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ASPIRATIONS AND SETTLEMENT

Russell Korobkin†

The legal-academic literature on litigation settlement describes a range of factors that affect settlement outcomes, but litigant “aspirations”—or ideal goals—are not among them. Negotiation scholars, however, routinely claim that high aspirations can improve bargaining outcomes. This Article presents the “reference point theory of aspirations,” which reconciles these competing approaches by situating negotiator aspirations within the standard legal-academic model of settlement. Based on this theory, the Article offers a series of hypotheses concerning the role of aspirations in settlement negotiations, and then reports the results of experimental tests that demonstrate the hypotheses to be plausible. Finally, in light of the reference point theory of aspirations, the Article reconsiders the usual prescriptive advice offered by negotiation scholars that litigants always should set high aspirations for themselves in bargaining situations.

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INTRODUCTION

What determines whether litigants settle out of court or demand an adjudicatory resolution of their dispute? When a lawsuit does settle, what determines the settlement price? Law-and-economics scholarship has addressed this situation primarily by reference to the parties' reservation prices—the maximum amount a defendant is willing to pay to settle the case and the minimum amount a plaintiff is willing to accept—and secondarily by reference to strategic behavior that might lead a rational litigant to refuse a settlement offer that is superior to his reservation price.

Recent legal scholarship that incorporates behavioral insights from psychology and other non-economic social sciences into theories of settlement suggests that a more nuanced understanding of litigants' preferences than the economics-based approach provides can improve our understanding of settlement behavior.¹ This new area of scholarship, however, does not challenge the theoretical framework of the economic model, so much as it provides a richer account of both what might affect litigants' reservation prices and what might cause litigants to reject even settlement offers superior to their reservation prices. Thus, I will refer to the law-and-economics perspective together with the newer behavioral science insights collectively as the "standard model" of settlement.

¹ See discussion *infra* Part I.B.

The standard model notably omits any detailed consideration of whether and how litigants' "aspirations"—sometimes synonymously referred to as "goals" or "targets"—play a role in settlement.² The term "aspiration" is defined here as the ideal target settlement sum, or set of terms, for which a litigant strives in negotiations, although achieving that target provides no discontinuous external benefit.³ This measure is differentiated from a litigant's reservation price, defined as the minimum that the litigant will accept (if the plaintiff) or the maximum amount that the litigant will pay (if the defendant).⁴

The omission of aspirations from the standard model is troubling for two reasons. First, popular and scholarly literature on negotiation often contends that negotiator aspirations are an important independent determinant of bargaining outcomes.⁵ Second, this literature suggests that negotiators are able to choose their own aspirations, at least within some boundaries. The latter point implies that understanding the role of aspirations in settlement has the potential not only to deepen negotiators' understanding of settlement bargaining, but also to enable negotiators to improve their individual outcomes. The usual claim is that negotiators who set high aspirations, defined as target goals far above their reservation price, will achieve superior outcomes compared to negotiators with low aspirations.⁶

This Article explores the discrepancy between the standard model of litigation, which ignores negotiator aspirations, and the general negotiation literature, which identifies aspirations as central to understanding (and succeeding) in bargaining. The Article also advances a theory of how the effect of aspirations can be incorporated into the framework of the standard model, and provides experimental evidence consistent with the theory. The "reference point theory of aspirations" holds that negotiator aspirations can affect a variety of factors ("settlement levers") that litigation scholars using the standard model have heretofore identified as important to settlement behavior, and thus that aspirations can indirectly affect settlement outcomes.⁷ The experimental results provide preliminary support for the theory,⁸

² See discussion *infra* Part I.

³ Cf. Chip Heath et al., *Goals as Reference Points*, 38 COGNITIVE PSYCHOL. 79, 80–81 (1999) (calling targets not accompanied by a change in material rewards "mere goals" to distinguish them from goals that are accompanied by an external reward, such as when "a salesperson sets a goal to sell 200 units because he or she receives a bonus at 200"). This definition is, I believe, the dominant definition in the legal and social science negotiation literature.

⁴ See sources cited *infra* note 10.

⁵ See discussion *infra* Part II.

⁶ See discussion *infra* Part II.B.

⁷ See discussion *infra* Part III.A.

⁸ See discussion *infra* Part III.B.

although further research is necessary to understand fully the nature of the relationship between aspirations and settlement outcomes.

More broadly, the findings provide, for the first time, empirical support for two tentative claims about aspirations and settlement negotiations, the first directly and the second indirectly. First, litigants with high aspirations are likely to obtain more-favorable outcomes than those with low aspirations, because high aspirations can cause litigants to set higher reservation prices, to bargain for a longer period of time before reaching agreement, and to perceive less beneficial outcomes as unfair and thus be less likely to agree to such outcomes. Second, litigants with high aspirations are more likely to fail to reach a settlement than litigants with low aspirations, even when settlement would be in the best interests of both parties. This is because all of the reasons that higher aspirations might improve litigants' settlement outcomes when agreement is reached also simultaneously imply a reduction in the range of outcomes that are potentially acceptable to both parties. Further, the experiments provide support for the claim that high aspirations are likely to cause litigants to be less satisfied with settlements reached compared to litigants with low aspirations.

Part I of this Article lays the groundwork for the later empirical work by describing the basic law-and-economics and more recent "law-and-behavioral-science"⁹ perspectives concerning which factors affect settlement outcomes. This body of literature noticeably fails to take account of litigant aspirations and, in fact, its reasoning implicitly suggests that aspirations are actually not relevant to settlement negotiation outcomes.

Part II reviews the conventional wisdom among scholars interested in negotiation generally, as opposed to settlement negotiation specifically, which holds that aspirations can affect bargaining outcomes, as well as the empirical evidence that supports this common perception. It concludes that, although the empirical evidence is not conclusive and the justifications for the importance of aspirations are not obviously correct, there are reasons to believe that aspirations might play an important role in settlement outcomes.

Part III attempts to bridge the gap between the standard model of settlement and the negotiation literature on aspirations in bargaining generally by presenting the reference point theory of aspirations. This Part then presents a series of specific hypotheses as to how aspira-

⁹ See generally Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000) (suggesting that a law-and-behavioral-science perspective may provide a more nuanced understanding of human behavior). This perspective is alternatively referred to as "behavioral law and economics." See, e.g., BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

tions might affect those factors identified as “settlement levers” by the standard model of settlement and thus indirectly affect settlement negotiation outcomes. Each hypothesis is tested in an experimental setting, and statistically significant results are presented, along with a discussion of what further inquiries are necessary to test the general theory more fully.

Based on the theory and experimental results presented in Part III, Part IV revisits the common but inadequately supported claim that negotiators will achieve more-desirable results if they set high aspirations rather than low aspirations. Part IV concludes that a prescriptive approach to aspirations should balance the benefits of high aspirations against their corresponding costs.

I

THE STANDARD MODEL OF SETTLEMENT

A. Law-and-Economics Approaches to Settlement Behavior

I. *The Central Importance of Reservation Prices to Settlement Negotiations*

In any bargaining situation, negotiators have a reservation price, defined as the maximum amount the negotiator is willing to give up or the minimum amount the negotiator is willing to accept, as the case may be, to consummate a transaction.¹⁰ Buyers would prefer to pay any amount up to their reservation price for the subject of the negotiation rather than walk away without a deal, but for any higher price they would prefer not to reach an agreement. Sellers would prefer to trade the subject of the negotiation for any amount that exceeds their reservation price; for any lesser amount, they would prefer not to reach an agreement. All points along the range of potential agreements between a buyer's and seller's reservation price, (assuming that the buyer's is higher), are all mutually beneficial, or, in economic terms, “Pareto superior”¹¹ to the alternative of not reaching an agreement. This range of points is often labeled the bargaining zone,¹² and

¹⁰ See, e.g., DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 51 (1986); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 45 (1982); G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 27 (1999); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 49 (1985).

¹¹ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 14–15 (5th ed. 1998) (defining a Pareto-superior allocation as one that “makes at least one person better off and no one worse off”).

¹² See, e.g., SHELL, *supra* note 10, at 27–29; Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1816–17 (2000). Other authors use a range of similar, synonymous terms. See, e.g., LAX & SEBENIUS, *supra* note 10, at 247 (“bargaining set”); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND*

the conceptual framework for understanding negotiation is sometimes referred to as the "bargaining zone model."¹³

The law-and-economics approach to litigation settlement predicts that where a bargaining zone exists (that is, where the defendant's reservation price for settlement is higher than the plaintiff's), disputes will settle at some point within the zone.¹⁴ Where there is no bargaining zone, settlement attempts will fail and adjudication will result.¹⁵

To predict whether a bargaining zone will exist in a particular dispute and, if so, what its endpoints will be, this approach relies on common assumptions of "expected utility theory"¹⁶ or, more generally, "rational choice theory,"¹⁷ regarding the manner in which litigants will determine their reservation prices. The standard law-and-economics perspective on settlement negotiations, exemplified by a landmark article by George Priest and Benjamin Klein,¹⁸ predicts that litigants will determine their reservation prices based on the expected value of litigating and the difference in transaction costs between settling out of court and litigating to judgment.¹⁹

To calculate the expected value of litigation, assuming that liability is disputed and damages are not, litigants will multiply their estimate of the plaintiff's chances of prevailing on the liability issue by the plaintiff's damage.²⁰ If damages are also at issue the calculation is more complicated, but the basic reasoning remains the same: both litigants will value litigation based on the weighted average value of all potential outcomes.²¹

In any particular case, the litigants may reach different estimates of the expected value of litigation because making such estimates is far from an exact science. But because the plaintiff and defendant presumably have access to the same information about the dispute (at

DISPUTES 20 (2000) ("Zone of Possible Agreement"); RAIFFA, *supra* note 10, at 45 ("zone of agreement").

¹³ See, e.g., Sally Blount et al., *The Price is Right—Or Is It? A Reference Point Model of Two-Party Price Negotiations*, 68 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1, 1–2 (1996).

¹⁴ See, e.g., POSNER, *supra* note 11, at 607–08; John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 285–86 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66–69 (1971).

¹⁵ See, e.g., POSNER, *supra* note 11, at 608; Gould, *supra* note 14, at 285.

¹⁶ See generally SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 79–83 (1993) (describing expected utility theory as a "normative" theory of behavior that describes how people actually behave).

¹⁷ For a discussion of how the assumptions of rational choice theory are used in legal scholarship generally, see Korobkin & Ulen, *supra* note 9, at 1060–75.

¹⁸ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

¹⁹ See *id.* at 12–13.

²⁰ See *id.* at 12.

²¹ See *id.* at 29–30 (noting that the same model applies when plaintiffs and defendants disagree about damages rather than liability).

least after discovery), on average, there should be no difference between plaintiff and defendant estimates. When there are differences, it is equally likely that the plaintiff will be more optimistic or pessimistic than the defendant about her chances in court.²²

Because adjudication usually has much higher transaction costs (the largest factor being attorneys' fees²³) than does settlement,²⁴ the estimated expected value of litigation seldom matches a litigant's reservation price. When determining their reservation price, rational plaintiffs will subtract the amount of money they will save in transaction costs if they settle out of court from their estimate of the expected value of litigating.²⁵ Rational defendants will add the amount of money they will save in transaction costs by settling to their estimate of the expected value of the plaintiff's claim in order to determine their reservation price.²⁶ Thus, for example, if the plaintiff and defendant each believe the plaintiff has a 50% chance of winning a court verdict, the plaintiff's damages are \$200,000, and the plaintiff and defendant would each spend \$20,000 more in legal fees to litigate than to settle, the plaintiff's reservation price should be \$80,000, the defendant's reservation price should be \$120,000, and the model predicts that the parties would settle for some amount between those two values.

