

UNIVERSITY OF CAPE TOWN



MASTERS THESIS

Addressing Predictable Irrationality: Insights from Practice

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Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the Master in Laws (LLM) (Dispute Resolution) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses. I hereby declare that I have read and understood the regulations governing the submission of Master in Laws (LLM) (Dispute Resolution) dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

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Abstract

Faculty of Law
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LLM in Dispute Resolution

Addressing Predictable Irrationality: Insights from Practice

by Robert WATSON

The traditional repertoire of techniques available to mediators is well-suited to assisting negotiators in resolving their disputes where those negotiators are acting in a manner approximating axiomatic rational behaviour. These techniques rely on parties acting in this manner and effectively and accurately uncovering, processing and calculating all the necessary information to make decisions in maximising their utility. Behavioural-Economists have made great progress in illustrating that human beings do not follow these axioms when making economic-decisions and have identified a number of ways in which we predictably deviate from that expectation of behaviour. These deviations can have significant effects on negotiations and mediation. This disjuncture between expected and actual behaviour provides us with an opportunity for development of additional techniques which can supplement our existing mediation-tools where appropriate. In their practice, experienced mediators have had to respond to these unexpected behaviours and have developed their own strategies for doing so. This learned-knowledge represents a rich potential source of strategic knowledge. Through a series of interviews, these lessons were distilled and, encompassing a brief theoretical discussion, an overarching strategy for interventions in such circumstances was identified. This paper represents a modest attempt at addressing this disjuncture and it is submitted that further opportunities for development exist.

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Chapter 1

Introduction

1.1 Introduction and Research Area

The majority of academic writing concerned with mediator technique relies on certain expectations of how negotiators make economic decisions. Together these expected behaviours form what is known as the *rational* mode of decision-making. Behavioural-Economics has illustrated that these expectations are very often inaccurate and has established a number of theories which better illustrate how people make those decisions¹.

A disjuncture therefore exists. Mediation's academic texts and the practice-orthodoxy prescribes techniques designed as responses to a false ideal of behaviour. Noting this problem, Bell, Raiffa, and Tversky², issued the imperative to improve our understanding of choice-making behaviour and its relationship with negotiation and mediation and to bridge the gap to these alternate models.

The benefit of doing so is clear; these new insights can allow mediators and negotiators to better understand their counterparts and clients as well as the impact of their own behaviour. This can then grant them a more nuanced and flexible tool-kit of interventions. In the years since Bell, Raiffa, and Tversky Bell's challenge, further progress has been made in analysing and predicting decision-making behaviour. Though some work has been done in incorporating these lessons into mediation-writing, it appears that room for further progress remains.³

This paper represents a modest attempt to address this gap. The aim is to first describe the tenets of rational behaviour, then to establish how the traditional mediation-model suits those expectations. Thereafter the paper aims to supplement this established range of techniques by offering alternative options for mediators faced with behaviour deviating from the rational model. To identify such options, it is necessary to first identify and describe the behaviour requiring an amended approach. Five well-established behavioural theories are therefore identified and their effect within the mediation-context described or hypothesised. These theories were chosen for the strength of evidence supporting them and for the extent to which they impact on mediation. In each case, the paper notes the manner in which the particular behaviour violates the rationality expectations.

To establish whether these theories accurately portray negotiators' behaviour, interviews were conducted with 7 experienced South African mediators working within the commercial and family contexts. The interviews were based on a series

¹Amos Tversky and Daniel Kahneman. "Judgment under uncertainty: Heuristics and biases". In: *Science* 185.4157 (1974), pp. 1124–1131.

²David E Bell, Howard Raiffa, and Amos Tversky. *Decision making: Descriptive, normative, and prescriptive interactions*. Cambridge University Press, 1988, p. 19.

³Tversky and Kahneman, "[Judgment under uncertainty: Heuristics and biases](#)".

of fictional mediation-scenarios in which negotiators act in the “deviant” manners described by these theories.

The behavioural theories are descriptive in nature and have been well-established through thorough testing, it therefore unsurprising that the scenarios resonated with those who regularly conduct mediations, even where the interviewees were unaware of the academic work describing these behaviours.

The main purpose of the interviews was to ascertain whether, having experienced these “deviant” behaviours in practice, the interviewed mediators had developed their own repertoire of responses. Given their familiarity with the behaviour described and their experience, the interviewees were indeed able to provide useful and well-reasoned insights into possible responses to that behaviour.

The conclusions reached are discussed in detail below but it is submitted that they provide an expanded range of interventions available to mediators in circumstances where standard mediation-techniques may prove unproductive. It was also clear that the interviewees’ views on the appropriate nature and aims of these interventions held certain common threads. While their stated views differed as to the appropriate level to which a mediator should influence the decisions of the negotiators, it became clear that, in practice, they were each prepared to make interventions which had such an impact. Cognisant of the need to both be and appear neutral, while simultaneously empowering the negotiators to better pursue to their own interests, the interventions proposed provide useful options for addressing the effects of these deviations by enabling the parties to improve their decision-making on their own volition.

1.2 Structure

To understand and evaluate the proposed techniques, we must understand the academic-context in which these interviews took place. Chapter 2 begins by describing the most prominent behavioural-assumptions which together form the *rational* model of decision-making behaviour. Each of these are discussed in turn and later used to explain how the five behavioural-theories chosen for discussion deviate from this model.

Having established what this expected behaviour is, Section 2 of Chapter 2 describes the structure and strategies underpinning the dominant model of mediation and how these strategies suit these behavioural assumptions.

Section 3 issues a word of caution, noting that although the paper seeks alternative and additional techniques, the traditional-model retains significant value and should not be discarded as a means of structuring a mediation or, in many cases, as an appropriate response to behaviour approximating rational behaviour. The techniques prescribed here are intended to supplement rather than replace a more defined and established set of techniques. This caution is repeated throughout the paper.

Before discussing the deviations and their effects individually, Section 4 describes the methodology used to extract the views of the interviewed mediators. This discussion describes the interview process and the research-strategy behind the interviews.

Methodology thus established and having illustrated the mediation-orthodoxy and the behavioural assumptions underpinning it, we then discuss the areas in which our standard mediation-techniques can be supplemented with reasoned responses to predictably-deviant behaviours.

Before addressing the deviations individually, a more general discussion must take place. Section 5 notes some common considerations relating to decision-making biases and heuristics generally. These issues must be considered throughout the discussion of the individual biases.

Section 6 discusses certain theories and issues which should shape our understanding and evaluation of the strategies proposed. The aim being to establish an appropriate lens for analysing the interviewees' suggestions.

Section 6.1 discusses the extent to which mediators should intervene to influence a matter. It comprises a brief consideration of the importance of the neutrality and independence of mediators and a brief introduction to Susskind and Thaler's "Nudge" theory⁴ as an organising concept with which to make this assessment. This discussion produced an overarching ideal against which the proposed strategies can be compared and evaluated.

Section 6.2 considers two newer bodies of mediation-theory and which prescribe methods and strategic emphasis which differs from traditional mediation models. These theories are noted to place the techniques raised within the interviews within an academic context, developed as they generally are from practice rather than from theory and then to introduce a potential source of further techniques befitting our theoretical ideal which can further supplement our standard tools.

Having established the context in which these interviews took place and having identified a guiding theory for the discussion of the individual deviations, the focus can shift to the individual deviations and the results emerging from the interviews. Chapter 3 deals with the individual biases in turn.

In respect of each bias the discussion follows the same pattern. First, the behavioural-theory is stated and explained in its original context, thereby describing how people make their decisions and the evidence supporting the theory.

To establish how this behaviour differs from our expectation of rational-behaviour, it is then contrasted with the assumptions underpinning the rationality assumption

We then discuss the impact of the deviation within the mediation context specifically.

To better illustrate the behaviour being addressed, it then briefly describes the fictional scenarios discussed in the interviews. Thereafter the paper addresses the answer from the interviews. The first goal is simply to determine whether the behaviour described by these theories is often experienced within mediations.

Thereafter the theories and strategies emerging from the interviews are recounted and analysed. This analysis builds on the theoretical discussion at Section 6 of Chapter 2.

Having addressed the deviations individually, Part D concludes the paper with some general remarks. First a final caution notes the difficulty of identifying the effects of specific deviations in specific circumstances while retaining some room for optimism by recognising our limited goal of providing options to supplement a well-established set of techniques rather than of providing a rigid menu of interventions.

The paper concludes by identifying the common threads to the mediators' views and comparing them to the theoretical ideals established earlier, thereby presenting a coherent theory to guide mediators' where negotiators acting deviate as described here. Finally, potential sources of further insights are identified, particularly within the *Narrative* and *Transformative* mediation theories.

⁴Richard H Thaler and Cass R Sunstein. *Nudge: Improving decisions about health, wealth, and happiness*. HeinOnline, 1999.

Chapter 2

Establishing an Analytical Context

2.1 Behavioural Assumptions Underpinning Traditional Mediation

Before evaluating the behavioural theories and seeking new techniques we must first understand the classic mediation structure. These existing tools broadly operate on a set of assumptions regarding the mediation's participants.

These tenets were developed over a number of years through the work of several historic economists and have underpinned much of our modern economic-theory and analysis. In general terms rational decision-making uses all available information with the goal only of maximising personal utility, determined according to established, identifiable and consistent preferences, while minimising all personal costs. This concept comprises the four assumptions underpinning Von Neumann and Morgenstern's *Expected-Utility-Principle*¹ being the assumptions of *transitivity*, *completeness*, *independence* and *continuity*, which together service the ultimate goal of maximising one's self-interest².

2.1.1 Transitivity

Transitivity refers to the expectation of consistency of choices, thus if X prefers A to B and B to C, they must prefer A to C. People are therefore expected to be able to place a number of outcomes or resolutions into a linear order of preference³. Consistency of choices renders decision-making predictable and utility-enhancing. I

2.1.2 Completeness

Completeness demands an ability to make comparative decisions between all possible outcomes⁴. Any combination of A, B and C can therefore be compared with any other and ranked in order of preference meaning that people can properly assess all available options their expected-utility. In this manner, a range of choices and outcomes can be compared and choices accurately made. This accuracy is necessarily utility-enhancing.

¹John Von Neumann and Oskar Morgenstern. "Theory of games and economic behavior". In: *Bull. Amer. Math. Soc* 51.7 (1945), pp. 498–504.

²Neva R. Goodwin et al. *Microeconomics in Context*. Armonk, New York: M.E. Sharpe, Dec. 19, 2013. ISBN: 0765638789, p. 146.

³Michel Regenwetter, Jason Dana, and Clinton P Davis-Stober. "Transitivity of preferences." In: *Psychological Review* 118.1 (2011), p. 42, p. 3.

⁴Herbert Gintis. *The bounds of reason: Game theory and the unification of the behavioral sciences*. Princeton University Press, 2014, p. 5.

2.1.3 Independence

The *Independence* axiom requires the ability to make decisions without being influenced by irrelevant considerations. A rational person would therefore evaluate a particular proposal with reference only to information actually influencing their expected utility.⁵

2.1.4 Continuity

The *continuity* is similar to *transitivity* in that it demands consistency in decision-making. It assumes that a person attaches similar utility to similar proposals and there should not be significant “spikes” or “troughs” in expected utility between similar outcomes⁶. Thus a person who values 100 oranges at 10,000⁷ utility points should, absent any particular cause, value 99 oranges at close to 10,000 points. When people rationally analyse potential outcomes, similar outcomes are therefore valued similarly.

2.1.5 Self-Interest

This Neo-Classical model considers these axioms necessary deductions from the central rationality axiom, that economic actors maximise their own utility. This assumption underpins the entire analytical framework upon which classical economic theory rests. By this view, utility is determined on depends solely on one’s personal outcomes⁸. We should note that this theory does not represent reality and a more subtle understanding of peoples’ preferences has since been developed to incorporate more benevolent interests⁹. In reality, in many cases, parties will be prepared to sacrifice some of their own interests in pursuit of benefits to others, including even the person with whom they are negotiating.

In sum, within the constraints of the knowledge available to them rational decision-makers make the best possible decisions for their own ends. We will note below how far people do actually deviate from this expectation and how economists have progressed in accounting for the failings of this assumption and the other assumptions.

2.2 The Traditional Model of Mediation

We must now assess how our established mediation techniques follow naturally from these assumptions and are appropriate interventions where those assumptions hold true.

The ordinary Law-and-Economics approach to mediation generally uses the following pattern¹⁰. Resolving a conflict relies on consensus being reached between the parties. The precise ordering of the steps followed in pursuit thereof will vary but the process will generally share several common features. The parties are encouraged to explore their and their opponents’ interests and uncover potential outcomes

⁵Gintis, *The bounds of reason: Game theory and the unification of the behavioral sciences*.

⁶H.R. Varian. *Intermediate Microeconomics: A Modern Approach*. W.W. Norton & Company, 2010. ISBN: 9780393934243, p. 597.

⁷Of course this is an arbitrary figure and decision-makers do not actually make decisions in this manner

⁸Goodwin et al., *Microeconomics in Context*, p. 146.

⁹Regenwetter, Dana, and Davis-Stober, “*Transitivity of preferences*.”, p. 3.

¹⁰Haksoo Ko. “On the Role of a Mediator: A Behavioural Law and Economics Perspective”. In: *Asia Pacific Law Review* 17.sup1 (2009), pp. 195–204, p. 197.

for the resolution of the matter¹¹. The mediator then steers the participants, with varying techniques and levels of influence, towards those outcomes which may be acceptable to all parties, or the *Zone-of-Possible-Agreement*¹². The mediator moves the parties towards this zone by facilitating the trading of concessions and bargaining towards mutually acceptable solutions.¹³

To assist a negotiator to decide whether to accept an offer or concession is acceptable, mediators will act as *agents of reality*¹⁴ by encouraging them to properly evaluate their options and rigorously test the assumptions or beliefs regarding their prospects either within or outside the mediation. Commonly this process involves encouraging participants to calculate their “best-alternative-to-a-negotiated-settlement” (BATNA¹⁵). Essentially the parties are encouraged to predict the likely outcome of a failure to reach a negotiated settlement. The mediator assists the negotiator to consider the information necessary to make fully informed choices¹⁶.

In most (but not all) cases, their BATNA is the likely outcome of litigation¹⁷. Participants must therefore consider the full meaning and consequence of proceeding to trial and their prediction of their likelihood of success, expected size of the adjudicated award, the costs of obtaining that award including both financial and emotional costz, the impact on their relationship with their opponent and the amount of time it is likely to cost them. The total utility of this outcome is then compared with the total utility of the outcom available through mediation. Once offers are created which fall within the range of outcomes acceptable to both or all of the negotiators, the ZOPA is reached and settlement can result¹⁸.

A rational actor confronted with an offer or considering how to construct their own offer would be able to quantify the utility of their alternative outcome to settlement, compare the two and make a choice which optimises their self-interested utility or where designing an offer, reduces their own cost while maximising the appeal to the other party¹⁹.

Mediators are often wary of accepting that their goal is to maximise preferences, preferring to limit the scope of their intervention to the *facilitation* of the process of negotiation²⁰. In reality though it appears that this goal *does* inform mediators’ strategies.²¹ This is unsurprising as maximising parties’ preferences necessarily increases the likelihood of reaching settlement and leaving the parties viewing the process as helpful and the mediator effective and worth the cost of their services. Therefore, where possible, mediators will try and reach a utility-maximising outcome, using the techniques described above.

¹¹Bell, Raiffa, and Tversky, *Decision making: Descriptive, normative, and prescriptive interactions*, p. 19.

¹²Negotiation Experts. *The Zone Of Possible Agreement (ZOPA)*. URL: <https://www.negotiations.com/articles/zopa/> (visited on 04/25/2017).

¹³*Ibid.*

¹⁴Susan S Silbey and Sally E Merry. “Mediator settlement strategies”. In: *Law & Policy* 8.1 (1986), pp. 7–32.

¹⁵Robert Benjamin. *The Natural History of Negotiation Mediation: The Evolution of Negotiative Behaviours, Rituals, and Approaches*. June 2012. URL: <https://www.mediate.com/articles/NaturalHistory.cfm> (visited on 04/25/2017).

¹⁶*Ibid.*

¹⁷*Ibid.*

¹⁸Negotiation Experts, *The Zone Of Possible Agreement (ZOPA)*.

¹⁹Laurence Boule. “Predictable irrationality in mediation: Insights from behavioural economics”. In: *Australasian Dispute Resolution Journal* (2013), pp. 4-5.

