

Miswanting

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Editors' Note: If you're assuming that a settlement will make you (or your client) happy, it's time to question that assumption. By explaining the work of positive psychology (or what makes people happy), these authors explore how people often end up misdiagnosing their own goals. But if you understand your own and your client's pressures toward misidentifying what you need out of a negotiation, you are better prepared to set goals that will actually work for you both. This should be read in conjunction with Schneider on Aspirations.

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

Disputants routinely negotiate over positions. Each party to a negotiation adopts a position, argues for it, and eventually makes concessions (or not) to reach an agreement. Unfortunately, however, agreements based on positions are unlikely to meet the wants and needs that motivated the parties to adopt those positions in the first place.

Proponents of problem-solving negotiation argue that disputants should therefore seek not to assert positions but rather to identify and satisfy their underlying interests. Indeed, according to the proponents of this approach to negotiation, the very “object of a negotiation” is to satisfy “underlying interests.”² On this view, disputants should try to get what they really want at the bargaining table.

But what if they don't know what they *really* want?

Impact Bias

Researchers from an emerging movement within psychology—labeled “positive psychology” or “hedonic psychology”—have learned a great deal in recent years about what people really want. Of greatest relevance to this Chapter, researchers have discovered that people are often mistaken about what they want or what will make them happy.

It is not that people are entirely unaware of what they want or how they will feel. In fact, people are generally quite skilled at predicting whether they will feel positively or neg-

actively about some event or item.³ People accurately predict, for example, that they will feel favorably about a promotion and unfavorably about a demotion. Likewise, people are generally pretty good at predicting the specific emotion(s) they will experience upon obtaining some item or experiencing some event.⁴ People anticipate, for instance, that they will feel pride and joy upon being promoted and anger and embarrassment upon being demoted.

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

Often people predict correctly the valence of their emotional reactions (“I’ll feel good if I get the job”) and correctly predict the specific emotions they will experience (e.g., joy). Even when achieving such accuracy, however, it is important for people to predict what the initial intensity of the reaction will be (how much joy they will experience) and the duration of that emotion (how long will they feel this way). It is useful to know that we will feel happy on our first day at a new job, but better to know how happy and how long this feeling will last, before committing ourselves to a lifetime of work as a tax attorney. It is helpful to know that it will be painful to end a long-term relationship, but better to know how painful and whether the pain will last half a second or half a decade.⁵

Unfortunately, people have a tendency to overestimate the impact of future events on their emotional well-being. Psychologists Daniel Gilbert and Timothy Wilson refer to this phenomenon as the “impact bias.”⁶

Gilbert, Wilson, and other researchers have found that the impact bias influences reactions to all kinds of life events, including romantic breakups, personal insults, failed exams, sports victories, electoral defeats, winning prizes, receiving gifts, failing to lose weight, failing to obtain a promotion, and being diagnosed with a serious illness.⁷ With few exceptions, people tend to overestimate the emotional impact such events will have on their lives.

Researchers are not entirely sure why people have such difficulty assessing the emotional impact of various life events and outcomes, but they have identified several potential explanations. First, when predicting reactions to a future event, people tend to ignore the impact that *other* events are likely to have on their sense of well-being. Researchers refer to this as “focalism”⁸ or a “focusing illusion.”⁹ Relatedly, when choosing between items, people tend to ignore the features the items share in common and overestimate the emotional impact that distinct features of the chosen option will have on their well-being. People are prone, in other words, to an “isolation effect.”¹⁰ Also, people underestimate the extent to which they use “sense-making processes” to dampen the emotional impact of an experience or outcome.¹¹ People “inexorably explain and understand events that were initially surprising and unpredictable, and this process lowers the intensity of emotional reactions to the events.”¹² In advance, however, they fail to appreciate that they are equipped with this “psychological immune system.”¹³