Slightly more complex versions of this basic approach also take account of other relevant factors in setting a reservation price.²⁷ For example, according to standard accounts of rational choice theory, individual litigants are presumed to be risk averse.²⁸ Thus, in the example above, depending on how risk averse they are, a plaintiff may set her reservation price below \$80,000 and a defendant above \$120,000 to take account of the certainty settlement provides, which is preferred to the expected value of the risk of adjudication.²⁹ Also, rational litigants are presumed to take into account the time value of money. This means that, assuming no prejudgment interest is available, a plaintiff will set her reservation price for a settlement today even

²² See *id.* at 13–14.

²³ See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91–92 (1983) (noting that attorneys' fees constitute the largest litigation expense).

²⁴ The costs of adjudication are usually so much greater than the costs of settling out of court that some theorists simplify the analysis by assuming the costs of settling to be zero. See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1075 (1989).

²⁵ See Priest & Klein, *supra* note 18, at 12–13.

²⁶ See *id.*

²⁷ For a comprehensive review of the factors lawyers use and should consider when determining the settlement value of a case, see Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1 (1991).

²⁸ See POSNER, *supra* note 11, at 12–13.

²⁹ See Cooter & Rubinfeld, *supra* note 24, at 1076 (describing how risk aversion may cause the subjective value of trial to diverge from its expected value).

lower than the risk-adjusted expected value of litigation less transaction costs.³⁰ Precisely how much the value of time will reduce the plaintiff's reservation price depends on both the amount of time it would take to secure an adjudicated resolution of the dispute and on the plaintiff's personal discount rate.³¹ The defendant, in contrast, will prefer to keep his money for longer, so he too will discount the expected value of a plaintiff verdict and set his reservation price for settlement correspondingly lower.³²

According to this traditional approach, the observed high rate of settlement³³ is expected because plaintiffs and defendants are presumed to make similar predictions about the value of adjudication,³⁴ and transaction costs (and in some models, risk aversion) give each side a desire to settle.³⁵ Therefore, settlement efforts will fail, and adjudication will result, only when (1) the plaintiff and defendant have different estimates of the expected value of litigation, (2) the plaintiff's estimate is higher than the defendant's, and (3) the two estimates differ by more than the combined transaction costs (and risk-aversion effects) of the parties.³⁶ This model offers no predic-

³⁰ See, e.g., Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 420-21 (1973).

³¹ A litigant's discount rate depends on a variety of factors, including saving and borrowing rates, the prime rate, inflation, risk coverage, and taxes. See GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 127-28 (1983). In a more general sense, the discount rate is anything that contributes to a smaller payoff, represented in economic terms. Cf. Posner, *supra* note 30, at 420-21 (explaining that plaintiffs and prosecutors have greater discount values than defendants because of higher borrowing costs for individuals to finance their lawsuit, and because delay increases costs for the party with the burden of proof, who needs to discover evidence and prove facts).

³² Notice that, unlike risk aversion and transaction costs, which make the plaintiff's reservation price lower and the defendant's reservation price higher, the time value of money shifts both parties' reservation prices lower, at least if there is no prejudgment interest. See, e.g., Hoffman, *supra* note 27, at 25.

³³ Commentators disagree about the precise rate of settlement, but agree that the rate is extremely high and that court resolution of disputes is the relatively rare exception rather than the rule. See, e.g., Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994) (indicating that settlement is the most frequent disposition of civil cases); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996) (noting that the "great majority" of cases filed are settled); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1212 (1992) (stating that "[s]ettlement is where the action is"); Trubek et al., *supra* note 23, at 81 (noting that fewer than 8% of civil suits in the authors' sample were resolved by trial).

³⁴ See, e.g., Priest & Klein, *supra* note 18, at 13-14.

³⁵ See, e.g., Cooter & Rubinfeld, *supra* note 24, at 1076; Gould, *supra* note 14, at 286; Landes, *supra* note 14, at 66.

³⁶ See, e.g., POSNER, *supra* note 11, at 609; Gould, *supra* note 14, at 285-86; Landes, *supra* note 14, at 67-68; Posner, *supra* note 30, at 417-18.

tions about the precise settlement amount, only that the amount will fall somewhere within the bargaining zone.³⁷

2. *Strategic Considerations*

a. *Risk Preference and Bargaining Behavior*

Insights from game theory have enabled other law-and-economics scholars to enhance this model of settlement, either by questioning whether all lawsuits in which a bargaining zone exists will result in settlement or by suggesting what settlement value within the bargaining zone the parties will ultimately agree upon.

Robert Cooter and his coauthors argue that rational litigants will not always accept a settlement offer that is superior to their reservation price.³⁸ If a plaintiff receives a settlement offer of \$90,000 from a defendant, for example, she not only must consider whether this amount exceeds her reservation price, but also the uncertain consequences of rejecting this offer.³⁹

Assuming that the plaintiff's reservation price is below \$90,000, if the plaintiff knew that the defendant's reservation price was exactly \$90,000, the plaintiff would accept the offer. If the plaintiff knew that the defendant's reservation price was \$120,000, however, she might refuse the offer and demand more, knowing that the rational defendant should be willing to pay up to \$120,000. In most situations, litigants do not know their opponents' reservation price with certainty, but can only estimate that price.⁴⁰ Thus, by rejecting a defendant's offer that is above her reservation price, the plaintiff risks causing a bargaining impasse.

Assume, for example, that the plaintiff's reservation price is \$80,000, and she believes there is a 50% chance that the defendant's reservation price is \$90,000 and a 50% chance that it is \$110,000. A risk-neutral plaintiff would then rationally reject a \$90,000 settlement offer and risk an impasse because such a strategy would have a 50% chance of costing her \$10,000 (the difference between her \$80,000 reservation price and the \$90,000 offered) but a 50% chance of earning her an additional \$20,000 (in the form of a higher settlement). A

³⁷ See, e.g., Hoffman, *supra* note 27, at 5; see also sources cited *supra* note 36.

³⁸ Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

³⁹ See generally *id.* at 226, 237 (stating that the direct effect of holding out for a higher amount is an increase in the likelihood of trial).

⁴⁰ Cf. *id.* at 231–32 (stating that each party to litigation has observable and unobservable traits that bear upon his strategy, but that each forms expectations about his opponent based only upon observable traits); Cooter & Rubinfeld, *supra* note 24, at 1079 (noting that bargainers might overestimate the willingness of their opponent to make concessions, leading to a failure to settle).

risk-averse plaintiff, in contrast, might accept the \$90,000 offer because it provides a certain \$10,000 benefit.

b. *Patience*

The insights of Cooter and his coauthors suggest that the range of possible settlements is smaller than the full range of points within the bargaining zone because litigants will strategically reject settlement offers that are superior to their reservation prices if the benefit of accepting the offer is lower than the average expected return of holding out for a better settlement value. This analysis begs the question, however, of how lawsuits ever settle, and for what amount, when both parties know (or strongly suspect) that there is a large bargaining zone and have similar risk preferences. Consider, for example, a negotiation in which the plaintiff's reservation price is \$90,000, the defendant's reservation price is \$120,000, these figures are "common knowledge,"⁴¹ and both parties are risk neutral. Knowing the defendant's reservation price, a plaintiff might demand \$119,000. A rational defendant should agree to pay that much, *except* for the fact that he knows a rational plaintiff should be willing to accept \$91,000!

Game theorists have proposed that this stalemate will be broken, and some settlement amount within the bargaining zone agreed upon, on the basis of the relative costs to the parties of delaying an agreement.⁴² That is, the party with the most patience should win the lion's share of the cooperative surplus.⁴³ Patience is measured by comparing the value that the negotiator places on an immediate agreement to the value that she would place on a delayed agreement reached only after further bargaining.⁴⁴ A negotiator is relatively patient if she places a relatively low premium on immediate versus delayed agreement (that is, has a low discount rate).⁴⁵ The more patient party is more willing to delay agreement, and because the less patient party knows this, she has an incentive to make concessions to avoid delay.⁴⁶

⁴¹ That is, both litigants know both parties' reservation prices, and both know that the other knows. See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 304 (1994).

⁴² See *id.* at 222.

⁴³ Cf. Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 *ECONOMETRICA* 97, 98-99 (1982) (observing that in an alternating-offer bargaining game with a fixed bargaining cost or fixed discounting factor, and both players being rational, the player who proposes first has relative advantage, and the more impatient party will always end up with less than half the subject of the bargain).

⁴⁴ See BAIRD ET AL., *supra* note 41, at 222.

⁴⁵ See, e.g., Nirvikar Singh, *Nash Bargaining with the Option to Wait*, 55 *ECON. LETTERS* 69, 71 (1997) ("[T]he more patient player benefits from the possibility of postponement.").

⁴⁶ Cf. *id.* (stating that the party with the lower discount rate is better off if the possibility of postponement of bargaining to another period exists, while the party with the higher discount rate is worse off in the same situation).

Assume, for example, that the defendant must pay his attorney a \$1000-per-day retainer for each day prior to a settlement being reached, and that the plaintiff is willing to wait indefinitely to reach an agreement. In this case, the defendant should pay his reservation price, knowing that if he offers less the plaintiff will decline the offer and watch the defendant deplete his resources until he finally concedes. Elaborate mathematical models suggest that, under the assumptions of no private information and a system of alternating offers, the litigants should split the difference between their reservation prices if they have identical costs of delay, and that a litigant with twice the costs of delay of the opponent should accept one-third of the cooperative surplus, and so on.⁴⁷

B. Modifications from Behavioral Decision Theory

In the last decade, legal scholarship drawing on empirical findings of behavioral decision theory has taken issue with the reliance of

⁴⁷ These models, known as "Rubinstein bargaining games," have spawned an elaborate economic literature in the general bargaining context. For a plain explanation of the role of impatience derived from Rubinstein's model, see H. Peyton Young, *Negotiation Analysis*, in NEGOTIATION ANALYSIS 1, 6–7 (H. Peyton Young ed., 1991). Both Rubinstein in his original work and subsequent scholars attach various strict conditions to their games (for example, players must make alternating offers with a certain period of time elapsing between each offer). These restrictions make it difficult to apply the models to real-life negotiating situations, where parameters are rarely so strict and well defined. This literature, however, can provide useful insights into how specified changes in the ground rules of bargaining can affect the way rational parties should decide to divide a cooperative surplus. See, e.g., Dilip Abreu & Faruk Gul, *Bargaining and Reputation*, 68 ECONOMETRICA 85 (2000) (players are uncertain about the strategic intent or posture of their opponent); Lutz-Alexander Busch & Quan Wen, *Perfect Equilibria in a Negotiation Model*, 63 ECONOMETRICA 545 (1995) (bargaining over payoffs for the "disagreement period" following rejection of an offer); Shinsuke Kambe, *When Is There a Unique Equilibrium in Less Structured Bargaining?*, 50 JAPANESE ECON. REV. 321 (1999) (players negotiate about who will make the next proposal); Abhinay Muthoo, *Bargaining in a Long-Term Relationship with Endogenous Termination*, 66 J. ECON. THEORY 590 (1995) (repeated bargaining encounters between the same two parties); Abhinay Muthoo, *A Bargaining Model with Players' Perceptions on the Retractability of Offers*, 38 THEORY & DECISION 85 (1995) (the effect of "retractable" offers); Robert Powell, *Bargaining in the Shadow of Power*, 15 GAMES & ECON. BEHAV. 255 (1996) (how power affects agreement by giving a bargainer in a Rubinstein bargaining game the option of imposing a settlement); Horst Raff & David Schmidt, *Cumbersome Coordination in Repeated Games*, 29 INT'L J. GAME THEORY 101 (2000) (the role of communication between the parties in coordinating agreement in a Rubinstein game); Singh, *supra* note 45 (each player may choose to postpone the negotiations by one period). For studies criticizing the core assumptions of Rubinstein bargaining games, see, for example, W. Bentley MacLeod & James M. Malcomson, *Contract Bargaining with Symmetric Information*, 28 CAN. J. ECON. 336, 337 (1995) (arguing that the Rubinstein model is not appropriate for analyzing contract bargaining, where time always elapses before the transaction is completed and there is always time for parties to renege or renegotiate the contract); Matthew Spiegel et al., *Understanding when Agents Are Fairmen or Gamesmen*, 7 GAMES & ECON. BEHAV. 104, 105 (1994) (finding in controlled experiments that subjects with a relative bargaining advantage do not fully exploit that advantage, and subjects with a relative bargaining disadvantage still tend to demand an equal, rather than a lesser, division).

economic models on the assumption that litigants will make settlement decisions in accordance with the assumptions of rational choice theory.⁴⁸ Although there is some disagreement on this point, the behavioral scholarship on litigation presents more of a modification and supplement to the traditional economic approaches rather than a paradigm shift. Most of this research can be viewed as implicitly (if not explicitly) taking issue with either (1) the economic assumptions about how litigants determine their reservation prices, or (2) which settlement amounts will fail to garner agreement of the litigants even though the amounts meet the necessary condition of being within the bargaining zone. This literature does not, however, fundamentally challenge the basic conclusion of law-and-economics theorists that a bargaining zone lying between the litigants' reservation prices is a necessary but not sufficient condition for settlement to occur.⁴⁹

1. *Non-"Rational" Perspectives on Reservation Prices*

Scholars working in the field of "law and behavioral science" are critical of the standard assumption of law-and-economics scholarship that rational choice theory provides an adequately nuanced description of human behavior for the analysis of legal rules and institutions.⁵⁰ The scholarship on settlement arising from this mode of analysis most often attempts to demonstrate that a litigant's decision of whether to accept a settlement will sometimes depend on factors that would be considered irrelevant by devotees of rational choice theory. The implication of this work is that litigants might determine their reservation prices in a different way than the economic model predicts.