²⁰Leonard L Riskin. “Understanding mediators’ orientations, strategies, and techniques: A grid for the perplexed”. In: *Harv. Negot. L. Rev.* 1 (1996), p. 7.

²¹During the interviews, each of those mediators interviewed referred to some degree of desire and concerted action to at the very least determine whether settlement is possible.

The classic mediation-techniques aim at achieving or approximating such an outcome²². The imperative to fully explore the interests underpinning the participants' decisions and the options available to satisfy those interests are aimed at achieving the most mutually-desirable outcome possible. The parties are therefore encouraged to seek a wide range of utility-maximising outcomes and to use their rational decision-making power to find the best outcomes for themselves. Their ability to do so depends on the participants matching or approximating the behavioural assumptions underpinning the rational behavioural model.

2.3 Residual Value of the Existing Model

That the classic mediation-techniques are predicated on an expectation of informed, consistent and coherent decision-making is both sensible and borne out by the consistent responses of those interviewed for this paper. There is also no doubt therefore that these techniques retain significant value. As Birke and Fox highlight²³, a focus on these deviations not an indictment on the rationality-model. That model acts as a "compass" towards desirable outcomes. As Boulle notes, the mediation process can be likened to a market system wherein rational decision-makers produce efficient outcomes through the bargaining process. Rational actors therefore generally produce efficient outcomes²⁴. Thus the concept of rationality is both descriptive and aspirational. We are generally here aiming to facilitate this kind of negotiation.

This view is borne out by the interviewee's commonly recommended response to participants acting in unexpected or "irrational" manners, it is important to try and place them in a more rational state of analysis and communication. This indicates that rational, calculated behaviour is desirable in this context and is, to some degree at least, achievable through the correct choice of technique and that where the parties are approximating the *rational* axioms, the classic techniques are very useful. This is unsurprising. Mediators who can rely on parties fully and accurately exploring, understanding and evaluating their interests and being capable of making coherent decisions are more predictable and the ebb-and-flow of concessions and negotiation can more easily be anticipated and constructively guided²⁵.

It is further submitted that the behavioural axioms may also serve a role as predictive tools where the "deviant" behaviours are perhaps more difficult to recognise and predict. Thus, if we cannot predict how a person is going to act, a mediator may be best served by acting under the assumption of a rational mind-set²⁶.

We must therefore be clear that this paper seeks only to build on existing strategies, rather than replace them. To reiterate therefore, we are aiming only to determine whether mediators recognise particular patterns of "deviation" from these assumptions and if so, to distil the lessons learned by mediators in responding to these deviations so as to expand the range of tools available in response to these deviant behaviours.

²²See, for example, Gibsons's (1994) invocation to "act rationally" and encourage rational solutions in response to unexpected or unpredictable behaviour on the part of participants and indeed mediators themselves (cf. Bell, Raiffa, and Tversky, pp. 166-168)

²³Richard Birke. "Evaluation and facilitation: moving past either/or". In: *J. Disp. Resol.* (2000), p. 309.

²⁴Boulle, "Predictable irrationality in mediation: Insights from behavioural economics".

²⁵Goodwin et al., *Microeconomics in Context*.

²⁶Indeed, the majority of economic analysis relies on these assumptions for this reason, see Goodwin et al.

2.4 The Interview Process

Unfortunately it appears that little academic work has been aimed at incorporating these behavioural findings into mediation strategies²⁷. As these theories describe how people actually behave, it was hoped that experienced mediators would recognise behavioural patterns approximating these theoretical behaviours, even if they were unaware of the academic work describing them. If this were the case, it was hoped that through practice, they would have developed their own responses.

To determine whether this was so, a number of interviews were conducted with experienced mediators with varying specialisations. The interview process consisted of seven interviews, which averaged around 90 minutes per person. The interviewees were given factual scenarios presenting participants acting in line with each of the deviations described below. The interviewees were given the choice to deal with family or commercial disputes and separate scenarios were created for either context.

The interviews were semi-structured in that a standard list of questions was used in reference to each scenario but discussion was allowed to flow where necessary and helpful, with follow-up questions used in order to develop and pursue issues raised by the interviewee. The questions used were deliberately open-ended since, as Yin²⁸ contends, open-ended questions encourage participants to use their own words and not that of the recorder.

These interviews were qualitative in approach since they aimed at uncovering the lived experiences of mediators rather than making statistical enquiries. Edmondson and McManus²⁹ states that the less is known about a phenomenon the more likely *exploratory-qualitative* research will prove fruitful. The interviews aimed to generate theory, rather than test theory and were therefore intended to be more in-depth, nuanced and flexible than a quantitative approach would have allowed. Though traditional mediation-practice is well described and analysed in the literature, little investigative research has been done into the particular strategies mediators have developed as responses to common “irrational” behaviours and for this reason, a more in-depth interview process was necessary.

The interviews were limited in number and the interviewees therefore represent a small sample size. In qualitative research, the sample size may be smaller than that found in quantitative research³⁰. This paper does not seek statistical confirmation of a theory but rather a sufficiently extensive canvassing of the views of those likely to have relevant views to give. Thus, the writer seeks *saturation*³¹, in the sense of having a sufficiently wide range of interviewees such that all possible and relevant views and opinions are covered by the field of interviewees.

Although desirable complete saturation is impossible to achieve, however, certain factors present here limit the number of interviewees necessary for a sufficient approximation thereof. Firstly, the field of experienced mediators in South Africa is reasonably small. Secondly, that the interviews are conducted with experts in the field suggests that a wider knowledge of possible strategies and interventions

²⁷Ko, “On the Role of a Mediator: A Behavioural Law and Economics Perspective”.

²⁸Robert K Yin. *Qualitative research from start to finish*. Guilford Publications, 2015.

²⁹Amy C Edmondson and Stacy E McManus. “Methodological fit in management field research”. In: *Academy of management review* 32.4 (2007), pp. 1246–1264.

³⁰Mark Mason. “Sample size and saturation in PhD studies using qualitative interviews”. In: *Forum qualitative Sozialforschung/Forum: qualitative social research*. Vol. 11. 3. 2010.

³¹Thomas Groenewald. “A phenomenological research design illustrated”. In: *International journal of qualitative methods* 3.1 (2004), pp. 42–55.

for mediators will be held amongst the relatively small grouping of interviewees³². Though there are some distinctions between the mediators interviewed, their practical training is largely sourced from similar materials and institutions³³. This was borne out in the similarities between the methods generally proposed during the interviews.

2.5 General Considerations Relating to the Deviations

Despite the aforementioned desirability of the rational model's predictions and its residual value as a tool for prediction and analysis, it has significant descriptive limitations. The assumptions referred to above do not adequately predict or describe our actual economic behaviour³⁴. Rational-economics theorists had more many years noted that "errors" occur but had consistently concluded that they were not predictable³⁵. In later years, behavioural-economists and psychologists have shifted this belief, finding that in many cases these 'errors' took on a very consistent form and have as a result, noted the need for interdisciplinary research to make these observations useful³⁶.

While a detailed discussion of five specific deviations follows below, we should first note a few characteristics which they share as they may inform our general approach to dealing with the deviations.

An important aspect to remember is that when we "deviate" from the rational expectation of behaviour, we do not do so consciously. They are automatic, sub-conscious processes which are difficult to subvert. Birke and Fox's analogy to optical illusions is helpful here in that it illustrates that although our brain responds to stimuli or information in something of a distorted manner, we are unaware that it is doing so³⁷. As a result, merely pointing out that our brains are acting in this way is often insufficient to prevent its effects.

We should also take heed of Kahnemann and Tversky's reminder that these deviations do not always act to hinder settlement³⁸. In many cases, they may lead to settlement where a rational actor would not settle. The extent to which mediator should intervene in such circumstances will vary according to the mediator's understanding of their role.

2.6 Establishing an Analytical Framework

Before analysing consider the interviewee's proposals, a framework for that analysis must be established.

³²J Lewis Ritchie and J Lewis. "J. & Elam, G.(2003). Designing and selecting samples". In: *Qualitative research practice. A guide for social science students and researchers* (), pp. 77–108.

³³*Ibid.*

³⁴Daniel Kahneman and Amos Tversky. "Conflict Resolution: A Cognitive Perspective". In: *Preference, Belief, and Similarity* (1992), p. 729, p. 50.

³⁵*Ibid.*, p. 49.

³⁶*Ibid.*

³⁷Birke, "Evaluation and facilitation: moving past either/or".

³⁸Riskin, "Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed", p. 746.

2.6.1 Mediator Neutrality and Intervention - What is a Nudge too Far?

Neutrality, impartiality, and independence are commonly considered fundamental elements of mediation and are included in many definitions of mediation, including that in the preamble to the 2005 Model Standards of Conduct for Mediators, define the process as one in which, “an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute³⁹.” Many academic definitions also include reference to these concepts⁴⁰.

Despite this, there is a growing academic belief that these terms do not actually describe the reality of mediation⁴¹ and in many cases are not necessarily desirable attributes of mediator behaviour⁴². This acknowledgement has taken hold within academic writing but nonetheless appears, at least theoretically, to remain as a foundational element of the process in the minds of mediators⁴³.

This overarching concept appears to include four elements⁴⁴:

1. A lack of conflict of interest
2. *Process-equality* wherein each party is treated equally
3. *Outcome-neutrality*, meaning that the mediator’s preferences as to the outcome of the negotiation are irrelevant
4. Self-determination for the parties wherein the parties themselves decide the outcome, rather than the mediator

The rationale underpinning these ideals, is to encourage participants to trust in the process, accept its outcomes, exercise their self-determination and accept the legitimacy of the process. Where a participant feels that they are not being treated fairly, their communication with the mediator and willingness to engage with the process is likely to suffer. That this rationale relates to the views of the participants indicates that the appearance of neutrality is equally important. Thus, mediators must ensure that they not only are neutral but also that they appear to be so⁴⁵.

Douglas’ work questions the binary manner in which we view mediators as either neutral or non-neutral⁴⁶. Freed from this dichotomy, she offers an alternative conception of what mediators really view their obligations in respect of neutrality. Her key finding is that mediators emphasise their role in empowering the self-determination of their negotiators⁴⁷. This role involves ensuring that both or all parties involved are able to make decisions giving effect to their own interests. Thus, the actions of the mediator must give effect to the interests and informed views of the participants rather than their own.

³⁹American Arbitration Association. *Model Standards of Conduct for Mediators*. Sept. 2005. URL: https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf (visited on 01/31/2018).

⁴⁰Carrie Menkel-Meadow et al. *Dispute resolution: beyond the adversarial model*. Wolters Kluwer Law & Business, 2011, p. 95.

⁴¹Orna Cohen, Naomi Dattner, and Ahron Luxenburg. “The limits of the mediator’s neutrality”. In: *Conflict Resolution Quarterly* 16.4 (1999), pp. 341–348.

⁴²Linda Mulcahy. “The possibilities and desirability of mediator neutrality-towards an ethic of parity?” In: *Social & Legal Studies* 10.4 (2001), pp. 505–527.

⁴³Susan Douglas. “Neutrality in mediation: a study of mediator perceptions”. In: *Queensland U. Tech. L. & Just. J.* 8 (2008), p. 139, p. 2.

⁴⁴Carol Izumi. “Implicit bias and the illusion of mediator neutrality”. In: *Wash. UJL & Pol’y* 34 (2010), p. 71, pp. 74–75.

⁴⁵Hin Hung. “Neutrality and impartiality in mediation”. In: *ADR Bulletin* 5.3 (2002), p. 7.

⁴⁶Douglas, “*Neutrality in mediation: a study of mediator perceptions*”, p. 140.

⁴⁷*Ibid.*, pp. 150–151.

A further insight from her work⁴⁸ and the work of a number of others⁴⁹ is that in cases where a power-imbalance exists between parties, an entirely equal process can lead to an inequality of outcome and opportunity to affect the negotiation. In addition to these academic voices, it appears that the practical attitude of mediators agrees that some degree of assistance is justified in certain circumstances to ensure a fair overall process.

This approach echoes Birke's critique of the popular dichotomy⁵⁰ assumed between *facilitative* and *evaluative* mediators, a divide⁵¹ which provides a useful but probably incomplete description of a spectrum of approaches one can take on this issue. Facilitative-mediators only provide the platform and process for the parties to communicate and explore their interests. Evaluative-mediators play a deeper role in that they evaluate and analyse the content of the proposals made by each side. Birke argues that this distinction between evaluative and facilitative-mediation has perhaps drawn too much attention in the literature. They are useful terms for differentiating techniques but the absolute distinction drawn between the two approaches does not resonate with reality. Very few mediators operate solely in one or the other manner and will intervene in appropriate circumstances, including often where a power-imbalance exists.

We must therefore ask whether the behaviours we are considering here justify similar interventions. The decision-making heuristic or rationality-shortfall manifests as an inability to fully and correctly appraise and analyse one's own interest or to appraise one's strategic position. Where this is the case, it is submitted that interventions aimed at addressing this inability are justified on similar grounds to those justifying interventions in the case of negotiating power imbalances. In a sense, these failings may themselves be considered a source of power-imbalance.

Ko's brief introduction of her *new-evaluative* approach suggests a similar conclusion. Without prescribing particular techniques or approaches, she argues that mediators should intervene to assist negotiators whose cognitive-abilities are limited by these biases. Though she does not justify this argument on a power-imbalance basis, the logic is similar. Where a party is unable to give best-effect to their own interests through a disadvantage of knowledge, skill or experience, a mediator is justified in intervening to correct that shortcoming⁵².

If an intervention is justified, it must be crafted in the light of the need to retain fairness and the appearance of neutrality. Thus, the interventions aimed at addressing these cognitive errors should be limited to encouraging the parties to properly consider their own interests and the risks they face rather than promoting the mediator's preferred outcome.

Susskind and Thaler's *Nudge Theory* presents a potential outline for the proper limits of intervention. Their work describes a libertarian-paternalistic model wherein the *choice-making* architecture of a decision is manipulated to encourage a party to make the decision which ultimately gives effect to their interests⁵³. This approach is libertarian in that it promotes the pursuit of self-determination but it is paternalistic

⁴⁸Douglas, "Neutrality in mediation: a study of mediator perceptions", pp. 147-148.

⁴⁹Sara Cobb and Janet Rifkin. "Practice and paradox: Deconstructing neutrality in mediation". In: *Law & Social Inquiry* 16.1 (1991), pp. 35-62, p. 35.

⁵⁰Birke, "Evaluation and facilitation: moving past either/or", p. 309.

⁵¹See Zena Zumeta. "Styles of mediation: Facilitative, evaluative, and transformative mediation". In: *National Association for Community Mediation Newsletter* (2000).

⁵²Ko, "On the Role of a Mediator: A Behavioural Law and Economics Perspective".

⁵³Daniel Watkins. "A nudge to mediate: How adjustments in choice architecture can lead to better dispute resolution decisions". In: *Am. J. Mediation* 4 (2010), p. 19.

in that the information surrounding the decision is manipulated to encourage a particular choice. Thus, the manipulator (in our case the mediator) is not altering the preferences but encourages a more effective pursuit of these preferences⁵⁴.

Based on our earlier discussion, it appears that our approach mirrors this conception of intervention in that the mediator should limit their interventions to those assisting the negotiator to access and use the information governing their decisions. The mediator should therefore should not pursue a particular outcome but rather encourage parties to consider all potential outcomes and to accurately pursue that result best suiting their interests.

2.6.2 Alternative Theories of Mediation – Opportunities for Insight

Having attempted an explanation of the appropriate level and aims of mediator-intervention in response to the behaviour discussed in this paper, it is useful to consider the lessons of two newer schools of mediation theory. These theories are chosen because their focus goes beyond the types of interventions forming the traditional structure of a mediation. A complete study of these two relatively well-developed fields of mediation theory is not necessary but a brief introduction increases our understanding of the issues facing us.

By understanding the aims underpinning these theories, particularly in relation to better equipping people to make decisions in a manner which best promotes their own interests, we can place the techniques proposed in the interviews within an academic context and compare them to those theories' strategies. It also potentially allows us to supplement the interviewee's proposals and determine whether they provide further suitable responses falling within the bounds we have prescribed for desirable interventions.