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

[W]e might believe that a new BMW will make life perfect. But it will almost certainly be less exciting than we anticipated; nor will it excite us for as long as predicted.... Gilbert and his collaborator Tim Wilson call the gap between what we predict and what we ultimately experience the ‘impact bias’ — ‘impact’ meaning the errors we make in estimating both the intensity and duration of our emotions and ‘bias’ our tendency to err. The phrase characterizes how we experience the dimming excitement over not just a BMW but also over

any object or event that we presume will make us happy. Would a 20 percent raise or winning the lottery result in a contented life? You may predict it will, but almost surely it won't turn out that way. And a new plasma television? You may have high hopes, but the impact bias suggests that it will almost certainly be less cool, and in a shorter time, than you imagine. Worse, Gilbert has noted that these mistakes of expectation can lead directly to mistakes in choosing what we think will give us pleasure. He calls this 'miswanting.'¹⁴

“Miswanting” in Negotiation

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

This has important implications for lawyers and other agents who represent disputants in negotiation. Under the prevailing model of the lawyer-client relationship—the so-called “client-centered” counseling model—the client is viewed as a fully competent and autonomous actor who retains full decisional authority over her case.¹⁵ The lawyer, by contrast, is a largely passive and objective advisor who strives to avoid encroaching on client autonomy in the decision-making process.¹⁶

This model of the lawyer-client relationship is arguably embodied in many of the ethical rules that govern lawyer conduct. For example, Rule 1.2 of the Model Rules of Professional Conduct provides that “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation,” “consult with the client as to the means by which they are pursued,” and “abide by a client’s decision whether to settle a matter.”¹⁷ Likewise, Canon 7-7 of the Model Code of Professional Responsibility provides that “it is for the client to decide whether he will accept a settlement offer,”¹⁸ and Canon 7-8 provides that “the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself.”¹⁹

The client-centered approach to lawyering—both in theory and as reflected in various ethical rules—is both sensible and respectful. After all, the client is the principal, and the lawyer is merely the agent hired by the client. The client “owns” the problem, and she will reap the primary benefit (or bear the primary brunt) of the outcome. Thus, it seems appropriate to vest decision-making power solely in her hands. Research on the impact bias gives one pause, however, because it suggests that clients may have difficulty predicting what they want out of a negotiation. Even given this difficulty, the client will generally know better than anyone else what she wants. But in at least some circumstances, her lawyer may have insight that she does not. Namely, in those cases where the client is a “one-shotter” and the lawyer is a “repeat player” who has represented dozens or even hundreds of similarly situated clients in like cases, it seems *possible* that the lawyer might have a deeper understanding of the client’s underlying wants.²⁰

Suppose, for example, that a lawyer named “Linda” represents a client named “Clint.” Clint used to be an executive with Company X. He enjoyed working at Company X, and several close friends remain there. Unfortunately, Company X fired him a year ago despite good

performance evaluations. Clint believes, based on a couple of e-mails his former boss sent to a friend, that he was terminated due to his race. After investigating Clint's claim, Linda filed suit against Company X on Clint's behalf, asserting myriad violations under Title VII, the primary federal employment discrimination law.

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

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

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

Having represented several similarly situated clients in the past and having familiarized herself with the research on the impact bias, Linda is skeptical that Clint truly understands what he wants. She worries that even if he prevails at trial and recovers a sizeable award, his contentment with that award will be short-lived. She knows, for example, that money (beyond a comfortable, middle-class amount) contributes minimally to happiness.²¹ She also knows that friendships and social interaction do increase one's sense of well-being,²² and Clint has several close friends at Company X with whom he would interact on a much more regular basis if he were to return to work. Finally, she knows that people are happier when they are fully engaged in some productive activity,²³ and Clint seems to have had this kind of engagement at Company X.