One modification to the economic model is based on evidence collected by social scientists that individuals' perceptions of the world tend to be biased in a self-serving or "egocentric" direction. People tend to view available evidence as being more supportive of their beliefs and positions than is objectively appropriate, to overestimate their own skills and abilities, and to be unrealistically optimistic about future life events. For example, studies have shown that fans of competing football teams believed that their team committed significantly fewer infractions than the fans of the opposing team perceived;⁵¹ that nearly all drivers believed they were better than average;⁵² that people

⁴⁸ See, e.g., Korobkin & Ulen, *supra* note 9, at 1055.

⁴⁹ See, e.g., Korobkin, *supra* note 12, at 1816-17.

⁵⁰ See, e.g., Korobkin & Ulen, *supra* note 9, at 1055.

⁵¹ Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 130-32 (1954).

⁵² See David M. DeJoy, *The Optimism Bias and Traffic Accident Risk Perception*, 21 ACCIDENT ANALYSIS & PREVENTION 333, 338-39 (1989); see also James R. Dalziel & R.F. Soames Job, *Motor Vehicle Accidents, Fatigue and Optimism Bias in Taxi Drivers*, 29 ACCIDENT ANALYSIS

engaged to be married believed their chances of getting divorced were close to zero (although most knew the base rate is approximately 50%);⁵³ that married couples' estimates of the percentage share of the household chores that they perform routinely exceeds 100% when added together;⁵⁴ and that people believed there was an above-average chance for positive events to occur to them, but a below-average chance they would experience negative events.⁵⁵

George Loewenstein and his coauthors demonstrated that litigants might suffer from an egocentric bias when evaluating the strength of their cases, thereby reducing the size of the bargaining zone created by the transaction costs of seeking adjudication and possibly eliminating the zone altogether.⁵⁶ In an experimental setting, the authors asked subjects to play the role of either plaintiff or defendant in a settlement negotiation and gave both subject groups identical information about the facts of a tort lawsuit.⁵⁷ According to the traditional economic model of settlement, with its rational choice theory roots, the subjects' role should be irrelevant to their analysis of the expected value of litigation.⁵⁸

Consistent with the hypothesis derived from research on the egocentric bias, however, the experimenters found that subjects in the role of plaintiff, on average, estimated that the litigation value of the case was much higher than did subjects playing the role of defendant.⁵⁹ Taking the analysis one step further, the experimenters found that the greater the difference in the parties' estimates of the value of litigation, the less likely they were to reach a negotiated settlement.⁶⁰ Implicitly, the experiment found that the egocentric bias resulted in plaintiffs having higher reservation prices relative to defendants than the economic model would predict, and that the more egocentric the

& PREVENTION. 489, 492 (1997) (indicating that surveyed taxi drivers were overly optimistic about their abilities to drive safely at high speeds, minimize injury to themselves in an unavoidable accident, swerve around sudden road hazards, and control a skidding car).

⁵³ See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993).

⁵⁴ Michael Ross & Fiore Sicoly, *Egocentric Biases in Availability and Attribution*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 179, 183-85 (Daniel Kahneman et al. eds., 1982).

⁵⁵ Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 807 (1980).

⁵⁶ George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL. STUD. 135, 138-39 (1993); see also Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1337 (1995) (arguing that disputants' self-serving biases reduce the likelihood of settlement).

⁵⁷ Loewenstein et al., *supra* note 56, at 145.

⁵⁸ See Priest & Klein, *supra* note 18, at 13-14.

⁵⁹ See Loewenstein et al., *supra* note 56, at 150-51.

⁶⁰ See *id.* at 152-53.

litigants' perceptions of the case, the less likely that a bargaining zone would exist.

Another modification to the traditional economic model of settlement is derived from the predictions of "prospect theory," the empirically based theory of decision making offered by Daniel Kahneman and Amos Tversky as a descriptive alternative to expected utility theory.⁶¹ Prospect theory predicts that when individuals view a choice between a certain prospect and a probabilistic (or risky) prospect as the choice between two "gains," they will demonstrate risk aversion—preferring the certain prospect to a risky prospect with the same expected value—just as rational choice theory predicts.⁶² But when individuals view such a choice as one between "losses," they will usually demonstrate risk-seeking behavior—preferring the risky prospect to the certain one with the same expected value—contrary to rational choice predictions.⁶³

Studies by Jeffrey Rachlinski,⁶⁴ Russell Korobkin and Chris Guthrie,⁶⁵ and Guthrie⁶⁶ rely on this theory in constructing theories of settlement. Rachlinski hypothesized that, in civil litigation, plaintiffs would likely view the settlement versus litigation decision as a choice between "gains," since they stood to receive money in either scenario, whereas defendants would likely view the same decision as a choice between "losses," since they stood to pay money in both scenarios.⁶⁷ In a series of experiments, he demonstrated that subjects assigned to the role of defendant in a hypothetical lawsuit tended to prefer litigation to settlement when the two options had similar expected values, whereas subjects assigned to the role of plaintiff, on average, preferred settlement.⁶⁸

In another experiment, Guthrie and I asked two groups of subjects to play the role of a plaintiff accident victim and to decide whether they would prefer a settlement offer of \$21,000 or a risky trial

⁶¹ For the first specification of prospect theory, see Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); see also Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 *J. BUS.* S251 (1986) (stating that "deviations of actual behavior from the normative model are too widespread to be ignored," and that individuals commonly violate basic rules of rational choice theory).

⁶² See Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 296, 297 (1992).

⁶³ See *id.*

⁶⁴ Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 *S. CAL. L. REV.* 113, 116 (1996).

⁶⁵ Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 *MICH. L. REV.* 107, 109 (1994).

⁶⁶ Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 *U. CHI. L. REV.* 163, 168–69 (2000).

⁶⁷ See Rachlinski, *supra* note 64, at 135.

⁶⁸ See *id.* at 135–40.

with an expected value of \$19,000.⁶⁹ Those subjects for whom settlement would leave the plaintiff better off financially than she was prior to the accident (because settlement would cover her accident-related expenses and resulted in a surplus) were more likely to prefer settlement than were those subjects for whom settlement would leave the plaintiff in a worse position than before the accident (because settlement would not cover her accident-related expenses).⁷⁰ From these results, we concluded that litigants often have multiple reference points from which they might evaluate the choice between settlement and litigation.⁷¹ Both groups of plaintiff subjects should view settlement as a certain “gain” and trial as a probabilistic gain if they use their current (post-accident) position as their reference point. But if subjects viewed the choice from the reference point of their pre-accident position, those playing the role of a plaintiff for whom \$21,000 would be insufficient to restore her to her pre-accident position might view settlement as a “loss” and trial as the only possibility of avoiding the loss. These subjects, therefore, would prefer the risky option of trial. This reference point would still cause the other group of subjects to view settlement as a “gain,” however, leading to risk-averse behavior.⁷²

Guthrie refined the Korobkin and Guthrie hypothesis regarding litigants’ risk preferences, relying on prospect theory’s more specific prediction that individuals’ usual risk profiles will be reversed when the risky prospect has a very low probability of occurring.⁷³ Prospect theory predicts that individuals are likely to be risk *seeking* when choosing between “gains” of the same expected value when the probability of the risky choice paying off is extremely small, and risk *averse* when choosing between “losses” when the probability of the risky prospect coming to pass is extremely small.⁷⁴ Guthrie designed hypothetical litigation scenarios that asked subjects to choose between a certain settlement and a risky trial with the same expected value in which the plaintiff was extremely unlikely to prevail, but the monetary verdict

⁶⁹ See Korobkin & Guthrie, *supra* note 65, at 130–33. The expected value represents the plaintiff’s recovery of either \$28,000 or \$10,000 at trial. *Id.* at 131.

⁷⁰ See *id.* at 132–33.

⁷¹ See *id.* at 133.

⁷² Subjects for the experiment were undergraduate students. *Id.* at 120. In a later study, Korobkin and Guthrie used practicing lawyers to play the role of the plaintiff’s attorney (rather than the plaintiff), and found that both experimental groups of attorney subjects preferred certain settlement over the option of risky litigation with a lower expected value. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 100 (1997). The authors hypothesized that lawyers’ training and experience might cause them to evaluate options more consistently with expected utility theory than do non-lawyers. *Id.* at 87–88.

⁷³ Guthrie, *supra* note 66, at 187.

⁷⁴ See Kahneman & Tversky, *supra* note 61, at 281, 285–86.

would be extremely large if she did prevail.⁷⁵ He found that, in this context, plaintiff subjects were risk seeking and defendant subjects risk averse.⁷⁶ From these results, Guthrie predicts that the bargaining zone in settlement negotiations will be more favorable to plaintiffs (i.e., relatively higher) in "nuisance suits"—those in which plaintiffs have a very low likelihood of success—than in "ordinary" litigation—those cases in which plaintiffs have a non-negligible chance of prevailing.⁷⁷

2. *Limitations on Settlements Within the Bargaining Zone*

Empirical research also suggests that settlement amounts between a plaintiff's and defendant's reservation price may not be viable points of settlement if one of the litigants believes that settling for that amount would violate norms of fairness.

Experimental economists have found that subjects playing the "ultimatum bargaining game" consistently behave in a way that contradicts the predictions of rational choice theory.⁷⁸ In the game, one party, the "proposer," is given a certain amount of money (the "stake") by the experimenter. The proposer must suggest a division of the stake between himself and the other party, the "responder." The responder must either accept the proposal, in which case the stake is divided in accordance with the proposal, or reject the proposal, in which case the stake is returned to the experimenter and neither party gets any money. Because money is the only item at stake in the game, the outcomes of accepting and rejecting the proposed division are clear and certain, and because all individuals presumably prefer some money to none, the responder's reservation price should be the lowest possible increment that the proposer can offer (for example, one cent or, if the rules of the game require offers to be in increments of twenty-five cents or \$1, one such increment). Many iterations of the game have been played in different settings, in different cultures, and with the rules varied slightly.⁷⁹ A consistent finding is that responders often do reject non-zero offers, choosing nothing over something.⁸⁰ The lower the offer, the more likely the responder is to reject it, and when the offer is less than 30% of the stake, a *majority* of re-

⁷⁵ Guthrie, *supra* note 66, at 188–90.

⁷⁶ *Id.* at 190.

⁷⁷ *Id.* at 191–95.