Transformative Mediation

Bush and Folger's work⁵⁵ provides an interesting lens for viewing the strategies proposed through these interviews. They contrast two models of mediation. The *Problem-Solving* model largely accords with the traditional-model referred to throughout this paper. It focusses on the issues facing the parties and on uncovering mutually-acceptable solutions to address each party's interests. The approach is therefore outcome-focussed. This is contrasted with their *Transformative*-model's focus on confronting the relational elements causing or exacerbating a dispute and on the parties' ability to engage with the mediation to best give effect to their desires⁵⁶.

They view mediation as capable of providing certain *shifts* allowing negotiators to actively engage in the matter in a problem-solving manner. Crucially, it is emphasised that in both cases, the shifts have to be driven by the negotiators themselves, the mediator must only provide the environment and guidance allowing this to occur⁵⁷.

These shifts include *empowerment* and *recognition* shifts⁵⁸. The former describes the transformation of a person who does not feel equipped to advocate their views and negotiate towards their desires to a place where they feel they can do so.

⁵⁴Thaler and Sunstein, *Nudge: Improving decisions about health, wealth, and happiness*, pp. 17-39.

⁵⁵Robert A Baruch Bush and Joseph P Folger. *The promise of mediation: The transformative approach to conflict*. John Wiley & Sons, 2004.

⁵⁶*Ibid.*, p. 19.

⁵⁷*Ibid.*, p. 86.

⁵⁸*Ibid.*, pp. 84-85.

A *recognition-shift* describes a negotiator becoming able to better empathise with their counterparts negotiators and to communicate this improved recognition and empathy. This transformation can encourage parties to feel that their well-being is being valued within the process and it is argued that this renders them able to bypass their anger, frustration or uncertainty regarding the negotiation and engage with the process in a more open and constructive manner⁵⁹.

This approach involves three major forms of intervention⁶⁰:

1. A micro-focus on the manner in which the parties communicate and its effect on the conflict
2. Encouraging negotiators towards self-led analysis as opposed to active guidance
3. Framing and reframing arguments to encourage recognition of the other parties' views and arguments

They argue that these transformative-techniques are so radically different to the *problem-solving* methods that a mediator cannot pick and choose between the broader strategies and must wholly embrace one set of interventions or the other⁶¹.

Narrative Mediation

The techniques proposed by the *Narrative-Mediators*⁶² were raised by several interviewees as a potentially useful means of addressing the behaviour we are considering here. A full exploration of this field is neither possible nor necessary here but a brief introduction is of benefit.

Like *Transformative-Mediation*, *Narrative-Mediation* focusses on addressing conflict itself rather than pursuing resolute outcomes. The theory posits that we view conflicts and people in terms of a narrative rather than as a crystallised entity. This narrative creates and informs a person's understanding of those people or events⁶³. The theory recognises that the narratives are generated from one's own perspective and are based on subjective moral-norms and access to one's own available facts. Two people involved in a dispute will therefore often have a wildly varied different understandings of a conflict. Although we view people and events in terms as a narrative, that narrative can be shaped by what Winslade and Monk describe as *totalising* descriptions⁶⁴ wherein people develop complex narratives where events are continually and inaccurately understood in a particular narrow light. Therefore an adulterous spouse's actions may always thereafter be interpreted as untrustworthy.

The techniques based on this approach emphasise the importance of building trust between the mediator and participant, to facilitate full and honest disclosure⁶⁵, separating the content of the dispute from the identity of those involved⁶⁶, creating awareness of the ongoing story of the conflict, mindful of how attitudes have shifted as time has passed, acknowledging the impact of differing cultural-norms on the

⁵⁹Bush and Folger, *The promise of mediation: The transformative approach to conflict*.

⁶⁰*Ibid.*

⁶¹*Ibid.*, p. 65.

⁶²John Winslade and Gerald D Monk. *Practicing narrative mediation: Loosening the grip of conflict*. John Wiley & Sons, 2008.

⁶³*Ibid.*, pp. 3-6.

⁶⁴*Ibid.*, p. 33.

⁶⁵*Ibid.*, p. 13.

⁶⁶*Ibid.*, pp. 31-35.

creation of these narratives of the conflict and finally emphasising the development and discussion of solution-based narratives wherein the parties are encouraged to imagine or design a positive continuation of the narrative.

We must remember these insights when analysing the interviews and determine whether they offer potential for further options for mediators.

Chapter 3

The Deviations and Suggested Responses

3.1 Introduction

We must now consider the five deviations themselves. In respect of each deviation, the paper will describe the theory its supporting evidence, identify how it “deviates” from axiomatic rational behaviour and assess its impact on mediation. Finally, the strategies and techniques emerging from the interviews are discussed and assessed in respect of each individual deviation.

Although the strategies emerged in deviation-specific contexts, in many cases they form part of a broader strategy which is useful in respect of other deviations. for example. Techniques aimed at encouraging full-consideration of facts and settlement options will be of use where negotiators’ focus is too narrow as a product of any of the deviations but also where someone generally fails to fully canvas their own interests and options.

3.2 Relative Distortion and Substitute Questions

3.2.1 Relative Distortion

What is Relative Distortion?

To begin we consider two deviations which operate in tandem within the mediation context. The first, Dan Ariely’s *choice-relativity-theory* argues that humans make decisions by comparisons¹, rather than by ascribing an absolute utility to a particular item. Thus, we determine value *relative* to other comparable items or options, available to us or not.

Ariely argues that this is an instinctive process. We do not decide to make evaluations in this manner, we just do². The value of doing so is that it allows us to remain within what Simon terms our *bounded-rationality*, our finite limit of computational-capacity³. Thus, instead of making a judgement on every element of an item and then aggregating the results to “rate” the item, we save computational-energy by “ranking” it relative to other items. Simon argues that without doing so, we would struggle to make complicated choices at all.

¹D. Ariely. *Predictably Irrational, Revised and Expanded Edition: The Hidden Forces That Shape Our Decisions*. HarperCollins, 2010. ISBN: 9780061353246, p. 2.

²*Ibid.*, p. 7.

³Herbert A Simon. “A behavioral model of rational choice”. In: *The quarterly journal of economics* 69.1 (1955), pp. 99–118, pp. 99–118.

He argues further that these comparisons can only be made between comparable items⁴. Thus, we may clearly prefer Coca-Cola to Fanta but we may not compare a coca-cola to owning a new pen. Again, this is a function of our brain's desire to minimise the computational-energy required to make this analysis.

Ariely's Economist-Magazine advert exempl elegantly illustrates this concept. It involves an advert for three subscription-options; the print edition only for \$125, online-only for \$59 and a combination of both also for \$125. When he presented these options to his 100-member MBA class, 84 chose option 3 while 16 chose option 2. When he removed option 1 from the equation with another class, 68 chose option 2 and 32 chose option 3. Since no one chose the print-only option, its removal should not have affected the second round of testing, since the choice in the first round was really only between options 2 and 3 anyway.

Ariely argues that this choice-structure was designed to manipulate potential subscribers using an understanding that people do not value items in absolute terms but instead value them by comparison with other similar items. Thus, in providing the print-and-online edition at the same price as the print-only edition, the print-and-online edition became attractive as it was clearly superior to the print-only option. The key is that the print-only and print-and-online options were very easily comparable. The print-and-online option is clearly superior to the print-only option. Because that option has "won" this comparison, it is imbued with additional strength in the comparison with the online-only subscription which, because of its lower price, is really the alternative facing the potential subscribers⁵.

Though this shift is irrational, it is not unpredictable. To reiterate, Ariely finds that the mind virtually always appraises things through comparison and where there are multiple options to consider, the mind ranks options which are similar to one another. Thus, if one option presented is even slightly more attractive than another similar option, its absolute value increases simply by virtue of the mind having made the comparison. Similarly, an option can be undervalued relative to other options because it fails on a similar comparison⁶.

Nature of the Deviation

The independence-tenet is violated. The print-only option is irrelevant to the print-and-online and online-only election but the experiment's results indicate a significant effect. Thus, an irrelevant, utility-neutral factor (its comparison with an irrelevant alternative,) affects the appraisal of another option.

It also violates the completeness-axiom since it shows that decision makers are not capable of assessing all potential outcomes, we can only do so by comparing them to comparable items.

Finally, the continuity-axiom is violated as our preferences between two similar items may significantly vary by virtue of a slight dissimilarity. Thus, our preferences are not smooth and predictable in the axiomatic sense.

Mediation and Comparison

The discussion of orthodox mediation-technique above illustrates how fundamental comparison is to the evaluation of options within mediation. In choosing to accept

⁴Anuj K Shah and Daniel M Oppenheimer. "Heuristics made easy: An effort-reduction framework." In: *Psychological bulletin* 134.2 (2008), p. 207.

⁵Ariely, *Predictably Irrational, Revised and Expanded Edition: The Hidden Forces That Shape Our Decisions*, pp. 4-6.

⁶*Ibid.*

a proposal or not, they are compared to each other and to their BATNA. Thus, a negotiator's decisions within a mediation necessarily rely on comparison.

3.2.2 Substitute Questions

Substitute Question Effect

Having established that we appraise options by means of comparison, we must also consider how that comparison is made. When we appraise an item or offer which has diverse effects on our varied interests, our brain's need to remain within its bounded-rationality forces it to narrow its focus. It does so by using a *substitute-question* through which the total value of a complex-proposal is determined by its performance in respect of a particular consideration. Boulle⁷ illustrates this concept through the extreme example of a consumer purchasing electronics based on their colour.

This process is an unconscious one⁸. The person acting in this manner has not chosen a determinative question but nonetheless makes the decision on that basis. In this manner, the cognitive-difficulties of comparison between complex proposals are reduced.

Nature of Deviation

In addition to the deviations already caused by the *choice-relativity* effect, the *substitute-question* effect distances the participants' behaviour even further from the rational-expectation by narrowing their calculation to a particular determinative issue. This exacerbates the violation of the axioms already resulting from the comparative-effect.

3.2.3 Combined Effect in the Mediation Context

When operating together, the total-effect can be explained as follows; when a proposal is made within a mediation, its value is assessed through comparison to the person's BATNA or to alternate proposals or outcomes either arising within the context of the mediation or experienced or attained by others within the knowledge of the participant. In making this comparison, the evaluator will very often subconsciously fixate on a particular sub-issue and compare the two offers solely or disproportionately on this consideration. Proposals which succeed or fail on this narrow consideration will be overvalued or undervalued, simply by succeeding or failing.

In many cases, the use of such heuristics is beneficial. Shah and Oppenheimer⁹ have described them as a means of reducing the computational effort of decision-making. Simon's *Bounded Rationality theory*¹⁰ recognises our limits in this regards and notes that, decision-making sometimes be impossible without the use of these heuristics. Therefore where a matter is too complex or where narrow issue does require particular scrutiny, this thinking may be useful. It is simple and allows a party certainty in their negotiation

Generally though, this will lead to a miscalculation of the true value of a particular proposal. We must be clear in using the term "value" here. We do not mean that

⁷Boulle, "Predictable irrationality in mediation: Insights from behavioural economics", p. 9.

⁸Daniel Kahneman and Shane Frederick. "Representativeness revisited: Attribute substitution in intuitive judgment". In: *Heuristics and biases: The psychology of intuitive judgment* 49 (2002), p. 81, pp. 49-81.

⁹Shah and Oppenheimer, "Heuristics made easy: An effort-reduction framework."

¹⁰Simon, "A behavioral model of rational choice".

the person is not properly deciding what their interests are; instead we mean that the person is not properly calculating the total effect of a proposal on those interests, whatever those interests may be. These biases can together have this effect in one of two senses.

In the more simple sense, the focus on a narrow issue as a determinate of the total value of a proposition will mean that the utility of the other aspects of the proposal will not properly be considered. Thus, the party will simply not be able to properly ascertain what it is that they want nor appraise a proposition with full consideration of their own complex interests. This narrow focus will also inhibit the brainstorming processes which are so integral to the solution-seeking phase of mediation. Focussing on a particular issue will limit the capacity to develop creative solutions. For ease of reference we shall refer to this effect as the *narrowing* effect.

A negotiator facing someone operating in this mode will have their prospects of successfully reaching settlement stand or fall on their ability to satisfy that person on that particular issue. Thus, if they can make the required concession at acceptable cost to themselves, they can hope to extract significant benefit from a negotiator who is only focussed on that narrow issue.

The other more complex effect operates like the Economist-advert above. When considering one or more settlement-proposal, a party's evaluation of that proposal may be distorted by its comparative success or failure on the substitute-question relative to another proposal, one's BATNA or anecdotal expectations of one's likely results from a negotiation. This means that because a particular proposal fails on this one issue, relative to this comparator outcome, its value relative to other proposals which cannot be compared along this substitute-question test will suffer disproportionately. We shall refer to this effect as the *relative-distortion* effect.

An example is useful to illustrate the point. A and B are married but intend to divorce. A's sister has recently been divorced and received interim-maintenance in excess of the amount proposed in B's consent-papers. A has been advised by their attorneys that in the event of the divorce being adjudicated in court, they are unlikely to receive any award of interim-maintenance at all but would instead more likely receive a lump-sum payment or a distribution of a greater value of assets. A's attorneys advise that even with the lower interim-maintenance offer, the total value of B's proposal is more than reasonable. Nonetheless A is focussed on the very narrow issue of maintenance and because B's offer fails relative to A's sister's experience on that issue, its absolute value relative to the BATNA falls. The BATNA cannot be compared on this same question because of the advice that the court prefers alternative methods. Thus, a distorted valuation of the consent-paper proposal will mean that the BATNA comparison cannot properly be made and A will be unable to properly assess their own prospects and interests.

3.2.4 The Interviews

The scenarios informing the interviews were based on a similar decision-making structure. In both cases a decision-maker was confronted with a complex choice between two potential outcomes and the implicit option of pursuing their BATNA. In both cases, in the face of multifaceted options, they made their decision based on a single criterion without properly considering the full range of relevant factors.

In both cases, the fact that the one offer succeeded in respect of this narrow criteria meant that the offer, as a whole, took on an inflated value when compared with another potential outcome or the person's BATNA.

The commercial scenario involved the CEO of a clothing-manufacturer choosing whether or not to continue a long-standing relationship with a logistics-company ('Clark's') who, responding to labour unrest and increased costs, were being forced to increase their transport price in order to remain viable. The alternative was to divert their logistics needs to another company ('Buchanan's'), who had previously tendered a lower price than the new proposed price but who, for various reasons, would offer an inferior service for the company's needs. The decision-maker fixated on price and did not adequately consider the other factors and as a result, overvalued the Buchanan's offer relative to Clarke's new proposal.

The divorce-scenario describes a spouse who is choosing between two complex offers of settlement for their divorce. As in the commercial scenario, the decision was made based on which of the two offers included the better motor vehicle. Again, the spouse's focus was very narrow in the face of a complex decision and ignored certain crucial issues relevant to this decision. The offer which included the better vehicle was overvalued relative other potential outcomes, including litigation or a renegotiation of the offers.

The interviewees were then asked whether they recognised this pattern of behaviour from their practice and then how they would respond to the person making their decisions in this manner with the discussion largely focussing on techniques for broadening the negotiators' perspective and identifying the limits of appropriate mediator-intervention.

3.2.5 Results

Recognition from Practice

The interviewees recognised the tendency of participants in their mediations to focus narrowly on a particular issue and of having that narrow issue disproportionately determining their attitude to the outcome as a whole. Each interviewee recognised this tendency but the explanations offered for this thinking and the interventions proposed varied.

A number of the interviewees noted that issues of money and assets easily calculable in terms of monetary value very often manifest as the substitute-question. It was suggested that the ease of calculation of their value was the cause thereof.

Several interviewees opined that in many circumstances it may be that a narrow focus on a particular issue appears irrational, a person's circumstances may mean that a substitute-question chosen to govern their choice-making really does represent the determinative question of a person's utility. In such cases this mode of thinking is not irrational at all. When discussing possible responses to such behaviour, one must therefore consider this possibility and explore the reasons behind the desire with an open mind.

Though the recognition of the narrowing effect was very strong and the suggested responses easily related, the distortion effect was less explicitly identified and addressed.

Recommended Interventions and Analysis

All of the interviewees suggested a strategy broadly structured around the traditional-model described above, each interviewee stating that the key intervention is to get the party to broaden their focus to include a consideration of the full range of potential outcomes and the interests underpinning them. Put differently, the interviewees were seeking ways of ensuring that the parties came closer to satisfying the

“completeness” axiom by ensuring that they were able to fully comprehend their preferences and make decisions accordingly. Reducing the distortionary impact of success or failure on the ‘substitute question’ could also ensure a greater degree of continuity in their preferences in that an offer’s value would not shift so dramatically with reference only to that determinative question. Both of these goals would render the mediation more predictable and ease the process of negotiation and concession-trading.