So what is Linda to do? She can certainly discuss these issues with Clint by informing him about the impact bias. She could tell him, for example, that people often make poor predictions about what they want and how happy they will feel if they get it. "I think you ought to know, Clint," she could say, "that no matter what they hope for when they buy a ticket, many lottery winners end up being no happier than they were before they won."²⁴

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

Linda's dilemma is but a microcosm of the broader dilemma faced by policy makers, regulators, and others trying to facilitate efficient decision-making in society. The impact bias and other departures from purely "rational" decision-making may warrant intervention by outsiders or regulation by authorities.²⁵ Open consideration of paternalism of this sort raises hackles in the legal community at large because it is deemed taboo to impinge on individual autonomy and freedom of choice. But it may be possible to find some middle ground by employing non-coercive interventions—including defaults, framing, and cooling

off periods—to assist those who might miswant in negotiation. Linda might use each of these tools to help Clint make a better decision, while leaving both of his options—going to trial with the hope of a large judgment or returning to work with back pay—available.

Default options have real force in choice situations because individuals generally prefer the status quo.²⁶ For example, companies have raised the savings rates of their employees by changing the default from non-enrollment to automatic participation in company 401(K) plans.²⁷ Likewise, Linda might suggest to Clint that returning to Company X should be viewed as his default because it restores him to his original position. By shifting Clint’s perception of his default to his prior employment with Company X, Linda may be able to influence the way he views his litigation options, placing the power of the status quo and inertia behind the option that seems most likely to promote his well-being.

Individuals are also influenced by the way options are framed, specifically whether the “downsides” or “upsides” are highlighted. For example, when choosing between a sure gain and a probabilistic gain with a comparable expected value, most people will choose the sure thing. In the context of Linda’s representation of Clint, Linda might emphasize that settlement reflects a sure gain, while Clint’s expected judgment at trial is only a probabilistic gain. With this frame, Linda implicitly invokes “prospect theory”²⁸ to increase the attractiveness of settlement and decrease the attractiveness of trial.

Cooling-off periods between the presentation of options and the final choice may also promote well-being. In negotiation, making the final decision away from the bargaining table offers two potential benefits. First, it might reduce the cognitive load on the decision-maker at the bargaining table itself, and research suggests that reducing cognitive load can increase the accuracy of individuals’ affective forecasts.²⁹ Second, a “time out” might also enable the decision-maker to manage his emotions more effectively. For example, if Clint’s motivation in taking Company X to court was vengeance, he might overvalue his long-term satisfaction from hurting the company, especially when he is in the same room as Company X representatives. Requiring that he wait until he is at a remove might help him make a better decision. Finally, Linda might suggest to Clint that he use the intermission to produce a detailed diary of what his typical day will look like if he takes the company’s offer or if he goes to court and wins a big award. How will he fill his day between waking and falling asleep? In other settings, this exercise has helped the diarists counteract the impact bias.³⁰

Conclusion

Negotiation scholars and practitioners have long known that disputants may not get what they want at the bargaining table. Perhaps what they want is unreasonable, unavailable, or even unlawful; perhaps they will commit decision errors in the negotiation process due to “heuristics and biases”; [Korobkin & Guthrie, *Heuristics*] perhaps their counterparts will simply “out-negotiate” them using successful “hard-ball” negotiation tactics or the more subtle but still effective “compliance tactics” employed by advertisers and retailers; [Guthrie, *Compliance*] perhaps other “barriers” might prevent them from getting what they want.³¹

What negotiation scholars and practitioners have generally assumed, however, is that disputants know what they want. The work reported in this Chapter calls this assumption into question. In his *New York Times Magazine* interview, Gilbert explained it this way, “You know, the Stones said, ‘You can’t always get what you want.’ [But] I don’t think that’s the problem. The problem is you can’t always *know* what you want.”³² Likewise, the most significant problem plaguing disputants may very well be that they can’t always know what they want.

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

Endnotes

This Chapter was adapted from Chris Guthrie & David Sally, *The Impact of the Impact Bias on Negotiation*, 87 MARQUETTE LAW REVIEW 817 (2004).

¹ ROGER FISHER, ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40 (2d ed. 1991).

² *Id.*

³ Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 345, 347 (2003).