⁷⁸ For discussion of the expansive ultimatum game literature, see Alvin E. Roth, *Bargaining Experiments*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 253, 282–302 (John H. Kagel & Alvin E. Roth eds., 1995); Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, J. ECON. PERSP., Spring 1995, at 209; Werner Güth & Reinhard Tietz, *Ultimatum Bargaining Behavior: A Survey and Comparison of Experimental Results*, 11 J. ECON. PSYCHOL. 417 (1990).

⁷⁹ See sources cited *supra* note 78.

⁸⁰ See, e.g., Camerer & Thaler, *supra* note 78, at 211.

sponders often will reject the proposal.⁸¹ The standard explanation of such results is that responders will not accept an offer that they believe is “unfair,” even if accepting the offer would leave them better off.

It is a short analytic step to hypothesize that litigants will view litigation settlement proposals in a similar vein and thus will potentially reject offers that would make them better off than if they litigated their cases to a final judgment. Legal scholars challenging the economic model of settlement have thus suggested that a settlement proposal must be viewed as fair to be viable, even if it falls within the bargaining zone.⁸² The same outcome can be explained alternatively as a consequence of litigants taking their desire to be treated fairly into account when establishing their reservation price. Thus, due to fairness concerns, a settlement proposal that would leave a litigant financially better off than would litigation might nonetheless fall below his reservation price.

A slightly different prediction that follows from “equity theory”⁸³ is that litigants’ propensity to accept settlement proposals might depend on the extent to which they feel they are in a socially equitable relationship with their opponent. A settlement proposal that might be acceptable to a litigant who feels personally validated and fairly treated by her opponent, despite the legal dispute, may be unacceptable to a litigant who feels ignored, unheard, or invalidated by her opponent. In one experiment, for example, Guthrie and I found that subjects playing the role of plaintiff in a landlord-tenant dispute were more likely to accept a certain settlement proposal over a trial if the landlord had failed to fix a problem with the tenant’s apartment through no fault of his own than if the landlord had repeatedly and willfully ignored the tenant’s complaint.⁸⁴ This was the case even when the law provided that the landlord was strictly liable for the problems with the apartment, and thus the tenant’s legal rights did not depend on the reasons for the landlord’s behavior.⁸⁵ These results, like the ultimatum game findings, suggest the need for modification of the economic model because litigants might reject settlement

⁸¹ See, e.g., Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, J. ECON. PERSP., Summer 2000, at 159, 161.

⁸² Cf. Korobkin, *supra* note 12, at 1816–31 (noting that failure to agree on how to allocate fairly the cooperative surplus can cause negotiators, including litigants, to fail to reach an agreement that would be superior to both parties’ reservation prices).

⁸³ Cf. ELAINE WALSTER ET AL., *EQUITY: THEORY AND RESEARCH* 17–18 (1978) (claiming that individuals’ comparisons between themselves and others are an important component of emotional well-being).

⁸⁴ Korobkin & Guthrie, *supra* note 65, at 144–47.

⁸⁵ See *id.* at 163. The willingness of “tenants” to accept the settlement proposal increased if they were told that the “bad” landlord had apologized for his negligence. The increase, however, was not enough to match the acceptance level of “tenants” who were suing a “good” landlord. *Id.* at 147–50.

offers that fall within the bargaining zone if issues concerning their relationship with an opponent make entering into an agreement with that person unattractive.

C. The "Standard Model" and "Settlement Levers"

The law-and-economics approach to understanding settlement and the more recent law-and-behavioral-science research rely on different assumptions about behavior. The strictly economic approach assumes that litigants will act in accordance with a relatively severe interpretation of rational choice theory, whereas law-and-behavioral-science scholars take issue with these strict predictions.⁸⁶ In seeking to provide a nuanced understanding of settlement behavior, however, these approaches are complementary, with the behavioral science insights refining rather than contradicting the law-and-economics approach. The insights from the two approaches taken together thus form what I refer to as the "standard model" of settlement bargaining.

The standard model, as described above, cannot render precise predictions concerning settlement amounts in particular negotiations. However, the model does identify a range of variables that one can expect to affect the outcome of settlement negotiations—that is, the likelihood that the negotiators will reach a settlement and, if they do, in what dollar-amount range. I will refer to these variables as "settlement levers." The reservation prices of both parties are obvious settlement levers: a change in either negotiator's reservation price will, depending on direction, make settlement either more or less likely, and will expand or shrink the range of possible settlement values. Each negotiator's reservation price is affected by the negotiator's estimate of the expected value of litigation, the relative transaction costs of settlement and adjudication, the negotiator's risk preference, and the negotiator's discount rate. These variables, then, can also be understood as settlement levers.

The standard model recognizes that reservation prices, while important, do not tell the full story of settlement negotiation outcomes. Whether or not settlement occurs, and at what price, depends also on the negotiators' estimates of the opposing negotiator's reservation price, their risk preferences for rejecting desirable settlement proposals in an effort to obtain even-more-desirable settlements, their patience in bargaining and perception of the opposing negotiator's patience, and their perceptions of what agreement or agreements

⁸⁶ See, e.g., Korobkin & Ulen, *supra* note 9, at 1055; Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 296 (2001) (reviewing BEHAVIORAL LAW AND ECONOMICS, *supra* note 9) ("The behavioralists seek to continue the basic project of law and economics by providing an improved model of choice.").

would be fair under the circumstances. These variables, too, are settlement levers.

Despite its interdisciplinary content and the range of variables that it recognizes as important, the legal-academic literature on settlement that constructs the standard model does not identify the negotiators' aspirations as settlement levers. In fact, the standard model has virtually nothing at all to say about aspirations. The concept of aspirations is almost, if not entirely, absent from the relevant literature. The remaining parts of this Article address this notable omission.

II

ASPIRATIONS IN NEGOTIATION

It is common conventional wisdom in texts on negotiation, some of which are authored by legal scholars, that negotiator aspirations affect bargaining outcomes.⁸⁷ Although the concept is noticeably absent from the legal-academic literature on settlement specifically, negotiation experts writing in both scholarly and popular genres often claim that aspirations are, in fact, one of the critical factors in bargaining. In *Bargaining for Advantage: Negotiation Strategies for Reasonable People*, G. Richard Shell (a Wharton Business School professor but a lawyer as well) argues that aspirations are more important than even reservation prices, the fundamental variable in the standard model of settlement.⁸⁸ Popular negotiation trainer Chester Karrass adopts a similar point of view, claiming that "[o]f all the journeys into negotiation, [the study of aspirations] is perhaps the finest trip of all."⁸⁹

A claim is not true simply because it was made by an expert, of course. However, while one might quibble with Shell's and Karrass's suggestions that aspirations are the most important determinant of bargaining outcomes, there are sufficient empirical data to strongly suggest that, at a minimum, aspirations play a role in bargaining. These data are reviewed in Subpart A, below.

⁸⁷ See generally Dirk Van Poucke & Marc Buelens, *Predicting the Outcome of a Two-Party Price Negotiation: Contribution of Reservation Price, Aspiration Price and Opening Offer*, 23 J. ECON. PSYCHOL. 67, 68 (2002) (citing social science articles that claim "higher aspiration prices . . . lead to better payoffs"). For examples of legal scholars who make this claim, see, for example, CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 171-72 (2d ed. 1993); DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 54 (1989); MNOOKIN ET AL., *supra* note 12, at 34; MELISSA L. NELKEN, *UNDERSTANDING NEGOTIATION* 62-63 (2001); SHELL, *supra* note 10, at 22-37; WILLIAM URY, *GETTING PAST NO* 25 (rev. ed. 1993); WILLIAMS, *supra* note 31, at 48-49; Jennifer Gerarda Brown, *The Role of Hope in Negotiation*, 44 UCLA L. REV. 1661, 1674-75 (1997). The number of non-legal negotiation scholars who advance this claim is too large to catalog, but some examples include: CHESTER L. KARRASS, *THE NEGOTIATING GAME* 43 (rev. ed. 1992); LAX & SEBENIUS, *supra* note 10, at 130; DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 25-26 (1981).

⁸⁸ See SHELL, *supra* note 10, at 27-28.

⁸⁹ KARRASS, *supra* note 87, at 43.

Less satisfying, however, are negotiation scholars' hypotheses concerning the mechanism or mechanisms by which aspirations affect negotiation results (which are often inscrutable or at minimum can be identified only via multiple inferential steps), and the empirical evidence that supports these hypotheses (which is completely non-existent). Subpart B reviews some of the explanations of the role of aspirations offered in the negotiation literature.

Part III then proposes a theory as to how aspirations could affect settlement outcomes within the construct of the standard theory and presents preliminary tests that demonstrate the theory's plausibility.

A. Empirical Evidence of the Importance of Aspirations

There is a substantial body of empirical research across a variety of settings on the effect of goals on an individual's task performance.⁹⁰ Social scientists have found a strong positive correlation between the difficulty of goals and an individual's performance. That is, when people are given (or choose their own) goals for the performance of tasks, they tend to perform better if the goals are difficult to achieve than if they are easy to achieve.⁹¹ The reasons usually offered to explain these results are that difficult goals cause individuals to direct more attention to a task, to expend more effort, and to do so with more persistence.⁹² In other words, goals motivate action.⁹³

A related finding of note is that individuals usually perform better when they have a specific, difficult goal than when they are told to "do their best."⁹⁴ Presumably, these findings reflect that the vague "do-your-best" goal can be interpreted by the individual to create a range of performance outcomes that indicate satisfactory performance relative to the goal.⁹⁵

Most of the copious amounts of empirical evidence on the effects of goals on performance, however, are collected in noncompetitive settings. For example, in some of the most common types of experi-

⁹⁰ An impressive amount of these data are collected, synthesized, and analyzed in EDWIN A. LOCKE & GARY P. LATHAM, *A THEORY OF GOAL SETTING AND TASK PERFORMANCE* (1990).

⁹¹ *Id.* at 27-29; see also Heath et al., *supra* note 3, at 81 (concluding from a review of the goal-setting literature that "studies that have manipulated goal difficulty have found that performance increases as the difficulty of the goal increases"); Gary P. Latham & Edwin A. Locke, *Self-Regulation Through Goal Setting*, 50 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 212, 214 (1991) (concluding that four hundred studies find a linear relationship between goal difficulty and performance).

⁹² LOCKE & LATHAM, *supra* note 90, at 86-108.

⁹³ See Latham & Locke, *supra* note 91, at 213.

⁹⁴ See LOCKE & LATHAM, *supra* note 90, at 29-31; Heath et al., *supra* note 3, at 81; Latham & Locke, *supra* note 91, at 215.

⁹⁵ Cf. Heath et al., *supra* note 3, at 99 (hypothesizing that "do-your-best" goals are interpreted by subjects as providing an easier target level than the difficult, specific goals that experimenters usually compare to "do-your-best" instructions).

ments, subjects are asked to list a series of objects, complete a series of math problems, do a repetitive clerical task for a set period of time, perform a physical task such as doing sit-ups, and so forth.⁹⁶ In these situations, individuals might lack not only motivation, but also any idea of what level of performance is minimally acceptable and what level is possible. It stands to reason that specific goals will give subjects a basis for evaluating their performance that otherwise might be completely absent, and that a nonspecific "do-your-best" goal will not offer much more guidance than no goal at all. And because performance outcomes, within a reasonable range, are largely within the control of the subject, it also stands to reason that the increased effort that a specific goal might inspire would likely have a significant impact on results.

It is not obvious, however, that these findings would translate to the context of bargaining generally or settlement behavior specifically. First, according to the standard model of settlement, litigants are presumed to know their own reservation price and to estimate their opponent's reservation price.⁹⁷ The litigant's own reservation price represents the minimum acceptable negotiating performance, while the estimation of the opponent's reservation price identifies the maximum possible outcome. Thus, having a specific aspiration might be less necessary as a guidepost in negotiation than in other tasks because there are at least two other visible reference points. Second, the negotiation context is competitive rather than noncompetitive. The opposing party actively tries to prevent the litigant from achieving a high level of performance.⁹⁸ Thus, even if specific aspirations lead to increased effort on the part of the negotiator who wishes to attain the target settlement, it is not obvious that the effort will translate into

⁹⁶ See, e.g., LOCKE & LATHAM, *supra* note 90, at 42 tbl.2-6.