The methods suggested for doing so were varied and insightful. Each interviewee emphasised that the mediator should unpack the interests underpinning the substitute-question and then brainstorm towards alternate means of satisfying that interest.

It was suggested that the narrow focus can be caused by a simple lack of preparation and planning by the negotiator, causing them to focus merely on easily quantifiable price or another simple variable as a determinant issue because are not ready to consider the full range of potential interests and outcomes affected.

To address this, two interviewees recommended prescribing “homework”, where negotiators are required to identify and assign value to the various elements of a settlement-proposal. This would force them to do the work necessary to fully consider the various issues. Examples of this could be to request that numerical values be attached to the various assets under discussion or that a range of outcomes be generated and then sorted into an order of preference.

Such a process could also generate problem-solving momentum by encouraging the party to view the process as a flexible one in which many varied permutations of outcome exist. Acknowledging the prospect of varied settlements along multiple planes of negotiation could loosen the person’s fixation on the determinative issue and allow the substitute question to take on a more appropriate valuation.

Another common proposal aimed at promoting this momentum was to request whatever the determinative issue is, it temporarily be ignored. This means that the parties are asked to discuss the settlement proposal ignoring the determinative issue. Thus, if one party were stuck on the issue of maintenance in a divorce settlement, the discussion could instead be diverted to the division of the other assets. If progress can be made on the ancillary issues, that momentum can be hoped to assist in respect of the central ‘substitute’ issue. Note though that it would be very important to ensure that the parties are reminded that that determinative issue has not been abandoned. They must be assured that they remain in charge of the negotiation and that that issue will be re-examined in due course.

Another common strain to the interviewees’ recommendations was to emphasise the importance of the negotiator’s emotional well-being. Some stated that the uncertainty and insecurity underpinning a mediated negotiation, particularly in a divorce-context, often caused this narrow focus. In order to ease this anxiety the interviewees consistently emphasising ensuring that negotiators in this situation are made to feel comfortable.

A unanimous recommendation was for the mediator to ensure that the negotiator is given the space to communicate their desires on that particular issue, in a manner in which they feel that their concerns are being heard, understood and accommodated and that they will thereby be made to feel that the negotiation on the other elements of the settlement will not be conducted at the expense of their interests on the one issue.

Another recommendation raised here and throughout the interviews was to ensure that the parties feel that they are driving the negotiation and deciding what their preferences are and how they are communicated. To this end, the interviewees

emphasised the importance of not directly telling the parties to consider other issues or to think in a certain way but instead, the mediator should encourage them to consider these issues by asking questions to lead the negotiators to flesh out their own thinking. Again, creating a trusting relationship was emphasised as necessary to facilitate this thinking.

In sum, the proposed strategies largely followed the standard mediation-approach aiming to encourage proper evaluation of negotiators' true interests, the options capable of satisfying those those interests and consequently informed decision-making. Though this strategy is by no means novel,¹¹ the specific interventions proposed suggest that the interviewees' experience has created an awareness of this behaviour and necessitated strategic responses aimed at assisting negotiators to approximate rational decision-making.

In addressing a shortfall in decision-making ability and encouraging more efficient self-assessment of interests and decision-making, the techniques remain within the bounds of appropriate-intervention established above. The interviewees' emphasis on subtly masking their own impact by encouraging negotiators' independent adjustment of their thinking illustrates an appropriate sensitivity to the importance of retaining neutrality.

Though these techniques primarily address the narrowing-effect, they would assist in ameliorating the distortionary-effect somewhat by creating a fuller understanding of the value of the total proposal, enabling a more certain and less distorted comparison with the comparator outcome.

3.3 The Endowment Effect

3.3.1 What is the Endowment Effect?

A number of theorists have posited and successfully tested the theory that economic-actors overvalue those things which they already own. This means that they grant greater weight to items they are being asked to sacrifice up than they would when gaining the same item. They therefore request more compensation for giving something up than they would pay to gain the same item. Various terms are used to denote this theory, including; *Endowment-Theory*, *Loss-Aversion* and *Divestiture-Aversion*¹¹.

Morewedge and Giblin's study¹² provides a simple illustration of this concept. Group A was given a coffee-mug and the option to trade it for a large chocolate-bar. Group B was given the chocolate and the option to trade for the mug. Starting with nothing, group C could choose between the mug and the chocolate.

56% of group C chose the mug while 44% chose the chocolate. This figure can be taken to represent a reasonably accurate estimation of the spread of preferences between the two items. Rational behavioural theories would predict that absent transactional-costs, members of groups A and B would choose the mug or chocolate in roughly the same ratio¹³. In fact, 89% of group A chose to keep the mug while 89% of group B kept their chocolate bar.

¹¹Peter Y Wolfe. "How a mediator enhances the negotiation process". In: *N. H. Bus. J.* 46 (2005), p. 38; Cyril Chern. *The Commercial Mediator's Handbook*. CRC Press, 2014.

¹²Carey K Morewedge and Colleen E Giblin. "Explanations of the endowment effect: an integrative review". In: *Trends in cognitive sciences* 19.6 (2015), pp. 339–348.

¹³Ronald H Coase. "The Problem of Social Cost". In: *Journal of Law and Economics* 3 (1960).

Analogous results were found in a study performed by Mnookin¹⁴ wherein test-subjects were asked to sacrifice goods not yet owned but expected meaning that negotiators expecting to receive a particular item, similarly overvalue those expected items.

This effect can be observed in negotiations around 'standard' contractual-terms or practices. Where a particular element of a negotiation attracts a standard treatment, this standard amounts to an expected benefit and offers falling short of that benchmark will generally be disproportionately undervalued¹⁵.

Note that this deviation will often operate in a similar manner to the *narrowing* comparison bias described above. For example, where a person is aware of someone else having received a particular outcome in similar circumstances, this result may become an expected result and any loss relative thereto will be subject to the same exaggeration of utility-loss.

This theory is not only useful when comparing losses to gains but also in assessing the utility expectations relating to differing losses particularly when their associated gains are considered. Kahnemann and Tversky¹⁶ note this effect, finding that utility expectations will vary more greatly between losses and losses than between gains and gains. Thus, the difference between a proposed salary of R40,000 and R45,000 will be more keenly felt by a person who earns R50,000 than by someone who earns R35,000.

It is also interesting to note the correlation between this mode of thinking and both the South African law of delict¹⁷ and the American law of tort¹⁸. In both systems courts are reluctant to compensate for lost-gains as opposed to compensating losses. In the South African context, losses in respect of expected future earnings have only recently been compensated by South African courts through delict and even then with a large degree of caution.

Korobkin¹⁹ posits a cause for this bias, suggesting that decision-makers' fear of experiencing regret through actively making a choice rather than receiving 'standard' treatment or maintaining the status quo may motivate this bias. He notes that it appears that this preference evaporates where there is no uncertainty as to the future consequences of having to make choices, i.e. where the full results of the alternative proposal are clear to the decision-maker.

Kahnemann and Tversky²⁰ make another interesting point for our purposes, stating that the greater impact of losses on expected-utility relative to restrictions on expected-gains affect the victims' view of the morality of the person causing this to occur. The same is true in respect of justifying other's actions. Actions which cause losses rather than restrict gains are seen as morally more significant. Thus if someone inflicts to protect their existing assets, they are viewed as less morally culpable than someone doing so solely to extend their expected gains. A common example would be where consumers or employees are more prepared to accept losses imposed by a company avoiding financial-losses than they would be where the company does so to expand profits.

¹⁴Robert H Mnookin. "Why negotiations fail: An exploration of barriers to the resolution of conflict". In: *Ohio St. J. on Disp. Resol.* 8 (1992), p. 235.

¹⁵Russell Korobkin. "Status quo bias and contract default rules". In: *Cornell L. Rev.* 83 (1997), p. 608.

¹⁶Kahneman and Tversky, "Conflict Resolution: A Cognitive Perspective".

¹⁷See for example the discussion in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* (CCT 185/13) [2014] ZACC 28

¹⁸Kahneman and Tversky, "Conflict Resolution: A Cognitive Perspective".

¹⁹Russell Korobkin. "Inertia and preference in contract negotiation: The psychological power of default rules and form terms". In: *Vand. L. Rev.* 51 (1998), p. 1583.

²⁰Kahneman and Tversky, "Conflict Resolution: A Cognitive Perspective".

s discussed in more detail below, a negotiator's view of the moral-worth of their counterpart will colour their views of any offers made by that party and their likelihood of settling rather than seeking retribution. Again, this is discussed in more detail below but it serves to note the potential for the effects to exacerbate one another. This combination of forces is referred to as *enhanced-loss-aversion*²¹ and can further inhibit concession-making.

3.3.2 Nature of the Deviation

Again, this bias violates the independence-axiom. Whether or not an item is already owned by a person should be irrelevant to its value to that person since the relevant concern is the ultimate distribution of rights and interests at the conclusion of the negotiation. By introducing an irrelevant consideration as a determinant of the expected utility of an item, the transitivity and continuity of a person's preferences are also inhibited. In fact, the analysis or prediction of preferences becomes impossible when factors extrinsic to an item affect a person's valuation thereof. In some cases, sentimentality or comfort with the *status quo* may operate as rational benefits to retaining things as they are. Nonetheless this will often not be the case and negotiators and mediators should be cognizant of the operation of this deviation.

3.3.3 Effect on Mediation

The mug-and-chocolate experiment succinctly illustrates the effect²². Simply put, fewer transactions take place because negotiators are less willing to make concessions than their preferences, absent this deviation, suggests they should. In more detail, the effect is that parties will fixate on a particular element of a dispute and are therefore inflexible. This is particularly problematic in cases where items had previously been shared, for example in a marriage or business partnership context. Each party overvalues the loss of one particular item and therefore overlook alternative potential settlement options.

Mnookin notes that this distorted weighting of preferences can cause parties to risk greater losses in the interest of avoiding certain losses. This is particularly relevant in the mediation-context as parties will, in the same manner, reject the 'certain' losses imposed by a settlement agreement in favour of embracing the risk of far greater loss in pursuing litigation. This difficulty in the context of pre-trial mediation is exacerbated by what Finch²³ describes as the sunk-costs of litigation where a participant who has already accrued legal costs in instructing attorneys and commencing pleadings will overvalue the utility loss of sacrificing those 'sunk costs' even in the face of likely larger future costs. action, would not be fully compensated.

Kahnemann and Tversky²⁴ make another observation which may hint at an effective means of managing this issue. They note that the loss-aversion effect is felt far less significantly in respect of losses of what they call 'trading goods' meaning assets such as money or in particular contexts and for particular people with the relevant knowledge like baseball cards which are generally transactional in nature, rather than assets which are 'for use', like the right of access to a certain property. The former, it is argued, are more easily placed into a trade-off analysis in that the negotiator is more used to making an appraisal of the utility of that kind of gain.

²¹Ibid.

²²Mnookin, "Why negotiations fail: An exploration of barriers to the resolution of conflict", p. 90.

²³Dave Finch. *Heuristics, Fallacies and Biases*. 2008. URL: http://letsinkit.com/?page_id=28.

²⁴Kahneman and Tversky, "Conflict Resolution: A Cognitive Perspective", p. 9.

Resorting to standard-terms in contracts can allow negotiating parties to manage the computational-energy of making decisions with regards settlement and contract negotiations, allowing parties to focus their discussions on the more complex issues unique to their situations. Similarly, focussing on the known-quantity of one's existing asset-allotment can be easier than making a comparison to an unknown possible gain. Nonetheless, these benefits should not be overvalued where they inhibit rather than facilitate effective decision-making.

3.3.4 The Interviews

Here the fictional scenarios described situations where a decision-maker is presented with settlement-proposals where they are being asked to give-up what they consider their existing legal rights in exchange for other benefits.

In both cases, the negotiator overvalues the cost of sacrificing that right and appears unwilling or unable to properly consider the benefits conferred by the alternate offers meaning that they fixate on that right and do not constructively engage in the negotiation.

The commercial-scenario describes the owner of a large retailer who owns the exclusive-rights to trade in certain goods within a shopping-centre. The centre's management lets a portion of its premises to a company wishing to trade in those goods. Instead of engaging with the centre's management, who appear open to constructive and beneficial solutions, the owner is not prepared to give up his exclusive-trade rights ignoring potential benefits as a result.

The divorce-scenario describes a spouse whose recently-divorced receives monthly maintenance. The spouse therefore expects that they are entitled to spousal maintenance. When confronted with an offer which does not include such maintenance but which compensates for this by including a generous distribution of the couples' assets, the decision-maker was neither prepared nor able to consider the full implications of the offer, rejecting it because of the lack of monthly maintenance. They experienced the denial of what they believed was a legal right as a loss of that right and overvalued that loss in terms of their overall estimation of the offer.

After being given time to consider these factual scenarios, the interviewees were asked whether they recognise this difficulty in practice and then if so, what their recommended responses were

Recognition from Practice

Again, the interviewees were all very familiar with this form of behaviour, noting the difficulty negotiators often feel when asked to give up a right or asset, even where that right or asset is merely an expected right or where the expected gain associated with doing so clearly justifies the sacrifice. This theory resonated particularly strongly within the divorce-context, where a number of anecdotal stories were presented to support this conclusion.

Recommended Interventions and Analysis

As we are again dealing with negotiators focusing too narrowly on a particular element of a dispute, it is unsurprising that many of the strategies referred to in relation to the substitute-question effect above were also put forward here. In both contexts, the aim of these methods is to encourage the parties to view their dispute with a

wider lens, fully considering all relevant elements of the negotiation, again bringing that person to axiomatic rational behaviour in similar ways.

Briefly, these observations and recommendations included emphasising negotiators' need to spend more time appraising their interests, noting the value of problem-solving momentum, the option of 'parking' the key issue to pursue other issues and the crucial importance of creating an environment in which the negotiator feels secure to discuss their interests openly and make decisions based on that information. All of these interventions were recommended with the proviso that the negotiators retain their feeling of control over the mediation.

In addition to the ordinary benefits of a broad analysis of one's situation, it is submitted that doing so allows parties the confidence in their decisions, alleviating the fear of negatively influencing their own outcomes through their own actions, encouraging them to take the positive step of offering a concession, addressing Kahnemann and Tversky's concerns discussed above

In addition to these repeated-strategies, further insights arose. The first relates to cases where a negotiator believes they have a legal right and the sacrifice of that right carries the same feeling of loss. Here, the legitimacy of the right should, where it is actually dubious, be challenged. The appropriate methods for doing so are discussed in greater detail below but the overlap and potential value of investigating that belief is worth noting as a strategic-option here. This strategy is aimed less at approximating rational choices than at improving the beliefs upon which those choices are made.

Another recommendation raised by all of those interviewed was simply to follow the traditional strategy described above; uncovering the interests underpinning the stated desire for the particular item and then brainstorming other potential solutions for their satisfaction. In most cases this advice is sensible and where it is possible it should be pursued. However, where the loss-aversion effect is operating to the extent that it is the heuristic bias underpinning the desire for the particular item, rather than any actual interest, pursuing the 'true' interest motivating the stated desire for the item may prove fruitless. Still, it is unlikely that a mediator could recognise that this is occurring without first exploring the motivations behind an apparently overzealous protection of a particular item.

In many cases an asset or right which may appear of little value might hold significant value for a negotiator. This value could be sentimental or related to a particular interest held by that person. The mediator should investigate the interests underpinning the desire for that item to determine if this is the case. Nonetheless, the interviewees suggested that it is often not the nature of the item but the fact of giving it up to which people attach large negative value.

In other cases the bias will act to narrow a participant's focus at the expense of their own interests. An interesting option raised by a number of interviewees relied on the insight that in many cases people want to have their ownership or legal entitlement to an item vindicated. Thus, to some extent they are motivated by the desire to be proved correct and to have their rights recognised, considered and respected. In such cases, a flexible negotiation all legal rights are subject to concession and trade can frustrate this interest. This is particularly relevant in cases where a person's loss is experienced in relation to a legal right to which they feel they are entitled.

A commonly-mooted solution mooted here was to use adjudication to settle that narrow issue. The adjudication could be outsourced to a third party, after the issues for consideration by the adjudicator are narrowed through the mediation process.

