts objectively and carefully, and that they support his view of the case (self-serving bias and availability heuristic).
- Even if the chances of prevailing and the range of likely recoveries have been explained to him, he can’t evaluate them properly because he doesn’t understand probability.
- He’s a sucker for narratives to the point where they can overcome elementary logic (the conjunction fallacy).
- Finally, he is reluctant to do anything to interfere with the way the gods have ordered the universe (status quo bias and regret aversion).

Against that array of distortions, illusions, and incompetencies, it's amazing we are ever able to settle at all. But here's the hard part: It's not just your opponent's case valuation that is affected by this list of biases and cognitive errors. So is your client's valuation. And so is yours.

A case I had some years ago stands out in my mind as a model of every one of these problems. The claimant alleged he had been laid off as a result of his disability. I was mediating the case for the Equal Employment Opportunity Commission ("EEOC").

The claimant was a pleasant enough fellow, but the case was entirely without merit as far as I could tell. The employer said, with what I judged to be complete credibility, that the firm had no idea the man was disabled. There was no evidence at all to rebut that claim. Further, at the same time the employer laid off the claimant, it laid off all its other employees in the claimant's classification (and several others besides) as a result of a business downturn.

Nevertheless, the employer was willing to make a settlement offer in the case because it didn't want to have an unknown liability on its books during discussions with a potential buyer.

In other words, I could get the guy a nice settlement if he would let me. I explained about the Americans with Disabilities Act and about his likelihood of recovery. I explained about motions for summary disposition. I explained how long it takes to get a case to trial and the vagaries of the jury system. I explained about court costs and attorney fees. And I presented the offer.

He appreciated it, he said, but I was wasting my breath. He wasn't pursuing this matter for himself; he was doing it for disabled people everywhere. It didn't matter if he won or lost. What mattered was that he was doing what was right. And he had promised God that he wasn't going to settle no matter what they offered.

Elsewhere in this book I will tell stories where I was a hero. This is not one of those. I couldn't get the guy to be such a profound disappointment to God.

\* \* \*

One way a lawyer (or a mediator) can influence a litigant to adopt a more worldly view of the prospect of settlement is through a process I call recasting.

The client is doing a great deal of self-talk reaffirming his role in his lawsuit. As it stands, he sees himself as the Avenging Sword of Justice. The goal of recasting is to change the role he talks to himself about. You want him to cast himself instead as the Reasonable Adult.

It is important to do this early. Once the role is cast, it is difficult to change. You do have a couple of things going for you, though. The client came to you because you have credibility; you are the expert. You wear the uniform, you have the badges and indicia, the dark suit, the big desk, and the thick books. He wants this meeting to go well. He wants you to like him and to agree with him. He wants you to agree with him so much that he will change what he thinks to get it to coincide with what you think. This is the **affirmation bias**, and it is very strong. So you might say something like this:

“Well, Mr. Client, I see you have a worthwhile case and I'm looking forward to helping you get it resolved. I want you to get the best result you can, and I'm going to work hard to see that you get it.

“But, as I'm sure you understand, the justice system in America is not a perfect system. We're going to get the best outcome we can get. We can't expect to get the best outcome we can imagine.

“You know, sometimes I see people who are in love with their lawsuits. These are people who have so little going for them that their lawsuits become the main focus of their lives.

“I can tell from talking to you, Mr. Client, that you are not one of those people and I want you to know I appreciate it. You are obviously a sophisticated adult with a realistic understanding of how the world works. I look forward to doing business with you.”

Throughout this little speech you get the client to affirm his agreement. This isn't hard. Few people want to admit they have unrealistic expectations, that they have nothing going on in their lives other than their lawsuits, or that they think the justice system is perfect. No one wants to argue with a person who tells them they are realistic and sophisticated and have a mature understanding of the world.

What does this accomplish? It causes the client to rethink his role. To the extent he commits to the role of the Reasonable Adult, he will tend to behave consistently with that commitment. He will look with disdain on the deluded and childish fantasies of the client who sees himself as the Avenging Sword of Justice. “That,” he thinks, “is not for sophisticated adults like me. Unlike some people (my opponent for example), I have a life to go back to when this lawsuit is over.”

I'm exaggerating of course, but you get the idea. A client who wants to see himself as the Reasonable Adult and who wants to show he has better things to think about than this lawsuit is a client who can be persuaded to settle.