⁹⁷ See RAIFFA, *supra* note 10, at 46.

⁹⁸ Modern negotiation theory stresses that bargaining is usually not a zero-sum game, in which a benefit to one negotiator is a loss to the other in absolute terms. Rather, bargaining has integrative potential that, when exploited, can make both parties better off. See, e.g., ROGER FISHER ET AL., *GETTING TO YES* 71 (2d ed. 1991) ("[T]here almost always exists the possibility of joint gain."). Although this is certainly true, in most negotiation situations in which parties can identify mutually beneficial tradeoffs, at the end of the day these gains from trade must be divided among the negotiators. It is a relatively rare situation in which all the issues or goods that one negotiator considers "good," the other considers "bad," thus rendering negotiation a completely noncompetitive activity. For example, consider the nursery rhyme in which Jack Spratt can eat no fat and his wife can eat no lean. In that case, the negotiation between Mr. and Mrs. Spratt is noncompetitive, because neither has any interest in what the other wants. In a more typical case, Jack would like lean better than fat, and Mrs. Spratt would like fat better than lean, but both would still place some value on both items. The parties can mutually benefit by allocating the lean to Jack and the fat to his wife rather than the reverse, but both would still prefer—and presumably try to capture during bargaining—both the fat and the lean.

better performance, measured by a more desirable settlement figure.⁹⁹

Although there are no experimental studies demonstrating that litigant aspirations affect settlement negotiation outcomes, some studies claim that aspiration levels can have an effect on bargaining outcomes generally. It is important to examine the aspirations and bargaining literature cautiously, however. Experimenters sometimes claim to be studying parties' "aspirations" or "goals" when their methodology reveals instead that the study concerns the effects of reservation prices—and not ideal targets—on bargaining outcomes.¹⁰⁰ For example, in some studies the experimenters assign bargaining goals and tell subjects that they may not accept any offer inferior to their goal.¹⁰¹ Thus, although the studies claim to measure the effect of negotiator "goals" or "aspirations," these terms are effectively defined as the subject's *reservation price* for reaching a negotiated agreement. By then demonstrating that subjects with higher "aspirations" achieve

⁹⁹ See Vandra L. Huber & Margaret A. Neale, *Effects of Self- and Competitor Goals on Performance in an Interdependent Bargaining Task*, 72 J. APPLIED PSYCHOL. 197, 197 (1987) (questioning whether research on the effect of goals in independent tasks is directly applicable to the interdependent task of bargaining).

¹⁰⁰ This is not to say that the authors of such articles are bad scholars or use sloppy empirical methods. Rather, this confusion demonstrates that the terms "aspirations" and "goals" are somewhat vague and subject to different meanings. Cf. Richard L. Oliver et al., *Outcome Satisfaction in Negotiation: A Test of Expectancy Disconfirmation*, 60 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 252, 257-58 (1994) (discussing the different meanings attributed to the word "aspirations" in the negotiation literature). As explained in the Introduction, I use the term "aspiration" to mean a party's ideal goal, and I assume that aspiration levels are subject to negotiator choice, at least within reason. Logic does suggest that aspiration levels must bear some loose relation to the objective strength of the negotiator's position, since it would be meaningless to say, for example, that a consumer aspires to purchase a new car for \$1. Cf. Blount et al., *supra* note 13, at 2 (defining an aspiration as the best outcome a negotiator can reasonably expect); Sally Blount White & Margaret A. Neale, *The Role of Negotiator Aspirations and Settlement Expectancies in Bargaining Outcomes*, 57 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 303, 304-05 (1994) (same); Van Poucke & Buelens, *supra* note 87, at 68 ("A negotiation target or *aspiration price* is the best result, the most desired outcome, with a non-neglectable probability of being accepted by the other party.").

¹⁰¹ See, e.g., Vandra L. Huber & Margaret A. Neale, *Effects of Cognitive Heuristics and Goals on Negotiator Performance and Subsequent Goal Setting*, 38 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 342, 349 (1986) (subjects instructed not to accept any deal with total profits less than a certain amount); Huber & Neale, *supra* note 99, at 200 (subjects instructed that it was against company policy to accept any transaction that did not meet the assigned goal); Melvin J. Kimmel et al., *Effects of Trust, Aspiration, and Gender on Negotiation Tactics*, 38 J. PERSONALITY & SOC. PSYCHOL. 9, 11 (1980) (subjects assigned low or high "aspiration" limits, below which they were not allowed to negotiate an agreement); Margaret A. Neale & Max H. Bazerman, *The Effect of Externally Set Goals on Reaching Integrative Agreements in Competitive Markets*, 6 J. OCCUPATIONAL BEHAV. 19, 25 (1985) (subjects instructed not to accept any deal with total profits of less than a certain amount); Gregory B. Northcraft et al., *Joint Effects of Assigned Goals and Training on Negotiator Performance*, 7 HUM. PERFORMANCE 257, 264 (1994) (subjects instructed that it was "against company policy" to accept any agreement less than the assigned goal).

better negotiated outcomes than subjects with lower "aspirations" (holding constant a goal of the opponent sufficient to create a bargaining zone when paired with either the high- or low-aspiration subject), the studies in fact substantiate that subjects with higher *reservation prices* achieve better outcomes than subjects with lower *reservation prices*.¹⁰²

This result is consistent with the standard model of settlement, and, more importantly, does not suggest a need to modify the standard model to account for the finding. Because no party will accept a deal for less than her reservation price, the standard model implicitly suggests both that negotiators will "aspire" to achieve at least their reservation price, and that reservation prices in turn affect outcomes, with subjects who have higher reservation prices achieving better outcomes than subjects with lower reservation prices, assuming there is a bargaining zone available to both subject groups.¹⁰³ The bargaining zone for high-reservation price subjects is smaller than the bargaining zone for low-reservation price subjects, and the portion of the bargaining zone that is available to the latter group but not to the former is the portion that is relatively less desirable for the negotiator.

Other studies demonstrate, however, that negotiation goals that exceed a party's reservation price can also affect bargaining outcomes. Sidney Siegel and Lawrence Fouraker assigned subjects either a high aspiration of obtaining a \$6.10 profit or a low aspiration of obtaining a \$2.10 profit in a negotiation.¹⁰⁴ Subjects were told that they could keep any amount of profit they were able to negotiate, thus implicitly suggesting that subjects had a reservation price of \$0, regardless of their aspiration level.¹⁰⁵ The experimenters found that high-aspiration subjects negotiated more-profitable agreements than did low-aspiration subjects,¹⁰⁶ and they concluded from this result that aspiration levels are an important determinant of bargaining payoffs.¹⁰⁷

¹⁰² See, e.g., Huber & Neale, *supra* note 101, at 358–59 (finding that negotiators constrained by difficult profit goals outperform negotiators under weaker constraints); Huber & Neale, *supra* note 99, at 200 (finding that average profits of negotiators assigned difficult goals were higher than those of negotiators assigned easy or moderate goals); Kimmel et al., *supra* note 101, at 14 (finding that negotiators with higher "aspirations" made more valuable initial offers and had a higher level of information exchange compared with low-"aspiration" negotiators); Neale & Bazerman, *supra* note 101, at 27 (finding a direct, positive relationship between goal difficulty and performance, as measured by average profit); Northcraft et al., *supra* note 101, at 266–67 (finding subjects with specific, difficult goals achieved higher profit per agreement).

¹⁰³ See, e.g., Korobkin, *supra* note 12, at 1793–94.

¹⁰⁴ See SIDNEY SIEGEL & LAWRENCE E. FOURAKER, BARGAINING AND GROUP DECISION MAKING 64 (1960).

¹⁰⁵ See *id.*

¹⁰⁶ *Id.* at 67, 68 tbl.4.5.

¹⁰⁷ *Id.* at 69–70.

In addition to keeping any profit that they negotiated, Siegel and Fouraker's subjects were told that they would have the opportunity to earn additional profit in a subsequent negotiation if and only if they achieved their aspiration level.¹⁰⁸ This instruction introduces a discontinuous external benefit at the aspiration point. That is, a bargain for a \$6.00 profit by a subject in the high aspiration group has a value merely ten cents greater than a \$5.90 profit, but a \$6.10 profit has an effective value that is more than ten cents greater than a \$6.00 profit. Thus there is a spiked increase in the financial value that accompanies an agreement at the aspiration level relative to an agreement for just less than the aspiration level. Siegel and Fouraker hypothesized (but did not test the hypothesis) that this discontinuity might have motivated subjects to reach the aspiration levels,¹⁰⁹ thus raising the question of whether aspiration levels that did not provide such a discontinuous profit motive would have had the same effect.

Recent studies appear to resolve this question in favor of the conclusion that aspirations can affect bargaining outcomes even if achieving them does not result in a discontinuous external benefit. Sally Blount White and Margaret Neale provided experimental subjects with both reservation prices and (more optimistic) aspirations, and instructed them to negotiate the hypothetical sale of a house.¹¹⁰ "Buyers" were told their reservation price was \$235,000, and "Sellers" were told their reservation price was \$225,000, thus establishing a \$10,000 bargaining zone.¹¹¹ Some of the Buyers were told their aspiration price was \$220,000 (low aspiration group), and others were told their aspiration price was \$200,000 (high aspiration group).¹¹² Some of the Sellers were told their aspiration price was \$240,000 (low aspiration group), others \$260,000 (high aspiration group).¹¹³ Thus, when negotiators were randomly assigned opponents, four types of pairings were possible: (1) low-aspiration Buyer vs. high-aspiration Seller; (2) low-aspiration Seller vs. high-aspiration Buyer; (3) low-aspiration Seller vs. low-aspiration Buyer; and (4) high-aspiration Buyer vs. high-aspiration Seller.

For type #1 pairings, the average sale price negotiated was \$232,664.¹¹⁴ For type #2 pairings, the average sale price was \$227,921.¹¹⁵ For type #3 and type #4 pairings, the average sales prices

¹⁰⁸ *Id.* at 65.

¹⁰⁹ *Id.* at 66.

¹¹⁰ Blount White & Neale, *supra* note 100, at 309.

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 311 tbl.1.

¹¹⁵ *Id.*

fell between the other two averages.¹¹⁶ Thus, the results suggest that high aspirations are correlated with better bargaining outcomes.

Other studies provide support for Blount White and Neale's findings. In a companion study using a similar methodology, Blount White and her coauthors found that when negotiators were provided reservation prices and aspiration levels, aspiration levels had an impact on outcomes that fell just short of statistical significance.¹¹⁷ This suggests that the effect of aspirations on outcomes is real, but that it can be overshadowed when the negotiator is exposed to numerous competing stimuli.¹¹⁸ In a later study, Jeffrey Polzer and Neale found that experimental subjects given a "do-your-best" instruction in a negotiation exercise achieved better results than did subjects given a specific goal that at first appeared difficult to achieve but was actually quite easy to achieve.¹¹⁹ This suggests that aspirations that are in fact modest lead to relatively undesirable outcomes and, by inference, that aggressive aspirations lead to more-desirable outcomes. Recently, Adam Galinsky and coauthors provided subjects with a reservation price and a much higher target price and told them to either (1) focus their attention on their target price, or (2) focus on their reservation price.¹²⁰ In subsequent negotiations, subjects given the former instruction achieved better outcomes than did subjects given the latter instruction.¹²¹ Although technically all subjects in these experiments were given identical target prices, the instructions can be understood as advising half to aspire to those high targets and the other half to aspire to the much lower reservation price.