This streamlining process is useful as it can significantly reduce the costs and time involved in referring the issue for adjudication.

Alternatively the mediator can, with consent of both parties, make a legal finding on that particular issue. The mediator should only do so where they have ensured that the participants understand that this finding only represents an opinion and neither advice upon which they should solely without further legal assistance nor a legally binding finding.

In both cases a finding in a negotiator's favour can further entrench them in that position. However, it was noted that in many cases merely having the right recognised and confirmed means that the 'loss' of that right is more easily accepted when because the party will feel that they are being compensated for an acknowledged-right rather than negotiating without that right having been acknowledged as theirs. More simply put, they will feel as though the negotiation was conducted from a fair or accurate starting-point.

It was also noted that a simple act of a negotiator acknowledging that their counterpart holds a legal right can serve a similar function. A mediator may therefore consider proposing that the other negotiator acknowledge this right. An explanation of the other party's attitude and the potential for thawing of their attitude on the negotiation may make such a proposition attractive.

The importance of carefully communicating the request for such a loss was raised by a number of the interviewees. This strategy largely echoes the work done in respect of identifying the importance of framing offers²⁵. The proposed solution was that instead of simply asking that a particular asset be sacrificed, a total outcome including the concessions offered in response is presented. Thus if one is being asked to give up a motor vehicle in return for an increased monetary settlement, the two results should always be referred to together. This assists in keeping the gains in mind. Based on the above-mentioned finding that the Loss-Aversion effect is much less keenly felt where 'assets for trade' are concerned, it is submitted that a combination of this technique with the work of assigning value to settlement options can be very helpful making the trade-off calculable as a whole rather than as two separate gains and losses. Similarly, framing a request for a concession as part of an offer which is on balance positive can address the enhanced loss-aversion effect referred to above.

Of course, this method relies on the availability of offered concessions with which to make the comparison. Hopefully these will reveal themselves through the ordinary process of uncovering interests and brainstorming solutions.

One interviewee suggested that the exaggerated value on a particular item can actually assist in stimulating settlement. This can happen in one of two ways. On the one hand, where the other party is motivated to settlement the attachment placed on a particular item may make them realise that they have to be prepared to accept losses of their own through concession-making. On the other hand a shrewd negotiator, recognising the importance of the asset to their 'opponent' may realise that they stand to gain significant concessions in return for giving in on that particular issue.

It was suggested that parties' unfamiliarity with mediation-processes may cause an anxiety which can underpin the desire to maintain the status-quo. It was argued that ensuring the parties recognise that their explorations and actions within the mediation are non-binding and confidential can reassure them that any exploration of potential alternatives will not cost them the item to which they are attaching such

²⁵Sanda Kaufman, Michael Elliott, and Deborah Shmueli. *Frames, Framing and Reframing*. June 2017. URL: <https://www.beyondintractability.org/essay/framing> (visited on 12/06/2017).

significant value. These considerations inevitably form part of all mediation processes but when confronted with a negotiator whose ability to accurately represent their interests is inhibited by a mistrust of the process, they become particularly important

An additional suggestion was simply to remind the party of the benefits, within the negotiation context, of giving for giving's sake. Obviously a party cannot be expected to make concessions for altruistic reasons but there are often materially beneficial reasons to do so. This is particularly so in cases where an ongoing relationship is expected or desired. There the act of giving up an item or entitlement can illustrate an intention to make peace and move towards an open and collaborative mind-set. Once such a signal is sent, it is often the case that the shift is reciprocated and the tone of the interaction becomes one in which a more productive negotiation can take place.

In many cases, a negotiator acts on behalf of others. In that event and even where acting personally, they may require a 'bridge-to-settlement' to allow such a concession. This means that in order to convince a constituency, or even themselves, to sacrifice an existing entitlement, an action by the other party giving that negotiator an excuse to make that sacrifice can be helpful.

While these insights undoubtedly provide potential interventions, we should note certain limitations on a mediator's ability to mitigate the deviation's effect. The first is simply that, as pointed out by a number of the interviewees, the attachment will often be deeply rooted in the psychology of the person holding it. In such cases, the mediator will generally neither be trained nor able to fix whatever the true cause is, particularly where it is not related to the kinds of considerations described above.

The above concern hints at a consideration we should bear in mind throughout this paper. This is simply that people react differently in different situations. It is therefore difficult to prescribe a rigid solution in a given circumstance. It therefore remains incumbent on the mediator to read their participants and be flexible in response.

Nonetheless, it again appears that because these mediators' experience has encouraged the development of some nuanced technique to supplement their general approach to mediation. Again, it appears that the interviewees were cognisant of the need to simultaneously address the effect of the deviation and tailor their interventions to avoid the appearance of bias. Again, the aim is to assist the parties in most accurately reaching their own conclusions.

It is submitted that the work of the theorists referred to above provides further opportunity for additional techniques to be developed. Kahnemann and Tversky's conclusion that the loss of 'transferable' assets does not attract the same feeling of loss suggests that asking negotiators to ascribe points or monetary value to the assets they are being asked to discuss would assist them in seeing them for what they are and valuing them without the distortionary loss-aversion effect.

Given that mediations very often occur as an attempt to avoid litigation or to curtail that process, Mnookin's observations on the sunk-costs of litigation acting are worth noting. Though this concept was not directly discussed through the interviews, it is submitted that mediators should directly attempt to address this issue. Emphasising that the costs of litigation are only likely to increase as the litigation process continues and using some of the above-named techniques specifically in reference to the sunk costs could assist in this regard.

3.4 Overconfidence in Outcomes

3.4.1 What is the *Overconfidence in Outcomes Theory*?

Economic actors are generally overconfident in their expectation of their gains from an upcoming transaction. A review by Helweg-Larsen and Shepherd²⁶ concluded that ‘hundreds’ of studies had confirmed this while Boulle describes this conclusion as ‘one of the most significant cognitive biases’²⁷.

Here we briefly consider four causes for this overconfidence which have emerged in various behavioural studies. Two of these are very similar but will be considered separately as there is a subtle distinction between them. We must discuss these causes as they will may point towards solutions for their common outcome.

The first is simply the common tendency to overestimate one’s own abilities and as a result, one’s own ability to influence the outcome of a negotiation or litigation in one’s own favour. Studies have confirmed that we very often overestimate our abilities, particularly in a professional context. Experiments have confirmed that *inter alia* college professors²⁸ and taxi drivers²⁹ generally consider themselves better than the average at their jobs. More apposite for our purposes is the finding that the same is true of professional negotiators³⁰.

We should note that many negotiators will be represented on mediation by attorneys. A number of factors have also been identified as encouraging overconfidence on the part of the attorney and as a result, the client³¹. Key amongst them is the imperative to maintain a posture of confidence in order to maintain one’s image in the eyes of both existing and potential clients. Attorneys may also be prone to posturing as a negotiating tactic. Kahnemann and Tversky note that in many circumstances, such overconfidence may actually be necessary to sustain negotiators in their efforts to pursue a fight³².

The second is the well-known *confirmation-bias*; the tendency to pursue and recall information which confirms existing beliefs and to interpret and analyse that information in a manner supporting those beliefs. Thus, people view factual and legal scenarios largely from their own point of view and overestimate the strength of their position.

Another is the subtly different theory of *availability-bias*³³ wherein people over-emphasise and over-value that information which is readily available to them. The other party does similarly with their own information. This disjuncture informs their differing views on a particular matter. Each side therefore emphasises the evidence or information which supports their original view and re-enforces their own views and discounts those of others. The effect is very similar to that of the ordinary

²⁶Marie Helweg-Larsen and James A Shepperd. “Do moderators of the optimistic bias affect personal or target risk estimates? A review of the literature”. In: *Personality and Social Psychology Review* 5.1 (2001), pp. 74–95, p. 74.

²⁷Boulle, “*Predictable irrationality in mediation: Insights from behavioural economics*”, p. 9.

²⁸Ola Svenson. “Are we all less risky and more skillful than our fellow drivers?” In: *Acta psychologica* 47.2 (1981), pp. 143–148, p. 146.

²⁹James R Dalziel and RF Soames Job. “Motor vehicle accidents, fatigue and optimism bias in taxi drivers”. In: *Accident Analysis & Prevention* 29.4 (1997), pp. 489–494, p. 491.

³⁰Roderick M Kramer, Elizabeth Newton, and Pamela L Pommerenke. “Self-enhancement biases and negotiator judgment: Effects of self-esteem and mood”. In: *Organizational Behavior and Human Decision Processes* 56.1 (1993), pp. 110–133.

³¹Lyle A Brenner, Derek J Koehler, and Amos Tversky. “On the evaluation of one-sided evidence”. In: *Journal of Behavioral Decision Making* 9.1 (1996), pp. 59–70.

³²Kahneman and Tversky, “*Conflict Resolution: A Cognitive Perspective*”, p. 750.

³³Tversky and Kahneman, “*Judgment under uncertainty: Heuristics and biases*”, pp. 207-232.

confirmation bias but the difference is that the latter refers to the evidence on which conclusions are based while the former refers to evidence being sought to justify existing conclusions.

A fourth cause is again similar but should be distinguished from the ordinary conceptions of the confirmation and availability biases. Here we are referring to the well-documented tendency to pursue, recall, interpret and analyse information in a manner which suits one's own desired outcome. The point is subtly different in that it refers to information which suits one's desires rather than one's beliefs. A famous experiment³⁴ involving the familiar spectacle of sports fans and officialdom illustrates this point quite clearly by recording the results of asking students of Dartmouth and Princeton to view a tape of a Football match between their Universities. The game had led to accusations that Dartmouth had cheated throughout the game. The study's participants were asked to note the number of fouls committed by each side. Princeton students concluded that Dartmouth had committed more than double the amount of fouls as had Princeton whereas Dartmouth students concluded that the two teams had committed a roughly equal amount of fouls. Similar experiments have been conducted in the litigation context and have shown that even without a pre-existing allegiance, parties will better recall facts which align with their desires than those which do not³⁵.

The last three of these causes therefore all refer to our brains' tendency to recall, process and evaluate information in an inaccurate and solipsistic manner. Where both or all parties to a negotiation are similarly affected, the possibility of a shared understanding of the facts and motivations underpinning the conflict is further limited.

3.4.2 Violations of the Axioms

Where an economic actor is overestimating their chances of success they are not violating the rationality axioms. They may be acting entirely rationally based on their beliefs about the parameters informing their choices. Thus, if an overconfident claimant believes that they have a 90% chance of succeeding through litigation, settlement for 50% of their claim would not be a utility-maximising choice³⁶. If, in reality, their chances of success accurately considers the true facts framing the decision.

3.4.3 Effect on Mediation

Taken together, these causes lead negotiators to overestimate the strength of their bargaining position and their likelihood of success. Settlement requires consensus between the negotiating parties. To reach the Zone of Possible Agreement ('ZOPA')³⁷,

³⁴ Albert H Hastorf and Hadley Cantril. "They saw a game; a case study." In: *The Journal of Abnormal and Social Psychology* 49.1 (1954), p. 129.

³⁵ See George Loewenstein et al. "Self-serving assessments of fairness and pretrial bargaining". In: *The Journal of Legal Studies* 22.1 (1993), pp. 135–159, where participants in the experiment were assigned the role of either Plaintiff or Defendant in a matter and then given identical facts, when asked to recall these facts the participants overwhelmingly recalled more facts which suited their case than those which did not. A similar result was found in the context of collective bargaining, see Leigh Thompson and George Loewenstein. "Egocentric interpretations of fairness and interpersonal conflict". In: *Organizational Behavior and Human Decision Processes* 51.2 (1992), pp. 176–197

³⁶ Ignoring the costs of pursuing an adjudicated award and

³⁷ Negotiation Experts, *The Zone Of Possible Agreement (ZOPA)*.

the outcomes being proposed must be preferable to all party's respective BATNAs³⁸, generally their expectation of the result of litigation.

Where parties in competitive negotiations overestimate their prospects of success in litigation or indeed within the negotiation itself and underestimate their opponent's strengths and arguments as a result of these biases, the ZOPA necessarily shrinks and will sometimes disappear as a result. This will often mean that parties, who should, properly estimating their prospects of success be able to reach an agreement, fail to do so. Birke summarises this effect as creating higher reservation prices, fewer concessions and therefore fewer deals³⁹.

A further result of specifically the latter three 'causes' is that the participants are inhibited from empathising with their opponents. This inhibits their ability to engage in constructive negotiation wherein the parties rigorously and empathetically consider the underlying interests and desires of their negotiating counterparts in pursuit of mutually-beneficial solutions to their conflict. Where they are focussed on the strengths of their own position and the facts and considerations underpinning that position, they are unlikely to be able to do similarly in respect of their counterparts.

Again, the result of this cognitive-error is not that parties have the wrong preferences but that they are unrealistic in their expectations of how these preferences are likely to be satisfied. In the pursuit of unrealistic expectations, participants will turn down proposals they should be accepting and can end up suffering as a result. The pursuit of consensus suffers as a result and inhibits the parties from maximising their utility in the resolution of the dispute.

We should caution to note that a mediator may often struggle to identify where a party is overestimating their strengths. These effects at times prohibit negotiators from themselves understanding and therefore communicating the full reality of their situation to the mediator. In other cases they may deliberately restrict their communication in this manner because they may think that they need to convince the mediator that their positions and tactics are reasonable and will therefore overstate the strength of their bargaining position by revealing only the information which assists in their arguments. Mediators will often therefore be indirectly limited in their ability to appraise the true merits of the negotiators' claims.

3.4.4 The Interviews

Here the interview scenarios described situations where a conflict has arisen and one or both of the parties overestimate the strength of their legal position and as a result are not prepared to negotiate because they believe that a litigious outcome would be more rewarding than any outcome which could result.

The overestimation of the likely outcome of litigation, which in these cases represents their BATNA has two elements. The first is simply that it means that they are certain or at least overconfident that they will succeed by either vindicating their total claim or by defending their opponent's claim entirely. The second factor, which reflects less of an overconfidence than perhaps a lack of knowledge and experience relates to the underestimation of the costs of engaging in litigation, be they financial, emotional or energy-resources.

³⁸Benjamin, *The Natural History of Negotiation Mediation: The Evolution of Negotiative Behaviours, Rituals, and Approaches*.

³⁹Birke, "Evaluation and facilitation: moving past either/or".

The commercial scenario involved a print-maker and gallerist in a dispute because a delivery had gone wrong and a number of valuable prints had been damaged. They disagreed over how a court would apportion blame for the resulting contractual breach with each side believing their case risk-free. This view was reinforced by the attorneys representing each party.

The divorce scenario involved two parties preparing to divorce with very different views on the likelihood of a court-order ordering a redistribution of the marital assets. The law, applied to these facts, was unclear but both sides believed that they would win any legal dispute on this point. This meant that any negotiated outcome would result in an outcome falling short of the total victory each predicted as the outcome of litigation and would refuse to enter into such a negotiation.

The interviews aimed at determining whether the mediators recognised this behaviour as a common element of legal negotiation then interrogated the mediators' views on the influence of attorneys in shaping their clients' views of the likely outcome of their dispute.

The major focus was placed on uncovering the mediators' recommended responses to this overconfidence. Since this would require an interrogation of the negotiators' views and pose the risk of creating an appearance of favouring one party's views to another, a crucial element of this discussion was the determination of appropriate limits to a mediator's intervention in this context.

3.4.5 Results

Recognition from Practice

Again, the suggestion that negotiators and their attorneys regularly overestimate their chances of success was met with unanimous agreement through the interview process and was repeatedly lamented as a major disrupter of negotiations where settlement is desirable and should be achievable. Although the general habit of overconfidence was unanimously recognised, the interviewees' views on the impact of attorneys on their clients' outlook was more varied. Given the regularity with which the interviewees are confronted with this behaviour, it is unsurprising that a broad range of strategies emerged from the discussions.

Recommended Interventions and Analysis

Again, and as expected, the importance of ascertaining the parties' true interests and brainstorming routes to satisfy them was emphasised throughout the interviews. It was specifically noted by two interviewees that where parties are convinced that they would win litigation, their thinking on settlement-outcomes is very narrowly focussed on monetary figures, echoing the manner in which litigation is generally settled. To address this, the availability and variety of non-monetary outcomes has to be emphasised. Reminding the parties that negotiation can create a settlement along varied axes, involving any number of assets, rights and responsibilities rather than just varying a monetary lump-sum settlement can assist in convincing them that a settlement package can be even more beneficial than a complete success through litigation. This can dislodge some of the resistance to negotiation which such confidence can cause.