⁴ *Id.* at 347.

⁵ *Id.* at 349.

⁶ *Id.* at 351.

⁷ See Daniel T. Gilbert, et al., *The Trouble with Vronsky: Impact Bias in the Forecasting of Future Affective States*, in THE WISDOM IN FEELING: PSYCHOLOGICAL PROCESSES IN EMOTIONAL INTELLIGENCE 114, 116 (Lisa Feldman Barrett & Peter Salovey eds., 2002).

⁸ Wilson & Gilbert, *supra* note 3, at 366.

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

¹⁰ Elizabeth W. Dunn, et al., *Location, Location, Location: The Misprediction of Satisfaction in Housing Lotteries*, 29 PERSONALITY & SOCIAL PSYCHOLOGY BULLETIN 1421, 1422 (2003).

¹¹ Wilson & Gilbert, *supra* note 3, at 371.

¹² *Id.*

¹³ See Gilbert, et al., *supra* note 7, at 124-25.

¹⁴ Jon Gertner, *The Futile Pursuit of Happiness*, N.Y. TIMES MAGAZINE, Sept. 7, 2003, at 46.

¹⁵ DAVID A. BINDER, ET AL., LAWYERS AS COUNSELOR 282 (2d ed. 2001).

¹⁶ *Id.* at 288-89.

¹⁷ MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(a) (1999).

¹⁸ MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-7 (1986).

¹⁹ *Id.* at EC 7-8.

²⁰ Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculating on the Limits of Legal Change*, 9 LAW & SOCIETY REVIEW 95, 97 (1974).

²¹ See, e.g., ROBERT E. LANE, THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES (1996) (demonstrating empirically that increased wealth beyond a poverty level has little to do with a sense of happiness); Mihaly Csikszentmihalyi, *If We Are So Rich, Why Aren't We Happy?*, 54 AMERICAN PSYCHOLOGIST 821, 822-23 (1999) (summarizing studies showing that material wealth has little impact on subjective well-being); David G. Myers, *The Funds, Friends, and Faith of Happy People*, 55 AMERICAN PSYCHOLOGIST 56, 59 (2000) ("Happiness tends to be lower among the very poor. Once comfortable, however, more money provides diminishing returns on happiness.").

²² See, e.g., LANE, *supra* note 21, at 6 ("[W]e get happiness primarily from people ..."); Myers, *supra* note 21, at 62 (reporting results that "confirm the correlation between social support and well-being").

²³ See, e.g., MIHALY CSIKSZENTMIHALYI, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE 3 (1990) ("Contrary to what we usually believe, moments like these, the best moments in our lives, are not the passive, receptive, relaxing times—although such experiences can also be enjoyable, if we have worked hard to attain them. The best moments usually occur when a person's body or mind is stretched to its limits in a voluntary effort to accomplish something difficult and worthwhile.").

²⁴ See, e.g., Philip Brickman, et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY 917 (1978).

²⁵ See, e.g., Colin Camerer, et al., *Regulation for Conservatives: Behavioral Economics and the Case for Asymmetric Paternalism*, 151 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1211 (2003); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 UNIVERSITY OF CHICAGO LAW REVIEW 1159 (2003).

²⁶ See William Samuelson & Robert Zeckhauser, *Status Quo Bias in Decision Making*, 1 JOURNAL OF RISK & UNCERTAINTY 7 (1988).

²⁷ See Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 QUARTERLY JOURNAL OF ECONOMICS 1149 (2001).

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²⁸ See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979).

²⁹ See Daniel T. Gilbert, et al., *The Future is Now: Temporal Correction in Affective Forecasting*, 88 *ORGANIZATION OF BEHAVIOR & HUMAN DECISION PROCESSES* 430, 434-36 (2002).

³⁰ See Wilson & Gilbert, *supra* note 3.

³¹ See *generally* BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow, et al. eds., 1995).

³² Gertner, *supra* note 14, at 46 (emphasis in original).