Although the experimental results described above strongly suggest that aspirations play a role in determining bargaining outcomes, they provide no insight into the mechanism or mechanisms by which aspiration levels might have this effect. In other words, the observation that high aspirations appear to be associated with better outcomes does not explain how aspirations affect the judgment or behavior of negotiators in ways that lead to such results.

¹¹⁶ *Id.*

¹¹⁷ See Sally Blount White et al., *Alternative Models of Price Behavior in Dyadic Negotiations: Market Prices, Reservation Prices, and Negotiator Aspirations*, 57 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 430, 437-38 (1994).

¹¹⁸ See *id.* at 438-39 ("When negotiators are faced with multiple sources of information regarding market prices, reservation prices, and aspirations, the negotiator appears to simplify and allow one reference point to dominate.").

¹¹⁹ Jeffrey T. Polzer & Margaret A. Neale, *Constraints or Catalysts? Reexamining Goal Setting Within the Context of Negotiation*, 8 HUM. PERFORMANCE 3, 14-16 (1995).

¹²⁰ Adam D. Galinsky et al., *Disconnecting Negotiated Outcomes and Evaluations: The Role of Negotiator Focus* (Working Paper, 2002).

¹²¹ *Id.* at 11-22.

B. Explanations of the Power of Aspirations

Negotiation scholars within the legal community routinely advise their readers that negotiators with high aspirations tend to obtain more-beneficial bargaining outcomes.¹²² Although the implication that aspirations drive bargaining is quite clear, explanations as to why this would be the case are usually less so—if they are attempted at all.

When negotiation scholars do attempt to explain why aspirations matter, the most familiar claim is that negotiators with high aspirations achieve desirable bargaining outcomes because they ask for more at the bargaining table. Consider, for example, the advice provided by two leading scholars of legal negotiation. Robert Mnookin and coauthors counsel negotiators about the role of aspirations as follows:

It's not enough simply to think about your reservation value—the least you would accept. In your preparation, it is critical that you aspire to an outcome that serves your interests much better than your best alternative. You generally won't get what you don't ask for. Much research has shown that those negotiators with high aspirations on average do better.¹²³

Charles Craver similarly counsels that “people who enter negotiations with high aspiration levels generally obtain more-beneficial results than those who do not begin with elevated expectations. It thus behooves bargainers to commence their interactions with high demands or low offers.”¹²⁴

Craver clearly advocates a particular bargaining strategy—making high (or extreme) demands. By observing that “[y]ou generally won't get what you don't ask for,”¹²⁵ Mnookin and his coauthors appear to be doing the same. Although this might be sound advice for bargainers,¹²⁶ following this strategy does not require the negotiator to have any particular aspiration level. Negotiators with low aspirations can make extreme demands or offers just as easily as can negotiators with high aspirations.

¹²² See, e.g., sources cited *supra* note 87.

¹²³ MNOOKIN ET AL., *supra* note 12, at 34. For similar claims, see FISHER ET AL., *supra* note 98, at 179 (“The best rule of thumb is to be optimistic. . . . The more you try for, the more you are likely to get. Studies of negotiation consistently show a strong correlation between aspiration and result.”); URY, *supra* note 87, at 25 (advising that “low aspirations tend to be self-fulfilling” because “[w]hat you don't ask for, the other side is unlikely to give you”).

¹²⁴ CRAVER, *supra* note 87, at 171–72.

¹²⁵ MNOOKIN ET AL., *supra* note 12, at 34.

¹²⁶ The claim that extreme initial demands lead to bargaining success is commonly made. See, e.g., KARRASS, *supra* note 87, at 20; Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 11–13 (1994) (presenting experimental results showing an increased likelihood of settlement).

Perhaps Mnookin and his coauthors, and Craver link aspirations with levels of demands because they believe that negotiators with high aspirations will naturally make higher demands than negotiators with low aspirations—that is, that there is a causal relationship between aspirations and demands. This is a sensible hypothesis, but even if true it seems unduly complicated. Rather than claiming that *aspirations* affect bargaining outcomes (and perhaps advising negotiators to establish high aspirations), why not instead claim that *demands* affect bargaining outcomes (and perhaps advise negotiators to make high demands)? Unless it is true that negotiators cannot adjust their demands without first adjusting their aspirations—which common experience suggests is not the case—invoking aspirations seems to be an unnecessary analytical step for understanding the determinants of bargaining outcomes.

The claim that demands affect bargaining outcomes—for which there is also empirical support¹²⁷—is easily accommodated within the standard model of settlement under either of two distinct lines of reasoning. Settlements are possible at any point between the plaintiff's and defendant's reservation prices because those settlements would be mutually beneficial to both parties. If a litigant asks for his own reservation price, he will never achieve a better result than that. Because the opponent never knows the litigant's reservation price with certainty, however, if the litigant asks for what he believes to be the opponent's reservation price, the opponent might agree to that amount or close to it, fearing that pressing for an amount more desirable for him might lead to an impasse. Negotiators are well advised to ask for what they estimate to be the opponent's reservation price, rather than asking for their own reservation price.¹²⁸ Mnookin and his coauthors' observation that "[y]ou generally won't get what you don't ask for"¹²⁹ suggests that this reasoning underlies their advice.

In addition, a high demand or a low offer can signal that the litigant making the offer believes he has a strong case. Because the opponent's reservation price depends in large part on the litigant's relative legal entitlements, such a signal can cause the opponent to lower her reservation price if she is the plaintiff or raise her reservation price if she is the defendant. Craver's advice is apparently based on this observation, as he notes that "[b]argainers who can rationally defend their seemingly excessive opening demands or apparently par-

¹²⁷ See, e.g., Galinsky et al., *supra* note 120, at 18 (finding negotiation subjects' first offers are correlated with final price).

¹²⁸ See LAX & SEBENIUS, *supra* note 10, at 132–34; RAIFFA, *supra* note 10, at 46.

¹²⁹ MNOOKIN ET AL., *supra* note 12, at 34.

simonious offers may be able to induce careless adversaries to reconsider their own preliminary assessments."¹³⁰

Thus, it appears that if aspirations affect settlement only because they are a determinant of initial demands (though not a necessary determinant), then there would be no reason to modify the standard model of settlement to take account of the role of aspirations. It would be sufficient for the model to take account of the role of initial offers.

Unlike Mnookin and his coauthors and Craver, Shell provides an explanation as to why aspirations affect bargaining outcomes in which aspirations themselves are necessary variables.¹³¹ He proposes the following: if you are a seller and are focused on your reservation price, you will relax once you receive an offer above that amount, and the buyer might recognize this relaxation and not increase the offer.¹³² If you have a higher (but not unrealistic) goal for yourself, however, you will not relax as soon, thus causing the buyer to increase the offer.¹³³

Shell's argument is fundamentally dissimilar to the one advanced by Mnookin and his coauthors and Craver, because he believes that high aspirations themselves are critical determinants of bargaining outcomes rather than a behavior that can be exhibited by any negotiator, regardless of her aspiration level.¹³⁴ Shell seems to suggest that while a negotiator with low aspirations can issue a high demand, the gap between what she demands and what she would accept (that is, her reservation price) will become transparent to the opponent during the bargaining process. If the negotiator has a high aspiration, on the other hand, the gap between demand and reservation price will not be apparent. The aspiration can thus effectively conceal the negotiator's reservation price and help the negotiator to convince her opponent that her reservation price is higher than it actually is. In other words, Shell hypothesizes that aspiration levels can affect bargaining outcomes because a negotiator's aspiration can cause a signal to be sent to the opponent concerning the negotiator's reservation price.

Although Shell's theory is provocative, it is ultimately unsatisfying because it does not provide an explicit account of why the reservation

¹³⁰ CRAVER, *supra* note 87, at 172. Such a response on the part of the offeree might be fully rational rather than careless. The offeror might, of course, have private information about the quality of the parties' respective cases. This possibility would cause a rational offeree to estimate the likelihood that an extreme offer is based on such private information (as well as the likelihood that an extreme offer is merely a bluff) and alter his reservation price accordingly. Cf. Korobkin & Guthrie, *supra* note 72, at 105 n.102 (discussing the informational value of an opening offer in the settlement context).

¹³¹ See SHELL, *supra* note 10, at 27-37.

¹³² See *id.* at 28.

¹³³ See *id.* at 28-29.

¹³⁴ See *id.* at 32-33 (stating that "[o]ptimistic goals are effective only if they are feasible; that is, only if [the negotiator] believe[s] in them").

price of a negotiator with low aspirations would be more transparent than the reservation price of a negotiator with high aspirations. Holding reservation prices constant, why would negotiators with high aspirations be able to convince their opponents to concede more ground than would negotiators with modest aspirations who simply follow the rational strategy of asking for far more than their reservation price? Shell's account tells us forcefully that aspirations—not just demands—matter, but it falls short of providing a persuasive account of why this would be so.

Jennifer Brown has come closest to providing a complete theory of why aspiration levels might have a direct, causal impact on bargaining outcomes. Brown hypothesizes that negotiators derive more utility from each dollar received up to their aspiration level than from each dollar received beyond their aspiration level.¹³⁵ The hypothesis that negotiators are more driven to achieve their level of aspiration than to go beyond it relies implicitly on prospect theory's prediction that individuals are "loss averse," meaning that losses from reference points have greater utility consequences than do equivalent-sized gains.¹³⁶ If individuals value losses more than equivalent gains, as prospect theory suggests, perhaps individuals care much more about "losing" a dollar relative to their aspiration than "gaining" a dollar. This, in turn, might cause negotiators to fight harder to reach their aspiration than to exceed it.¹³⁷

The intellectual roots of Brown's hypothesis can be traced to an argument advanced by Siegel and Fouraker in 1960, nearly two decades before prospect theory was formally proposed by Kahneman and Tversky.¹³⁸ According to Siegel and Fouraker, the level of aspiration of any individual negotiator "may be conceived as a position on the individual's utility function."¹³⁹ Negotiators evaluate settlement proposals from the reference point of their utility function.¹⁴⁰ Deviations down from their aspiration level are perceived as losses, entailing feelings of dissatisfaction, while deviations above their aspiration level are perceived as gains, giving the negotiator a psychological feeling of satisfaction.¹⁴¹ The goal point that has the largest difference in utility between it and the next-lower goal is the negotiator's level of aspira-

¹³⁵ See Brown, *supra* note 87, at 1669–73.

¹³⁶ See Heath et al., *supra* note 3, at 82 ("Outcomes that are encoded as losses are more painful than similar sized gains are pleasurable . . ."); Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in *BARRIERS TO CONFLICT RESOLUTION* 44, 54 (Kenneth J. Arrow et al. eds., 1995) (discussing "loss aversion," which posits that "losses generally loom larger than the corresponding gains").

¹³⁷ See Brown, *supra* note 87, at 1671.

¹³⁸ See SIEGEL & FOURAKER, *supra* note 104, at 61–70.

¹³⁹ *Id.* at 61–62.

¹⁴⁰ See *id.*

¹⁴¹ *Id.* at 62.

tion.¹⁴² The large difference in utility between these two points encourages the negotiator to strive to reach the higher level and avoid the disappointment of failure. Once the aspiration level is achieved, the negotiator loses enthusiasm to continue further because the value of any subsequent level is only marginally better than the level the negotiator has reached.¹⁴³

Siegel and Fouraker, as well as Brown, specifically predict that aspiration levels will affect whether negotiators perceive certain potential settlements as gains or losses.¹⁴⁴ This in itself is an important hypothesis, but the authors' work provides an even more valuable general hypothesis: aspirations might serve as reference points, against which negotiators might compare possible settlements on a range of dimensions.¹⁴⁵ Differences in aspirations might therefore lead to differences in negotiators' subjective evaluation of settlement proposals,¹⁴⁶ and thus lead to different bargaining behavior.

Part III builds on this insight to create a detailed theory of how aspirations can affect settlement outcomes in multiple ways by serving as reference points for negotiator judgments and choices, and how the standard model of settlement bargaining can be modified to take account of aspirations.