Understandably however, given that we are here trying to counter the inhibiting effects of the negotiators' unrealistic beliefs, the strategies proposed largely focussed on 'reality-testing'. A broad outline of this concept has already been given above but a fuller discussion of these strategies is warranted here. In sum, the aim is

to confront the participant to confront and carefully consider all the information influencing their chances of success and to recalibrate their expectations accordingly. This is entirely sensible, given that the biases leading to this overconfidence generally involve a failure or inability to properly confront and digest the information shaping their prospects.

A common note made during the interviews was the importance of questioning this confidence sensitively. It was noted that in almost all of the interviews that a direct challenge to a person's views can cause discomfort, mistrust and even an appearance of bias, all of which threaten the mediator-negotiator relationship.

One non-threatening manner of beginning this discussion suggested was to encourage consideration of those risks and costs which are independent of the strength of a person's case or their ability to argue that case. Confronting litigation's likely costs in non-recoverable fees, court delays, working-hours and emotional energy and, where relevant, the threats posed to the future relationship between the disputants or to the person or firm's reputation were all suggested as means of opening the debate into the wisdom of pursuing a litigious course.

When doing so it is important to highlight that these costs are not the fault of any of the parties but an inherent element of litigation. Again, these discussions should be framed in an inquisitive rather than instructional tone. Note again that these techniques will likely be of equal use where a person's anger is inhibiting the 'rational' pursuit of their interests. Finally it should always be pointed out to a negotiator that regardless of one's views of the strength of one's case, litigation is never certain and outcomes can rely on factors outside of the control of the parties and independent of the veracity of their claims or strength of their legal arguments.

Of course, these techniques do not address the heart of the overconfidence issue, being the negotiators' overestimation of the strength of their case. When addressing this issue, the importance of the manner in which the investigation is conducted was highlighted. Mindful of the risk of alienating the negotiator a common theme to the proposals was that the mediator should distance themselves from this discussion by ensuring that the challenges to that confidence come from others, either from third parties or the other negotiators. In cases where parties are very confident or even where they are posturing to that effect, their show of confidence can be used to convince them to engage with these issues. Essentially, the mediator can argue that such a process can only confirm the strength of their position and their relative bargaining power.

One suggested method of achieving this was to propose that the matter be referred to a third-party with expert knowledge in the relevant field. This can take the form of a legal opinion from an experienced attorney or advocate. The incumbent preparatory work of having to fully confront the available information and communicate one's version to such a critical and independent observer can challenge some of the assumptions and beliefs underpinning this overconfidence. It was hoped that because the parties would have to pay for this opinion, they would be motivated to engage with this process more thoroughly than they may have previously. Alternatively a similar 'narrow' arbitration process to that described in more detail in the social-preference theory discussion below was suggested as a means of achieving the same outcome.

Of course, both techniques run the risk of the third-party's findings confirming the views of the participant and thereby entrenching them further in the belief that litigation will mean total-victory and that any settlement short of or different to that outcome is unacceptable. In many cases such findings may indicate that the beliefs were correctly held, in which case the other party themselves may benefit from a

dose of reality and be encouraged to seek an alternative outcome to litigation when they recognise that they are facing a costly, drawn out and likely ultimately unsuccessful process. This may encourage them to make the concessions necessary to achieve settlement.

In other cases, confirmation of the strength of one's legal position and the knowledge that the mediation process has considered the strength of one's case may enable a party to consider more flexible outcomes, safe in the knowledge that their position of legal strength has been considered and acknowledged.

The other suggested method of outsourcing the critique of the parties' cases is to get them to communicate their views, evidence and information to one another. The method through which this should occur would depend on the state of the relationship between the two parties and the level of specialised knowledge required to appraise the matter. Where the parties are represented, a useful tool is to follow a process similar to the 'heads-of-argument' process used in litigation wherein the attorneys each prepare a skeleton of their argument, incorporating the evidence they would use to justify their factual claims and exchange them with the other side.

This process forces the parties to confront the information held and valued by the other side while giving them time to properly digest it. It was suggested that such a process poses the risk of the parties focussing too much on the legalistic elements of the dispute with the associated risk of entrenching their focus on their legal positions, at the expense of pursuing a negotiated and flexible settlement. However, it was suggested that one is only likely to resort to such measures where the parties are already thinking in this manner and one seeks to shift them by challenging their confidence in their legal position and that in such cases, such a risk is justifiable. Once the overconfidence in the legal position is addressed, non-legal outcomes become attractive.

Where this relationship is relatively stable and non-confrontational, it was suggested that a more direct approach can be taken wherein the parties and/or their representatives interact directly with one another. A face-to-face interaction can force the parties to consider each other's views with more empathy and can also highlight that the other party also has a degree of confidence in their prospects which in itself can motivate a reconsideration of one's own confidence. Where this method is used, the importance of ensuring respectful communication is of course paramount. It was also emphasised that the mediator must ensure that their own responses to the arguments and statements made remain entirely neutral.

Through the interviews it emerged that the most common method of communicating the views of the parties was to do so indirectly, through the mediator. This simply means that the mediator extracts the views and arguments of one and then communicates them to the other. Again, we must reiterate the importance of not appearing to be critical of the participants' views. In addition, the importance of phrasing one's enquiries sensitively was emphasised, with the suggestion that communicating the other party's views in a manner suggesting the mediator is confident in their ability to counter those arguments can force a deeper confrontation of the issues without putting the mediator-negotiator relationship at risk.

In cases where the funds or time required for third-party legal advice are not available or where the relationship between the disputants is such that direct communication between the parties or their representatives is likely to prove counter-productive, the mediator would have to take a more active role. The manner in which this is to be done and the extent to which the mediator should be prepared to exert their influence in this manner will depend on the relationship with the participant, their personality and the context in which the communication is made.

Generally speaking, similar considerations govern the manner in which the mediator should challenge these views. Challenges should be made through questions rather than statements, these questions should be framed in a manner suggesting confidence in their version and an interrogative mode of questioning should be avoided. It was suggested that emphasising that the questions used to test a negotiator's views are based on the views of the other party, rather than those of the mediator can go some way to minimising the confrontational feel of such an investigation. It was also emphasised by a number of interviewees that this process should never take place in front of the other party but should be done in private sessions. Where a relationship of trust exists or where the negotiator is experienced and appears secure in the mediation process, it was suggested that one can be more robust in highlighting one's concerns.

The discussion regarding the influence of attorneys on this confidence was instructive and varied. In sum the prevailing view was that attorneys themselves are often subject to the same miscalculations as their clients but that given their greater knowledge of the legal process, they are generally not overconfident to quite the same extent. Their influence can therefore be exploited as a means of managing their client's expectations somewhat. It was therefore recommended that in disputes where participants do not have a grasp of the legal principles relating to the dispute, recommending that they engage the services of an attorney can clearly help them in doing so.

One issue which was identified as capable of preventing attorneys from assisting in this manner is the understandable focus that attorneys place on the formal legal elements of a dispute. This is understandable given their training, experience and mandate within the mediation context but the result is that attempts to shift the focus to settlement outcomes outside of the realm of legal rights and responsibilities can be stifled. Where this is combined with the participants' overconfidence in their legal positions, this focus can make abandoning that thought process even more difficult than it would be where their clients are less confident.

Given that attorneys are generally trusted allies of their clients, it is important not to antagonise or threaten them by aggressively challenging their views. For this reason it was suggested sensibly that where a mediator is discussing the legal issues, their attention should be placed on and their questions directed at the attorneys, rather than their clients. Equally, where one is dealing with the non-legal issues, for example in crafting settlement outcomes, the attention should be shifted to the client though this shift should be subtle so as not to alienate the attorney. This shift can be as mild as a shifting of eye-contact to addressing one's questions directly to the client or so drastic as, where the client trusts the mediator sufficiently, by requesting a private session with the client. As ever, the appropriate action will depend on circumstances and it will be up to the mediator to be flexible in the face of varying relational dynamics.

This is not to say that the legal issues should be ignored. It was noted that where parties are being asked to negotiate outside of the ordinary litigious environment, retaining a constant awareness of the legal issues, even if that awareness is kept in the background, can reassure them that whatever path the negotiation takes, their legal rights have not been ignored and remain realisable and that they have little or nothing to lose from pursuing alternative settlement proposals.

Of course, any success a mediator has in managing the expectations of a negotiator will have to be met with a concomitant willingness on the part of that negotiator to 'climb-down' from the bullish position they had previously been communicating to the other side. The methods recommended for encouraging this are broadly

similar to those discussed in more detail below in the context of over-antagonistic negotiators but the overarching aim is to offer a route to settlement which does not rely on an admission that one's case is not as strong as one has previously made out.

Again, the general approach of the interviewed mediators followed a strategy broadly based on the traditional model of mediation with reality-testing unsurprisingly dominating the discussion. Nonetheless, the interventions proposed went beyond this model and suggested a willingness to intervene to counter the effects of this over-confidence. The manner and extent of these interventions were again shaped by similar considerations driving the other strategies proposed in this paper. Interventions can be made provided that they maximise the self-determination of the parties. It should be noted here that the interventions aimed at addressing the overconfidence aim at adjusting the information upon which the negotiators make their decisions, rather than by directing them towards a particular decision. This is sensible as the primary causes of the overconfidence are the failures to properly engage with the full information which should drive the estimation of their prospects of success. This distinction is important to note as it protects the self-determination of the party making that decision.

The other key strategic consideration is the need to avoid creating the appearance of bias or threatening the relationship between the negotiators and the mediator. As far as possible, information and advice should be communicated to negotiators by encouraging them to uncover that information themselves. Where this is not possible, the mediator themselves should, where feasible, still avoid communicating that information directly. Apart from the now familiar emphasis placed on retaining the appearance of neutrality, the impact of ego on reality-testing received particular focus here and further illustrated the risk of over-intervention and the need to manage the personalities of the negotiators.

3.5 Social Preference Theory and Attribution Bias

3.5.1 What are the Social Preference and Attribution Bias Theories?

For our discussion of this issue, it serves to begin by drawing a distinction between *direct* and *indirect* interests. We will refer to indirect interests as those where one's own outcomes are affected. We will refer to indirect interests as those contemplating the experience or outcome of others. Of course, this distinction is difficult to draw in certain cases but here we are concerned only with the results of mediation or negotiation more generally. In that context, a person's direct interests will be in the rights and responsibilities that they themselves receive or have imposed on them while the indirect interests will be those accruing to others, most pertinently in this case, the person with whom they are negotiating.

Behavioural Economics has established that it is not only our direct interests which affect our preferences, but also our indirect preferences⁴⁰. Thus, the outcome for others affects how we want a dispute settled. Of course, this claim will surprise no one. In our daily lives we know that this is the case. The absurdity of Amartya Sen's description of two strangers meeting in the street provides a particularly striking illustration of the weaknesses of the assumption of direct self-interest:

"Where is the railway station?" he asks me. "There," I say, pointing at the post office, "and would you please post this letter for me on the way?"

⁴⁰Kahneman and Frederick, "Representativeness revisited: Attribute substitution in intuitive judgment", p. 6.

"Yes," he says, determined to open the envelope and check whether it contains something valuable⁴¹"

A second, similarly observable conclusion has also been well-tested. Our indirect interests in respect of a particular person are significantly dependent on our view of their moral worth or blameworthiness in a particular context⁴². In most circumstance and in the absence of any negative conduct we wish for the best for one another. Thus we have an indirect interest in the direct interests of others. This benevolence is not unlimited and will vary with the strength of the relationship under discussion. For reasons which will become or which may already be clear, this side of the equation is of less importance for our discussion.

In other circumstances, where we feel that someone has acted in a morally suspect or blameworthy manner, particularly to one's own cost, our indirect interest in their utility can shift to include a desire that they be punished for that conduct. In this sense, our indirect interest in a person can run counter to their own direct interests. In some cases this desire to punish can actually trump our own direct interests to the extent that we are prepared to sacrifice some of our own direct gains in order to impair another's own direct interests.

This conclusion is most regularly tested and proven through *Repeat-Shot, Non-Cooperative* games⁴³ wherein participants each sequentially get the opportunity to essentially determine the outcome for the other party. The results indicate that we commonly employ a trigger strategy in terms of which the level of cooperation and benevolence governing the relationship between the players deteriorates as soon as one party causes harm to another by deviating from the most mutually beneficial strategies⁴⁴. Again, this conclusion is not in any way surprising. The impulse to punish or at least not to protect is commonly observed in response to hurtful or harmful behaviour.

This contrasts with our approach where such negative conduct has not been experienced. This is observable from ordinary life but it has also been rigorously proven through scientific testing. The simplest form of testing for this conclusion uses *Dictator* games wherein a participant is simply given the choice as to how to distribute a finite pool of resources between themselves and another person. The game is played once so that there are no potential consequences for not distributing the resources equally or fairly. A meta-analysis of the results of the large number of Dictator Games revealed an average distribution of 28.35%. Thus although people are not perfectly egalitarian, they are far more benevolent than the rationality axioms describe⁴⁵. Remembering that there are no consequences for failing to share, this certainly indicates that we do not generally allow our 'direct' interests to simply dictate our actions; we do consider the outcomes affecting others⁴⁶.

None of these conclusions are controversial or surprising. A more interesting conclusion emerges when our ability to attribute blame fairly and accurately has

⁴¹Amartya K Sen. "Rational fools: A critique of the behavioral foundations of economic theory". In: *Philosophy & Public Affairs* (1977), pp. 317–344, p. 332.

⁴²Keith G Allred et al. "The influence of anger and compassion on negotiation performance". In: *Organizational behavior and human decision processes* 70.3 (1997), pp. 175–187.

⁴³Gintis, *The bounds of reason: Game theory and the unification of the behavioral sciences*, p. 56.

⁴⁴James W Friedman. "A non-cooperative equilibrium for supergames". In: *The Review of Economic Studies* 38.1 (1971), pp. 1–12.

⁴⁵Christoph Engel. "Dictator games: A meta study". In: *Experimental Economics* 14.4 (2011), pp. 583–610, p. 8.

⁴⁶Oleg Korenok, Edward L Millner, and Laura Razzolini. "Giving, Taking, and Taking Aversion in Dictator Games". In: (2014).

been tested. We commonly overstate the moral blame of others and undervalue our own culpability in a particular outcome⁴⁷. Various causes for this analytical weakness have been tested and established. These justify discussion as they may offer some insight into appropriate responses to this behaviour.

One element of this is known as 'Attribution Bias'. Simply put, testing has regularly shown that we routinely overestimate other parties' own role in causing negative outcomes and undervalue and consistently underestimate the situational constraints under which they operate. Thus, when a person arrives late for a meeting, we are disproportionately inclined to attribute personal blame as opposed to considering the causes for that tardiness which are outside that person's control. Studies have concluded that the opposite is also true; we underestimate our own role in causing harm to others and overstate the significance of the situational constraints we face⁴⁸.

Similarly, the *naïve-realism* theory⁴⁹ describes the common overestimation of peoples' own moral beliefs. We generally overestimate our ability to properly evaluate facts and situations and make correct moral judgements and discount others' ability to do similarly. Essentially, most of us feel that we are individually the only people capable of properly evaluating a situation and its moral impact. This cannot be true of all of us. Two parties may view a particular situation differently and both will feel that they are uniquely capable of making the evaluation and therefore correct. When we believe that we are acting according to our principles and that those principles are correct, anyone acting in contrast to ourselves is seen as morally unacceptable and worthy of censure. The same forces will cause the other person to feel the same way and the parties will be driven further apart as a result.

Birke and Fox⁵⁰ note a further complicating issue when they argue that the very moral standards according to which the actions of others are appraised are very often determined in a manner which can lend itself to increased conflict. They cite a number of studies confirming that people develop their values in a self-interested manner in that they identify and emphasise those standards which suit their position. Thus, an employer's executives will likely emphasise meritocracy as a justification for wage-inequalities while their employees will likely focus on equality as the basis of their criticism of the same situation. In sum, the result is that people acting in contrast to one another in pursuit of their own direct interests are likely to analyse their own and each other's behaviour according to standards which cast themselves in a good-light and by extension, their antagonists in a bad-light.

3.5.2 Nature of the Deviation

On the most unsophisticated reading of the principles of rationality one could argue that the first three of the above conclusions violates this principle in that a person concerned only with maximising their own utility by improving their own situation would have no indirect interests at all.

This is not a useful conclusion since it is clear that we do hold such indirect interests. This is the point of the Amartya Sen set-piece referred to above. The idea that we, like the two strangers meeting in the street, are permanently focussing only

⁴⁷Russell Korkobkin. "Psychological impediments to mediation success: Theory and practice". In: *Ohio St. J. on Disp. Resol.* 21 (2005), p. 281, pp. 287-289.

⁴⁸*Ibid.*

⁴⁹Lee Ross and Constance Stillinger. "Barriers to conflict resolution". In: *Negotiation Journal* 7.4 (1991), pp. 389-404.

⁵⁰Birke, "Evaluation and facilitation: moving past either/or", p. 35.

on our own outcomes bears no resemblance to reality and creates the absurdity reflected in that piece.

As discussed, we have both direct and indirect interests. These are both nonetheless interests and therefore a rational person seeks to maximise these outcomes together. In some cases, it will be rational to sacrifice some direct interests to satisfy some indirect interests. On this slightly more nuanced interpretation of the self-interest axiom, it is clear that the desire to punish or protect does not necessarily violate the axiom.

This is so even where our desires to punish or protect are based on incorrect information, as we have noted that they often are. People will often overestimate the moral blameworthiness of a person with whom they are negotiating and will therefore disproportionately favour negative experiences for them. Thus, in a similar fashion to the overconfidence scenario described above, we may be making rational choices based on our subjective beliefs but objectively speaking those beliefs are very often exaggerated and the decisions reached are objectively irrational as a result.

3.5.3 Effect on Mediation

Here we are primarily concerned with cases where blame is exaggerated. The general default desire to at least somewhat prefer mutually-beneficial outcomes is very useful in a Mediation context. Parties who are concerned with satisfying one another's interests are more likely to offer concessions and demand smaller concessions for them. In this manner, the ZOPA⁵¹ of course increases. In addition, parties who have an interest in mutually-beneficial outcomes will also be more motivated and capable of the empathy necessary to conceptualise mutually beneficial outcomes to a dispute.

The opposite is true of the case where a party is seeking to punish. Concessions which may convince the other party to settle will be doubly difficult to make. In some cases, the *negative-utility*⁵² function will operate so strongly that parties may be prepared to sacrifice their own direct-interests to satisfy their indirect-interest in punishment. In a mediation-context this may often mean that parties are prepared to suffer the large and varied costs of litigation. Their desire to see a person identified as the culprit and ultimately ordered to correct the effects of their conduct would have a similar effect. If both sides feel this way about the other, this outcome is even more likely.

3.5.4 The Interviews

The commercial and family scenarios relating to this theory follow the same structure. In both cases a person presented with a settlement-proposal is motivated at least partially by a desire to punish the person making said offer. This desire to punish means that the person's direct interests are not the sole motivator of their decisions and are also being influenced by their indirect desire to punish. In both cases the anger underpinning the punishment motive appears to some extent unjustified and based on an incomplete comprehension or analysis of the factors leading to the outcome with which the person is unhappy.

In the commercial case, a supplier takes a risk on having sufficient stock of printers to facilitate an IT systems' designers' plan for a new firm of attorneys' offices.

⁵¹Birke, "Evaluation and facilitation: moving past either/or".

⁵²Korenok, Millner, and Razzolini, "Giving, Taking, and Taking Aversion in Dictator Games", p. 17.

Ultimately that supplier is unable to supply these printers and the systems' designer suffers a loss of business and reputational damages.

The supplier's conduct caused this issue but a number of facts suggest that the anger directed towards them should be mitigated somewhat. Despite this, the systems designer is prepared neither to forgive the supplier nor to consider the reasons they acted as they did. As a result, the designer is not prepared to work with the supplier to find a commercially preferable solution to the likely outcome of litigation. It is clear that there exists room for negotiation wherein such an outcome could be reached.

The family scenario involves the breakdown of a relationship wherein one spouse's behaviour has become very verbally aggressive and communication has shut down as a result after a number of incidents of public and private conflict. This spouse communicates to the mediator that this is indeed what has happened but provides insight into a number of factors which mitigate the moral guilt of their behaviour to some extent. It appears that the other spouse is not aware of these factors and is not seeking to understand the behaviour and is focussed on straightforwardly attributing blame and seeking punishment and is therefore ignoring potential benefits to an amicable resolution of the divorce.

Here, the interviewees were asked to confirm whether or not this behaviour was commonly found in practice and then to advise on the interventions they have developed to address the effects of this anger on negotiators' ability to pursue their interests in a utility-maximising manner.

3.5.5 Results

Recognition from Practice

Of the four 'deviations' discussed here, the overestimation of others' guilt and the associated effects on negotiations was probably the deviation most recognised and lamented by the interviewed mediators. A number of the mediators, particularly those whose backgrounds are more centred in psychology than in law, viewed this manner of thinking as one of the primary justifications for using mediation techniques. They noted the potential for a mediator to create empathy and understanding the parties and that the potential for constructive thinking that this can create can lead to better dialogue and mutually-beneficial outcomes.

Recommended Interventions

Once again, each of the interviewees recommended the standard techniques aimed at uncovering interests and brainstorming solutions. These need not be repeated here. In sum, they are aimed at encouraging the parties to more fully appraise the options available rather than pursuing the litigious path that their desire for punishment is driving them towards. Again, the attempt here is to get closer to the axiomatic 'completeness' of preferences.

The second grouping of interventions which were very forcefully emphasised here were those aimed at reality-testing, wherein the risks and costs of pursuing a strategy emphasising punishment and total victory are communicated to the person following that strategy. Again, the preference was indicated indirect means of achieving this goal and encouraging the negotiator to broaden their own perspective without appearing to undermine or devalue the person's position or beliefs. Again the goal here is to encourage a more reasonable expectation of the likely outcomes

and thereby is less concerned with encouraging rational decision-making as at improving the information upon which decisions are being made. This area of techniques largely echoes those discussed as responses to negotiators' overconfidence detailed in the previous subsection (3.4, overconfidence in outcomes).

The potential losses and risks posed by pursuing a vindictive strategy of this sort have been discussed but we should note the importance of ensuring that the person is capable of digesting this information and making sensible decisions accordingly. Again the appropriate limits to which mediators should act to this end are far from unanimous. At minimum, it was agreed that the mediator's role includes an attempt to calm the parties and ensure that they are acting towards their own best interests. Others went so far as to say that their role simply was to encourage settlement and that because a vindictive negotiator is not really negotiating at all; getting them to soften their stance necessarily forms part of this role.

One interviewee suggested a useful framework of analysis in terms of which we can view the desirable mindset for negotiation. This is described by the Transactional-Analysts as the adult ego-state⁵³. In very brief terms this refers to engaging the calculating, calm mind which is capable of digesting information and making outcomes-based decisions relying on that information, as opposed to emphasising the child ego-state wherein decisions are made more impulsively and based on emotion which in this case would be anger. The aim then is to minimise the effect of the person's anger in influencing their decisions. This goal has two elements; the first being to cause a reconsideration of the anger itself and then to minimise the impact of that anger on that a decision.

In attempting to minimise the anger itself, a number of useful strategies arose. The first which was unanimously raised was the importance of allowing the person holding the anger to communicate this anger either to the mediator or to the person with whom they are negotiating and to ensure that when they do so they feel that they are being heard with empathy and that their anger is being recognised. The interviewees were all quick to emphasise how useful this 'venting' process can be.

As has been discussed elsewhere in this paper, allowing the parties the time to consider the implications of their actions and on those of the other party as well as allowing the natural thawing of emotions can be very useful. For this reason it was noted that an appropriate break or delay can be helpful to this end. Such delays can also ensure that the parties are sufficiently motivated by accrued costs and delays to pursue settlement. Together these factors can cause the parties to appraise the dispute in a more constructive manner.

Another common thread to the techniques proposed was the importance of encouraging a better understanding of the reasons and motives behind the actions of the other party, the reasons behind their own interpretation of events as well as the effect of causes outside of the control of the other party.

The techniques proposed by the Narrative-Mediators were raised specifically in this context as a useful body of tools for doing this. The tenets of this approach are discussed at the end of Chapter 2 above but we should at this stage acknowledge the synchronicity between its goals and the desire to address the anger caused by this deviation. Acknowledging the manner in which differing beliefs and experiences can shape a person's understanding of an event can allow people to empathise and minimise the anger associated with others' actions.

⁵³For a brief introduction into the concepts underpinning the Transactional Analysts' model, see Fanita English. "How Did You Become a Transactional Analyst?" In: *Transactional Analysis Journal* 35.1 (2005), pp. 78–88. DOI: [10.1177/036215370503500110](https://doi.org/10.1177/036215370503500110)

The interviewees varied in their descriptions of the effect that attorneys can have on their clients in these circumstances. Some were of the view that attorney can act as effective 'agents-of-reality' in that they are aware of the nature and costs of litigation and can and are indeed required to advise their clients accordingly. The other positive effect of legal representation is that that attorney can act as a sounding board for the venting recommended above described above.

In contrast, it was also noted that many attorneys, trained as they are in the adversarial model of litigation can actually fuel this anger by focussing their views on the strengths of their client's case and those facts and that evidence which suits their own case. Some interviewees even noted that attorneys may, motivated by the pursuit of the fees guaranteed by protracted litigation, cynically encourage their client's anger as a means of preventing a quick settlement. This issue of the impact of attorneys and the appropriate manner in which mediators should engage with those attorneys is discussed in more detail in relation to their impact on the overconfidence of their clients above but we should note the link between the effects that attorneys can have in respect of both of these deviations.

One of the interviewees highlighted a potential difficulty which bears some consideration. They observed that in many cases participants have trouble withdrawing from their anger and the actions and communications which resulted therefrom. In his view the barrier to doing so was simply that it involves an admission of having thought or acted inappropriately. In such cases, even occasionally where a participant has privately acknowledged their regret or increased understanding of the other person's actions, they may not be prepared to adjust their communication or demands in respect of that person.

It was suggested that in such circumstances it is very important for that person to be given what essentially amounts to an excuse to soften their position. Encouraging the other party to make a gesture of contrition or an indication of a desire to repair the relationship which can include making some concession or display of a willingness to negotiate can act as this excuse.

In other cases, simply framing the retraction as an act of benevolence or maturity, either in a private session or in communicating the adjustment to the other party can act as a catalyst in this manner. Similarly, framing it as a selfless act in which the interests of their business or family are being pursued at the expense of one's own personal desires can amount to a justification which does not impair the pride of the person changing their attitude.

In some circumstances participants' anger will render them unreceptive to these techniques. We must remember that a mediator's impact will always rely on some degree of flexibility on the part of the negotiators. In some circumstances, the anger motivating a negotiator is justified and there is very little one can do to shift it. In other cases, the personality of the person acting in such a manner is such that these techniques will not find much purchase. Where this is the case, the Mediation is unlikely to succeed in any event and at the very least it will be clear to those participating that a concerted effort has been made to that end.

Here again, the mediators proposed interventions aimed largely at improving the information upon which the negotiators make their decisions, rather than directing the negotiators towards any particular decision. By creating the environment and encouraging the thought processes by which a better understanding of the other party's actions can be achieved, the hope is that the parties' anger can be dissipated and that the effect of that anger can be limited in terms of its impact on the parties' decision-making. The emphasis was again placed on interventions which assist the parties in overcoming the distortionary effects of this thinking on their own accord.

This is encouraged by assisting them to confront the information underpinning their beliefs in a more constructive manner. Similarly, the interventions aimed at restricting the impact of that anger on decision-making also aim at encouraging the parties themselves to come to their own, better calculated, conclusions rather than on straightforwardly imposing the views of the mediator on the issue.

Chapter 4

Conclusion

4.1 A Cautionary Note and Room for Optimism

In certain circumstances it may be difficult to identify which of these deviations or biases is affecting a negotiator's decision-making. For example a negotiator's overconfidence in the strength of their legal position may underpin a belief that they are entitled to certain legal rights and when they are asked to sacrifice those rights, the endowment-effect may excessively restrict their willingness to make that concession. In such a case, either or both of these effects could be operational and it may be difficult to isolate the individual effects. Numerous other potential combinations of these effects are also possible.

In addition, the deviations discussed here do not represent an exhaustive list of the ways in which negotiators regularly deviate from the rational axioms. Other commonly accepted deviations, for example the anchoring effect¹ will also have similar effects and will in certain cases be difficult to distinguish from the deviations referred to in this paper. As an example, a negotiator's view of their expected gain may be affected by their knowledge of an award made in ostensibly similar circumstances to those facing that negotiator. In such a case, the knowledge of that award can operate as an anchor against which any offer or demand will be compared and which comparison would result in similar effects to those driving the *Relative-Distortion* theory discussed above.

It therefore appears clear that the discussion above and the recommended interventions arising from the interviews cannot be treated as a recipe according to which mediators can straightforwardly identify behaviours and then formulaically implement a particular strategy in response thereto.

This was never likely to be achievable and does not render the insights arising from the interviews unusable. The varying techniques aimed at addressing the deviations largely aim at achieving similar outcomes and follow a similar pattern. They aim to encourage a full and accurate investigation of the various elements of a conflict while fostering a more nuanced and empathetic view of the facts, interests and potential outcomes underpinning the negotiations. Any intervention which aims at achieving these goals and does not exceed the bounds of acceptable mediator influence cannot harm the process.

Mediation is always a flexible process. There is no prescribed reaction to every action or decision of a negotiator and the mediator must always remain responsive to the individual characters of those negotiators, their own strengths, weaknesses and personality and the particular facts underpinning a dispute.

These techniques should therefore be considered options available as supplementary to our existing tools and which a mediator can employ at their discretion

¹Birke, "Evaluation and facilitation: moving past either/or", pp. 8-11.

where it appears that a negotiator's ability to give effect to their own interests is being inhibited by one or more of these deviations.

4.2 Conclusion

Historically, economics modelling and prediction has been based on a set of axiomatic conceptions of human behaviour. Together these assumptions make up the rational model of economic behaviour. Given these assumptions and because those assumptions do to a large degree approximate decision-making behaviour and are also to some extent an ideal of such behaviour, it is unsurprising that mediation techniques have been developed to respond to that expected behaviour. In very basic terms these techniques aim to uncover what the parties really want, explore the potential options for settlement and trade concessions until both sides are offered an acceptable outcome. The expectation is that in providing settlement options which do satisfy enough of the parties' interests, settlement can be reached. They therefore rely on parties knowing their own interests, understanding the parameters of their dispute and accurately making their choices accordingly.

Behavioural economists have convincingly illustrated a number ways in which human beings routinely deviate from this expected behaviour. This means that in reality there is very often a disconnection between a negotiator's interests and the decisions they make in pursuit of those interests. The academic literature relating to mediation and negotiation has not kept pace with the development of these behavioural theories. This presents an opportunity to supplement our existing mediation techniques with interventions aimed specifically at responding to these predicted deviations.

Given that these theories are descriptive of reality, it was hoped and expected that experienced would recognise these patterns from their practical experience. Through a series of interviews with mediators of varied backgrounds it was established that these theories do indeed describe very common behaviour and that as a result, the mediators have had to develop techniques to supplement the traditional techniques referred to above.

This experience provided rich insights into the techniques and strategies one can use to address these issues and the constraints and considerations shaping the choice of intervention.

Prior to engaging with the techniques suggested in these interviews, it was important to establish a framework according to which the proposed interventions could be evaluated for usefulness and appropriateness. The key issue was to draw the boundaries of acceptable mediator intervention in terms of how far the mediator should be willing to influence the proceedings.

The views of the mediators emerging from the interviews, when considered together with Douglas' work in establishing the ideal meaning of neutrality in this context and Birke's problematizing of the theoretical divide between facilitative and evaluative mediation were very helpful in establishing a broad ideal of the types of intervention at which mediators should aim when confronted with this deviant behaviour. Ultimately this ideal echoes and expands on Ko's New-Evaluative approach².

²Ko, "On the Role of a Mediator: A Behavioural Law and Economics Perspective"; Douglas, "Neutrality in mediation: a study of mediator perceptions"; Birke, "Evaluation and facilitation: moving past either/or".