III

THE REFERENCE POINT THEORY OF ASPIRATIONS

From one perspective, the omission of the concept of aspirations from the standard model of settlement is understandable. The law-and-economics, "rational choice" perspective on settlement behavior implicitly suggests that aspirations—at least to the extent that they are independent from identified settlement levers—should have no effect on bargaining outcomes. A "rational" litigant determines his reservation price by reference to his options should settlement negotiations fail. Thus, he must take into account the expected value, transaction costs, and risks associated with adjudication.¹⁴⁷ Regardless of his aspiration, the litigant should seek the most beneficial settlement agree-

¹⁴² *Id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.*; Brown, *supra* note 87, at 1670–71.

¹⁴⁵ *Cf.* Heath et al., *supra* note 3, at 79 ("Our claim is that goals serve as reference points and systematically alter the value of outcomes . . .").

¹⁴⁶ *Cf.* Terry L. Boles & David M. Messick, *A Reverse Outcome Bias: The Influence of Multiple Reference Points on the Evaluation of Outcomes and Decisions*, 61 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 262, 262 (1995) ("It has been known at least since the time of Shakespeare that the evaluation of a stimulus depends not only on the characteristics of the stimulus itself but also on the referent or standard that is brought to bear in the evaluation process.").

¹⁴⁷ *See, e.g.*, Korobkin, *supra* note 12, at 1795–96 (describing the relationship between a litigant's reservation price and the prospects, costs, and risks of adjudication).

ment possible but ultimately favor any final offer that is superior to his reservation price. During bargaining he might decline a settlement proposal that is superior to his reservation price, but only if his estimates of his opponent's reservation price or of the parties' relative costs of delay suggest that the potential benefits of doing so outweigh the risks.

The law-and-behavioral-science literature that modifies the law-and-economics approach suggests that litigants' analyses might depend on their role,¹⁴⁸ that their risk preferences might be context dependent,¹⁴⁹ and that they might value fair treatment in addition to the monetary benefits of settlement.¹⁵⁰ None of these modifications, however, undermines the law-and-economics intuition that aspirations have no relevance to the settlement dynamic.

The persistence of the conventional negotiation wisdom that aspirations do affect outcomes, along with the empirical support for that proposition, however, suggest that legal scholars should evaluate whether the descriptive accuracy of the standard model of settlement can be improved by modifying it to take account of the role of aspirations. Modifying the standard model to take aspirations into account, however, requires a theory of the mechanisms by which aspirations operate. This Part presents a general theory of how aspirations affect the outcome of settlement negotiations (the "reference point theory of aspirations"), offers a series of specific hypotheses that follow from the theory, and then presents experimental evidence that supports the hypotheses.

The reference point theory of aspirations has two components: (1) aspirations affect settlement outcomes indirectly by affecting variables identified by the standard model as settlement levers; (2) aspirations affect settlement levers by acting as cognitive reference points that "anchor" negotiator judgments and "frame" negotiator choices.

A specific (but non-exclusive) list of hypotheses that follow from the theory includes the following:

1. A litigant's aspiration level will affect his determination of his reservation price when the value of adjudication is uncertain.
2. A litigant's aspiration level will affect the likelihood that he will perceive a particular settlement offer to be fair.
3. A litigant's aspiration level will affect his patience at the bargaining table.
4. An opponent's aspiration level, if known to the litigant, will affect the litigant's patience at the bargaining table.

¹⁴⁸ See, e.g., *supra* notes 59–60 and accompanying text.

¹⁴⁹ See, e.g., *supra* notes 69–71 and accompanying text.

¹⁵⁰ See, e.g., *supra* notes 78–82 and accompanying text.

5. A litigant's aspiration level will affect his willingness to risk an impasse in an effort to obtain a more desirable settlement.

The experimental results, described in this Part, are consistent with these hypotheses and provide cautious support for the theory that aspirations can affect settlement negotiation outcomes by affecting settlement levers.

A. The Elements of the Reference Point Theory

In any particular settlement bargaining situation, the values of the relevant "settlement levers" are determined by the negotiators. That is, negotiator agency is an essential assumption of the standard model. Such determinations have two components: the negotiators' judgments about facts, and the negotiators' personal preferences. For example, a negotiator's reservation price is based on her prediction concerning the likely trial outcome (a judgment) and her aversion to risk (a preference). If an aspiration can affect the negotiator's judgments or preferences, it can affect one or more settlement levers and thus indirectly affect settlement outcomes.

Borrowing from the psychological literature on judgment and decision making, the reference point theory of aspirations posits that aspirations can affect settlement decision making via two mechanisms: aspirations can serve as cognitive anchors that bias relevant judgments, and aspirations can serve as cognitive frames that affect relevant preferences. The theory proposes that both of these mechanisms operate because negotiators refer to their aspirations when making such judgments and forming such preferences.

1. *Aspirations as Anchors*

Psychologists have long recognized that, when making judgments under conditions of uncertainty, individuals often begin with a reference value, and then adjust from that point to arrive at their final determination.¹⁵¹ What makes this process, known as "anchoring and adjustment,"¹⁵² particularly interesting is that the anchor value need not bear a rational relationship to the item subject to valuation, and the adjustment made to the anchor value is usually insufficient to account for the difference between the anchor value and the item's true value.¹⁵³ In other words, judgments affected by anchors will often dif-

¹⁵¹ See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128-30 (1974); Glen Whyte & James K. Sebenius, *The Effect of Multiple Anchors on Anchoring in Individual and Group Judgment*, 69 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 75, 75 (1997).

¹⁵² MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 23-30 (1992).

¹⁵³ See, e.g., *id.* at 25; Blount et al., *supra* note 13, at 3-4; Whyte & Sebenius, *supra* note 151, at 75-76. Some authors even define an anchor as a referent that is logically irrelevant to the subject of the valuation. See, e.g., Kahneman, *supra* note 62, at 308 ("Anchoring

fer from judgments made consistent with strict predictions of rational choice theory.¹⁵⁴

In one well-known example of this phenomenon, experimenters asked one group of professional auditors (Group A) whether they believed management fraud occurred in more than 10 of every 1000 companies audited by major accounting firms, and they asked another group of auditors (Group B) selected from the same general pool whether they believed such fraud occurred in more than 200 out of every 1000 companies audited.¹⁵⁵ They then asked subjects in both groups to estimate the number of such companies per 1000 that have significant management fraud.¹⁵⁶ Group A subjects estimated an average of 16.52 incidents of fraud per 1000 companies, while Group B subjects estimated an average of 43.11 incidents of fraud per 1000.¹⁵⁷ Presumably, the difference in average responses was due to the different anchors (10 versus 200) to which the subject groups were exposed.

Research suggests that anchors probably bias judgments by increasing the accessibility of information that is consistent with the anchor.¹⁵⁸ For example, Group A subjects in the auditor fraud experiment, who were exposed to the lower anchor, might have more easily been able to access information consistent with the belief that the fraud rate is low than could Group B subjects, who were exposed to the higher anchor.

Just as the content of the initial question posed to the auditor subjects apparently anchored the subjects' estimates of management fraud, a negotiator's pre-negotiation aspiration level could conceivably anchor judgments that she must make in order to establish various settlement levers. For example, aspirations might anchor judgments necessary to establish reservation prices and to determine what settlement values would be fair and thus acceptable.

2. *Aspirations as Frames*

Prospect theory predicts that the utility consequence of options depends not only on the absolute value of those options, but also on

effects will be explained as cases in which a stimulus or a message that is clearly designated as irrelevant and uninformative nevertheless increases the normality of a possible outcome.”).

¹⁵⁴ Cf. Whyte & Sebenius, *supra* note 151, at 76 (“[R]eliance on a given anchor may depend on factors other than normative appropriateness.”).

¹⁵⁵ Edward J. Joyce & Gary C. Biddle, *Anchoring and Adjustment in Probabilistic Inference in Auditing*, 19 J. ACCT. RES. 120, 122–23 (1981).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 125.

¹⁵⁸ See, e.g., Thomas Mussweiler & Fritz Strack, *Comparing Is Believing: A Selective Accessibility Model of Judgmental Anchoring*, 10 EUR. REV. SOC. PSYCHOL. 135, 144–57 (1999).

whether the options represent a "gain" or a "loss" relative to some external reference point.¹⁵⁹ While classical rational choice theory leads to the prediction that two plaintiffs who obtain a settlement that is \$10,000 greater than their reservation prices should be equally pleased (because the absolute value of their transaction relative to their alternatives is the same), prospect theory allows for the possibility that the utility consequences of such a settlement could vary depending on the reference point the litigants use as the basis for evaluating the transaction.¹⁶⁰ Because utility depends on whether the prospect is framed as a gain or loss, this implication of prospect theory is often called the "framing effect."¹⁶¹

Whether prospect theory and rational choice theory would predict different levels of satisfaction for a particular litigant depends on the litigant's reference point. A natural reference point for framing prospects is the status quo state of the world, or the individual's current position. In litigation, this position is represented by the litigant's reservation price, because the reservation price reflects the expected value of the right to an adjudicated outcome, which he currently possesses. If the litigant uses his reservation price as the reference point for judging settlement proposals, any larger amount for a plaintiff (or smaller for a defendant) will be evaluated as a satisfying "gain," while any smaller amount for a plaintiff (or larger for a defendant) will be evaluated as an unsatisfying "loss." If litigants use their reservation prices—and only their reservation prices—as reference points, rational choice theory and prospect theory would both predict that a settlement superior to litigants' reservation prices would generate positive utility that varies according to how superior the settlement is. Likewise, both theories would predict that settlements inferior to litigants' reservation prices would generate negative utility that varies according to the inferiority of the settlement.

It is possible, however, that litigants might reference their aspiration levels when evaluating settlement proposals or, alternatively, reference a combination of reservation price and aspiration level. In either case, prospect theory and rational choice theory would predict different utility consequences for particular settlement proposals. Any particular settlement proposal is more likely to fall short of a high aspiration level than a low aspiration level. Thus, if a litigant evaluates a settlement in reference to his aspiration level, prospect theory leads

¹⁵⁹ See Kahneman & Tversky, *supra* note 61, at 277–80; Tversky & Kahneman, *supra* note 61, at S257–59.

¹⁶⁰ Cf. Heath et al., *supra* note 3, at 84 ("One of the most basic aspects of motivation is that people do not see outcomes as neutral, but categorize them as a success or failure and then they experience positive or negative emotion based on their categorization.").

¹⁶¹ See Kahneman, *supra* note 62, at 297–98; Tversky & Kahneman, *supra* note 61, at S257–62.

to the prediction that a high aspiration will increase the likelihood that any particular settlement proposal will be viewed as unsatisfying rather than satisfying.

To test this intuition derived from prospect theory, a group of subjects ($n = 23$) was given the following description ("Arnold and Charles") of two settlement negotiations in which the plaintiffs had identical reservation prices and reached identical bargaining outcomes but had different aspiration levels:

Arnold sues Ben. Arnold will settle out of court for any dollar amount greater than \$5000 rather than bear the expense of a trial. His goal is to obtain at least \$10,000. After negotiating with Ben, Arnold agrees to accept a settlement of \$15,000.

Charles sues Donald. Charles will settle out-of-court for any dollar amount greater than \$5000 rather than bear the expense of a trial. His goal is to obtain at least \$20,000. After negotiating with Donald, Charles agrees to accept a \$15,000 settlement.¹⁶²

Subjects were then asked whether they believed Arnold would be happier with his outcome than Charles, Charles would be happier with his outcome than Arnold, or whether the two would be equally happy with their outcomes. Twenty-one subjects said Arnold would be happier than Charles, none said Charles would be happier than Arnold, and only two said the plaintiffs would be equally happy. The results are sharply different than what rational choice theory would predict¹⁶³—after all, each plaintiff received \$10,000 more than his reservation price—but consistent with the hypothesis that aspiration levels can affect the frame through which litigants view settlements, and thus can affect utility.