In brief, the interventions should ensure that the mediator both remains neutral and is seen to be neutral. The mediator should aim to increase the self-determination of the parties by empowering and encouraging them to maximise their utility based on their own interests, rather than by imposing their own interests on the outcome of the negotiation. Interventions are justified where a party's lack of knowledge, experience or some other disadvantage creates a power imbalance wherein an absolute equality of treatment would result in an inequality of outcome.

The type of analytical shortcomings caused by the deviations described here can be viewed in a similar light. This is particularly so where the weakness inhibits the potential for settlement and thereby causes the other party to the negotiation to suffer as a result. Thus, an intervention aimed at addressing one party's decision-making shortcomings also assists the other party and therefore does not aid one party at the expense of the other.

The net effect is to sanction those interventions which aim at encouraging behaviour approximating the rationality axioms and thereby reinforcing the effectiveness of the traditional model of mediation by creating an environment in which the parties are themselves capable of brainstorming their problems and making decisions which better give effect to their interests.

The interventions therefore appear to remain within the bounds of acceptable influence prescribed by Susskind and Thaler's Nudge theory in that they aim to influence the information upon which the decision is made, by encouraging the parties to properly evaluate the information available to them. This is as distinguished from directly influencing them to adopt a particular view or decision³.

The interviewee's responses were predominantly based in experience, rather than theory. This is as expected as there remains a dearth of theory prescribing responses to these behaviours. The interviews nonetheless provided significant insight into these issues.

Although the responses were varied as between the interviewees and in relation to the particular deviation under discussion certain general principles emerged from that discussion. Though in some cases the mediators were keen to emphasise their refusal to impact on the views of the parties, in the interest of remaining and appearing to remain neutral, their proposed responses to the fictional scenarios suggested that they are in fact prepared to intervene in ways which would affect the views of the negotiators. Others were prepared to more straightforwardly acknowledge that their actions routinely have this effect and acknowledge that in certain instances their interventions are necessary to move the mediation forward in a mutually beneficial manner.

It therefore appears that regardless of their stated intentions mediators do routinely impact on the ways in which negotiators reach their decisions. What became clear was that even where this was acknowledged, the extent to which it is acceptable to do so is circumscribed according to the limitations we have described above.

Ultimately, the mediators' intention appeared to be to encourage the parties to bypass the effect of the deviations by allowing them to better process the information underpinning the conflict and to make better decisions in pursuit of their own interests. Although the majority of the interviewees did not refer to academic theory in describing the mindset which should be encouraged, the Transactional-Analysts' conception of the Adult-Mode of thinking provides a useful illustration of the type of thinking which mediators should encourage.

³Thaler and Sunstein, *Nudge: Improving decisions about health, wealth, and happiness*.

When doing so, the ultimate aim appeared to be to make the standard mediation tools more effective by encouraging the parties to make decisions in a more accurate and calculated manner. The techniques emerging from the interviews are therefore best viewed as supplements to our existing mediation tools, rather than as replacements.

Although little academic work has been done to directly deal with these deviant behaviours, the development of the narrative and transformative mediation theories provide an interesting set of techniques which aim to achieve outcomes which would undoubtedly assist the parties in overcoming the cognitive-barriers these deviant behaviours describe. Though these schools of theory were mentioned during the interviews and undoubtedly underpin some of the views of the mediators, the majority of the techniques proposed through the interviews were learned through experience. Thus, these schools of theory were discussed here largely as an introduction to a body of work which could provide responses to the challenges proposed by these deviant behaviours and as a means of further understanding the goals at which those interventions should be aimed.

The confluence between the suggested interventions and the overarching strategy of Transformative-Mediation, particularly its pursuit of recognition and empowerment-shifts suggests that a broader investigation of the techniques prescribed there and their application in respect of these and other deviations may prove fruitful. We should note however that the interviewees' suggestions of analogous techniques were recommended as supplements to our traditional model, rather than providing an entirely alternative structure, as prescribed by Bush and Folger. A wholesale adoption of their prescribed techniques would therefore fall outside the experience and repertoire of most mediators but there are certainly lessons to be learned from it. In particular, their focus on the manner in which ideas and information are communicated between was not strongly canvassed by the interviewees but could be very useful in addressing some of the causes of the deviations referred to here⁴.

The Narrative-Mediation theories provide a further possible source of interventions which fall within the overarching strategy emerging from the interviews. Many of the major elements of that theory found representation in the similar strategies proposed in the interviews. One technique which was not mentioned in the interviews was to encourage the parties to reimagine the conflict in terms of a positive narrative. It is with the hope that doing so facilitates an improved empathy, understanding of the conflict and desire for cooperation which can improve the bargaining and problem-solving processes involved in our ordinary techniques.

Though room for further investigation and research undoubtedly remains, it is submitted that the interviews were useful both in prescribing possible techniques and in describing the characteristics against which mediators should evaluate their potential interventions where parties' decision-making behaviour does not match the rational model.

⁴Bush and Folger, *The promise of mediation: The transformative approach to conflict*.

Primary Sources, Legislation

American Arbitration Association. *Model Standards of Conduct for Mediators*. Sept. 2005. URL: https://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf (visited on 01/31/2018).

Primary Sources, Case Law

Department of Infrastructure Development, Gauteng (CCT 185/13) [2014] ZACC 28,
2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC). Oct. 3, 2014.

Secondary Sources

- Allred, Keith G et al. "The influence of anger and compassion on negotiation performance". In: *Organizational behavior and human decision processes* 70.3 (1997), pp. 175–187.
- Ariely, D. *Predictably Irrational, Revised and Expanded Edition: The Hidden Forces That Shape Our Decisions*. HarperCollins, 2010. ISBN: 9780061353246.
- Bell, David E, Howard Raiffa, and Amos Tversky. *Decision making: Descriptive, normative, and prescriptive interactions*. Cambridge University Press, 1988.
- Benjamin, Robert. *The Natural History of Negotiation Mediation: The Evolution of Negotiative Behaviours, Rituals, and Approaches*. June 2012. URL: <https://www.mediate.com/articles/NaturalHistory.cfm> (visited on 04/25/2017).
- Birke, Richard. "Evaluation and facilitation: moving past either/or". In: *J. Disp. Resol.* (2000), p. 309.
- Boulle, Laurence. "Predictable irrationality in mediation: Insights from behavioural economics". In: *Australasian Dispute Resolution Journal* (2013).
- Brenner, Lyle A, Derek J Koehler, and Amos Tversky. "On the evaluation of one-sided evidence". In: *Journal of Behavioral Decision Making* 9.1 (1996), pp. 59–70.
- Bush, Robert A Baruch and Joseph P Folger. *The promise of mediation: The transformative approach to conflict*. John Wiley & Sons, 2004.
- Chern, Cyril. *The Commercial Mediator's Handbook*. CRC Press, 2014.
- Coase, Ronald H. "The Problem of Social Cost". In: *Journal of Law and Economics* 3 (1960).
- Cobb, Sara and Janet Rifkin. "Practice and paradox: Deconstructing neutrality in mediation". In: *Law & Social Inquiry* 16.1 (1991), pp. 35–62.
- Cohen, Orna, Naomi Dattner, and Ahron Luxenburg. "The limits of the mediator's neutrality". In: *Conflict Resolution Quarterly* 16.4 (1999), pp. 341–348.
- Dalziel, James R and RF Soames Job. "Motor vehicle accidents, fatigue and optimism bias in taxi drivers". In: *Accident Analysis & Prevention* 29.4 (1997), pp. 489–494.
- Douglas, Susan. "Neutrality in mediation: a study of mediator perceptions". In: *Queensland U. Tech. L. & Just. J.* 8 (2008), p. 139.
- Edgeworth, Francis Ysidro. *Mathematical Phisycs: An Essay on the Application of Mathematics to the Moral Sciences*. C. Kegan Paul & Company, 1881.
- Edmondson, Amy C and Stacy E McManus. "Methodological fit in management field research". In: *Academy of management review* 32.4 (2007), pp. 1246–1264.
- Engel, Christoph. "Dictator games: A meta study". In: *Experimental Economics* 14.4 (2011), pp. 583–610.

- English, Fanita. "How Did You Become a Transactional Analyst?" In: *Transactional Analysis Journal* 35.1 (2005), pp. 78–88. DOI: [10.1177/036215370503500110](https://doi.org/10.1177/036215370503500110).
- Finch, Dave. *Heuristics, Fallacies and Biases*. 2008. URL: http://letsinkit.com/?page_id=28.
- Friedman, James W. "A non-cooperative equilibrium for supergames". In: *The Review of Economic Studies* 38.1 (1971), pp. 1–12.
- Gibson, Kevin, Leigh Thompson, and Max H Bazerman. "Biases and rationality in the mediation process". In: *Applications of heuristics and biases to social issues*. Springer, 1994, pp. 163–183.
- Gintis, Herbert. *The bounds of reason: Game theory and the unification of the behavioral sciences*. Princeton University Press, 2014.
- Golann, Dwight and Jay Folberg. *Mediation: The Roles of Advocate and Neutral*. Wolters Kluwer Law & Business, 2016.
- Goodwin, Neva R. et al. *Microeconomics in Context*. Armonk, New York: M.E. Sharpe, Dec. 19, 2013. ISBN: 0765638789.
- Groenewald, Thomas. "A phenomenological research design illustrated". In: *International journal of qualitative methods* 3.1 (2004), pp. 42–55.
- Hastorf, Albert H and Hadley Cantril. "They saw a game; a case study." In: *The Journal of Abnormal and Social Psychology* 49.1 (1954), p. 129.
- Helweg-Larsen, Marie and James A Shepperd. "Do moderators of the optimistic bias affect personal or target risk estimates? A review of the literature". In: *Personality and Social Psychology Review* 5.1 (2001), pp. 74–95.
- Hung, Hin. "Neutrality and impartiality in mediation". In: *ADR Bulletin* 5.3 (2002), p. 7.
- Infante, Dominic A and Andrew S Rancer. "Argumentativeness and verbal aggressiveness: A review of recent theory and research". In: *Annals of the International Communication Association* 19.1 (1996), pp. 319–352.
- Izumi, Carol. "Implicit bias and the illusion of mediator neutrality". In: *Wash. UJL & Pol'y* 34 (2010), p. 71.
- Kahneman, Daniel and Shane Frederick. "Representativeness revisited: Attribute substitution in intuitive judgment". In: *Heuristics and biases: The psychology of intuitive judgment* 49 (2002), p. 81.
- Kahneman, Daniel and Amos Tversky. "Conflict Resolution: A Cognitive Perspective". In: *Preference, Belief, and Similarity* (1992), p. 729.
- Kaufman, Sanda, Michael Elliott, and Deborah Shmueli. *Frames, Framing and Reframing*. June 2017. URL: <https://www.beyondintractability.org/essay/framing> (visited on 12/06/2017).
- Ko, Haksoo. "On the Role of a Mediator: A Behavioural Law and Economics Perspective". In: *Asia Pacific Law Review* 17.sup1 (2009), pp. 195–204.
- Korenok, Oleg, Edward L Millner, and Laura Razzolini. "Giving, Taking, and Taking Aversion in Dictator Games". In: (2014).

- Korkobkin, Russell. "Psychological impediments to mediation success: Theory and practice". In: *Ohio St. J. on Disp. Resol.* 21 (2005), p. 281.
- Korobkin, Russell. "Inertia and preference in contract negotiation: The psychological power of default rules and form terms". In: *Vand. L. Rev.* 51 (1998), p. 1583.
- "Status quo bias and contract default rules". In: *Cornell L. Rev.* 83 (1997), p. 608.
- Kramer, Roderick M, Elizabeth Newton, and Pamela L Pommerenke. "Self-enhancement biases and negotiator judgment: Effects of self-esteem and mood". In: *Organizational Behavior and Human Decision Processes* 56.1 (1993), pp. 110–133.
- Loewenstein, George et al. "Self-serving assessments of fairness and pretrial bargaining". In: *The Journal of Legal Studies* 22.1 (1993), pp. 135–159.
- Mason, Mark. "Sample size and saturation in PhD studies using qualitative interviews". In: *Forum qualitative Sozialforschung/Forum: qualitative social research*. Vol. 11. 3. 2010.
- Menkel-Meadow, Carrie et al. *Dispute resolution: beyond the adversarial model*. Wolters Kluwer Law & Business, 2011.
- Mnookin, Robert H. "Why negotiations fail: An exploration of barriers to the resolution of conflict". In: *Ohio St. J. on Disp. Resol.* 8 (1992), p. 235.
- Morewedge, Carey K and Colleen E Giblin. "Explanations of the endowment effect: an integrative review". In: *Trends in cognitive sciences* 19.6 (2015), pp. 339–348.
- Mulcahy, Linda. "The possibilities and desirability of mediator neutrality-towards an ethic of partiality?" In: *Social & Legal Studies* 10.4 (2001), pp. 505–527.
- Negotiation Experts. *The Zone Of Possible Agreement (ZOPA)*. URL: <https://www.negotiations.com/articles/zopa/> (visited on 04/25/2017).
- Ng, Irene CL and Lu-Ming Tseng. "Learning to be sociable: the evolution of homo economicus". In: *American Journal of Economics and Sociology* 67.2 (2008), pp. 265–286.
- Notini, Jessica. *Effective Alternatives Analysis In Mediation: "BATNA/WATNA" Analysis Demystified*. Jan. 2005. URL: <https://www.mediate.com/articles/notini1.cfm> (visited on 07/31/2017).
- Regenwetter, Michel, Jason Dana, and Clinton P Davis-Stober. "Transitivity of preferences." In: *Psychological Review* 118.1 (2011), p. 42.
- Riskin, Leonard L. "Understanding mediators' orientations, strategies, and techniques: A grid for the perplexed". In: *Harv. Negot. L. Rev.* 1 (1996), p. 7.
- Ritchie, J Lewis and J Lewis. "J. & Elam, G.(2003). Designing and selecting samples". In: *Qualitative research practice. A guide for social science students and researchers* (), pp. 77–108.
- Ross, Lee and Constance Stillinger. "Barriers to conflict resolution". In: *Negotiation Journal* 7.4 (1991), pp. 389–404.
- Sen, Amartya K. "Rational fools: A critique of the behavioral foundations of economic theory". In: *Philosophy & Public Affairs* (1977), pp. 317–344.
- Shah, Anuj K and Daniel M Oppenheimer. "Heuristics made easy: An effort-reduction framework." In: *Psychological bulletin* 134.2 (2008), p. 207.

- Silbey, Susan S and Sally E Merry. "Mediator settlement strategies". In: *Law & Policy* 8.1 (1986), pp. 7–32.
- Simon, Herbert A. "A behavioral model of rational choice". In: *The quarterly journal of economics* 69.1 (1955), pp. 99–118.
- Spangler, Brad. *Zone of Possible Agreement (ZOPA)*. June 2013. URL: <https://www.beyondintractability.org/essay/zopa> (visited on 06/23/2017).
- Svenson, Ola. "Are we all less risky and more skillful than our fellow drivers?" In: *Acta psychologica* 47.2 (1981), pp. 143–148.
- Thaler, Richard H and Cass R Sunstein. *Nudge: Improving decisions about health, wealth, and happiness*. HeinOnline, 1999.
- Thompson, Leigh and George Loewenstein. "Egocentric interpretations of fairness and interpersonal conflict". In: *Organizational Behavior and Human Decision Processes* 51.2 (1992), pp. 176–197.
- Tversky, Amos and Daniel Kahneman. "Judgment under uncertainty: Heuristics and biases". In: *Science* 185.4157 (1974), pp. 1124–1131.
- Varian, H.R. *Intermediate Microeconomics: A Modern Approach*. W.W. Norton & Company, 2010. ISBN: 9780393934243.
- Von Neumann, John and Oskar Morgenstern. "Theory of games and economic behavior". In: *Bull. Amer. Math. Soc* 51.7 (1945), pp. 498–504.
- Watkins, Daniel. "A nudge to mediate: How adjustments in choice architecture can lead to better dispute resolution decisions". In: *Am. J. Mediation* 4 (2010), p. 19.
- Winslade, John and Gerald D Monk. *Practicing narrative mediation: Loosening the grip of conflict*. John Wiley & Sons, 2008.
- Wolfe, Peter Y. "How a mediator enhances the negotiation process". In: *N. H. Bus. J.* 46 (2005), p. 38.
- Yin, Robert K. *Qualitative research from start to finish*. Guilford Publications, 2015.
- Zumeta, Zena. "Styles of mediation: Facilitative, evaluative, and transformative mediation". In: *National Association for Community Mediation Newsletter* (2000).