Even if aspirations can affect post-settlement satisfaction, however, it does not necessarily follow that aspirations will affect actual settlement negotiation outcomes. Assuming that Arnold would be happier with a \$15,000 settlement than Charles would be, Charles would not necessarily be less likely to accept a \$15,000 settlement offer. The effect of aspirations on satisfaction can conceivably affect outcomes, however, if that effect can influence litigants' preferences in ways that impact settlement levers.

Recall that prospect theory predicts not only that the utility consequences of prospects depend on whether they are framed as gains or losses, but also that losses are more painful than equivalent gains

¹⁶² For a more detailed description of the subjects and experiment methodology, see *infra* note 165 and accompanying text.

¹⁶³ Compared to either the prediction that subjects would believe the plaintiffs would be equally happy with their outcomes, or that the same number of subjects would have believed each plaintiff would be happier, $p = .00$.

FIGURE 1: ARNOLD AND CHARLES

are pleasurable.¹⁶⁴ This suggests that litigants might be willing to exert more energy and accept greater risks to avoid the dissatisfaction of a loss than they would to capture the satisfaction of an equivalent gain. If so, aspiration levels could conceivably affect settlement levers such as patience and the willingness to risk impasse.

B. Testing the Reference Point Theory

1. *Experimental Methodology*

I investigated the plausibility of the reference point theory of aspirations by identifying a series of specific, testable hypotheses and then testing these hypotheses experimentally. Subjects for the experiments were 187 second- and third-year law students at the UCLA School of Law. The majority of the subjects (164) were recruited in two Business Associations classes; the remainder (23) participated as part of a Negotiation class.¹⁶⁵ None of the subjects received compensation for his or her participation.

The subjects received an instruction sheet that described the experiment as "part of a research study investigating how lawyers and

¹⁶⁴ See *supra* note 136 and accompanying text.

¹⁶⁵ The Negotiation students participated in the experiments during the first week of the class, prior to being exposed to any discussion of aspirations, and without any discussion of the purpose of the experiments. Thus, these subjects were no more educated on the relevant issues than their peers recruited in the Business Associations classes.

law students think about issues that arise in negotiations concerning lawsuits and potential lawsuits.” They were further instructed that they would be asked to read several scenarios and to respond to one or two questions after each scenario; that there were no “right answers” to any of the questions; that no outside knowledge of the law was necessary; that their responses would not be individually identified; and that participation was voluntary.¹⁶⁶ The subjects completed their responses in the presence of the experimenter.

Each subject responded to three or four hypothetical scenarios describing a different litigation situation. Each scenario explained that the subject was the lawyer representing either the plaintiff or defendant. The scenario described the basic facts of the lawsuit, told the subjects that they were engaged in (or about to engage in) settlement negotiations with the opposing party’s lawyer, and informed the subjects about their aspiration in the bargaining. With some exceptions described below (such as when the scenario tested whether aspiration levels would affect reservation prices), subjects were also informed about their reservation price, or “bottom line.” When subjects were to play the role of a plaintiff’s lawyer, their aspirations were higher than their reservation price (that is, more than the minimum they were willing to accept to settle out of court); when subjects were asked to play the role of a defendant’s lawyer, their aspirations were lower than their reservation price (that is, less than the maximum amount they would pay to settle out of court). After reading each scenario, the subjects were asked to answer one question relevant to a settlement lever. Some of the questions required subjects to choose from several answer choices, while others were open-ended.

With one exception (described below), each scenario was presented in two or more versions. A single variable, usually the subject’s settlement aspiration, was manipulated between versions. Conclusions were drawn by comparing the mean response of subjects who responded to one version of a scenario with the mean response of subjects who responded to a different version of the same scenario, using an independent samples t-test. The different versions of each scenario were assigned randomly and the ordering of the scenarios was also randomized to insure, to the extent possible, that differences in mean responses to different versions of the scenarios were due solely to the effect of the variable manipulated between versions, rather than to differences in subject pools or to ordering effects.

¹⁶⁶ In each of the Business Associations classes, a small number of students declined to participate. The students who so declined are not included in the subject count.

2. *Hypotheses and Results*

a. *Anchoring Reservation Prices*

The plaintiff's reservation price represents the amount at which she is indifferent between settling the case out of court and litigating her claim. In other words, her reservation price is the value she places on her right to seek adjudication of her claim. According to the standard model, a litigant's reservation price should thus depend on her estimate of the expected value of litigating the claim to adjudication, the relative costs of litigation and settlement, her risk preference, the emotional costs of trial, and so forth, but it should not depend on an aspiration level determined exogenously to these variables. In reality, however, the factors that logically should inform the plaintiff's reservation price are often difficult to assess and fraught with uncertainty, making the normative determination of a reservation price in accordance with the standard model difficult. Given this practical difficulty, a plaintiff might base her reservation price, at least in part, on information that is not logically relevant from a normative perspective.¹⁶⁷

Hypothesis #1 posits that, when establishing a reservation price is difficult because the value of adjudication is uncertain, litigants might rely on their aspiration, which is much easier to establish than a reservation price, as an anchor value for determining their reservation price.¹⁶⁸ Thus, plaintiffs with high aspirations will tend to establish higher reservation prices, on average, than plaintiffs with low aspirations.

Experimental subjects were presented with a litigation scenario ("Landlord-Tenant") notable for the uncertainty surrounding the expected value of the plaintiff's legal claim should the case be resolved in court. Subjects were provided with information about the dispute and a settlement negotiation aspiration, and then asked to set their own reservation price. Subjects receiving Version A (low aspiration) were provided the following information:

You have agreed to represent a friend in a dispute she is having with her landlord. Last winter, the heater in your friend's apartment in California went out. First, the landlord was out of town. Then the landlord claimed nothing was wrong with the heater. After that, the landlord sent his brother-in-law to repair the heater, but the brother-in-law didn't really fix it properly. Finally, the landlord sent a professional repairman. By the time the heater was finally work-

¹⁶⁷ Cf. Whyte & Sebenius, *supra* note 151, at 79–81 tbls.1–2, 4–5 (finding that an irrelevant numerical anchor affected the "bottom line" of negotiating subjects, "even though more appropriate anchors were available").

¹⁶⁸ Cf. BAZERMAN & NEALE, *supra* note 152, at 28 (claiming that goals can become anchors for negotiators).

ing properly, it was three months after your friend initially reported the problem. Although the winter was moderate and the lack of heat not life-threatening, your friend was uncomfortable for a good portion of the winter. Your friend pays \$1000 per month rent.

You have threatened to file a lawsuit against the landlord in small claims court. Legally, the landlord is obligated to provide heat, and his failure to do so, if proven, entitles your friend to a rebate of some portion of her rent during the period that the heater did not work. Because there is a small chance you would lose in small claims court (the landlord claims the heater was never broken), the size of the award you would win is uncertain (the amount is completely subject to the judge's discretion and there is no available information on the size of past judgments), and small claims court is a hassle, you would prefer to reach a negotiated settlement with the landlord. However, if a settlement is not possible, you are not afraid to go through with the lawsuit. Prior to meeting with the landlord, you have set as your goal to settle the matter for at least \$750.

What will be the least amount of money you will accept to settle the case out of small claims court—that is, your “bottom line” in your negotiations with the landlord? (Note: you will not reveal your bottom line to the landlord).

Version B of the scenario (high aspiration) was identical, except that the last sentence of the second paragraph read:

Prior to meeting with the landlord, you have set as your goal to settle the matter for at least \$2000.

Version A subjects ($n = 18$) provided an average reservation price of \$608, while Version B ($n = 18$) subjects provided an average reservation price of \$1097, a highly significant difference.¹⁶⁹ The results support Hypothesis #1—that when litigants enter settlement negotiations with a defined aspiration level but without a clear, independently calculated reservation price, the aspiration level can significantly influence the litigant's effective reservation price. When this happens, a litigant with a high aspiration level would face a bargaining zone that is smaller and skewed more favorably than would a litigant with the same legal claim but a lower aspiration level.

One possible objection to drawing this conclusion from the comparison between Version A and Version B subjects is that Version A subjects may have provided lower reservation prices than they actually would have in a real negotiation because they were logically constrained by the low aspiration level provided to them. Version A subjects might have wished to establish higher reservation prices, but felt obligated by the experiment to provide reservation prices below \$750,

¹⁶⁹ $p = .00$.

since the aspiration level of \$750 made it logically necessary that their reservation price be no higher than this amount.

To insure that the difference in reservation prices between Version A and B subjects was not caused entirely by such a "ceiling effect"¹⁷⁰ that the scenario imposed on Version A subjects, another group of subjects was provided Version C of the scenario. Version C was identical to the other two versions, except that it omitted the final sentence of the second paragraph entirely, thus providing no specific aspiration level. Version C subjects provided an average reservation price of \$892, higher than that provided by Version A subjects, but still significantly less than the \$1097 provided by Version B subjects.¹⁷¹

FIGURE 2: LANDLORD-TENANT

The comparison between Versions B and C has two implications. First, the results suggest that the difference between the reservation prices set by Version A and B subjects was probably not *entirely* caused by the fact that Version A subjects could not logically have presented a reservation price higher than their aspiration of \$750. When a litigant cannot easily assess his reservation price with certainty, it seems likely that a higher aspiration will lead to a higher reservation price than will

¹⁷⁰ A "ceiling effect" results when subject achievement, or in this particular case subject responses, are so constrained that some subjects "top out." See, e.g., CLIFFORD J. DREW ET AL., *DESIGNING AND CONDUCTING RESEARCH: INQUIRY IN EDUCATION AND SOCIAL SCIENCE* 295 (1996).

¹⁷¹ $p = .02$.

a lower aspiration. Second, the results also suggest that litigants with a high, clearly defined aspiration level might establish higher reservation prices than subjects without a clearly defined aspiration level.

The standard model of settlement recognizes that the litigants' reservation prices are critical determinants of settlement negotiation outcomes.¹⁷² A plaintiff with a relatively high reservation price should achieve more-desirable settlement outcomes, on average, than a plaintiff with a relatively low reservation price, unless the former's reservation price exceeds that of the defendant but the latter's does not. For example, assume that the defendant's reservation price in settlement negotiations is \$20,000, and the plaintiff's reservation price is either \$15,000 (high reservation price) or \$5000 (low reservation price). For the high-reservation-price plaintiff, the bargaining zone ranges from \$15,000 to \$20,000; for the low-reservation-price plaintiff, the bargaining zone ranges from \$5000 to \$20,000. Holding other factors constant, the high-reservation-price plaintiff should, on average, achieve superior bargaining outcomes relative to the low-reservation-price plaintiff, since the range of possible agreements for the former is skewed toward higher dollar values.

b. *Anchoring Fairness Determinations*

The standard model of settlement recognizes that litigants may reject settlements that are superior to their reservation prices when they believe that the proposed settlement reflects an unfair or inequitable division of the cooperative surplus.¹⁷³ Determining what settlement values are or are not fair, however, can be even more difficult for a litigant than determining his reservation price. While an unavoidable lack of complete information makes setting a reservation price subject to error, there is not even a clear benchmark for judging the fairness of a proposed settlement.

Experimental evidence indicates that judgments about fairness are often self-serving, as people tend to recall more information and arguments supportive of their claims than of an opponent's claims. Loewenstein and his coauthors demonstrated that, in a settlement negotiation simulation, "plaintiff" subjects not only provided higher estimates of the expected value of the plaintiff's claim than did "defendant" subjects, but "plaintiff" subjects also believed that a much higher settlement amount would be the fairest result of the negotiations than did "defendant" subjects.¹⁷⁴

If litigants invoke their aspirations as reference points against which they judge the fairness of a potential settlement, then high aspi-

¹⁷² See discussion *supra* Part I.A.1.

¹⁷³ See discussion *supra* Part I.B.2.

¹⁷⁴ See Loewenstein et al., *supra* note 56, at 150, 151 tbl.2.

rations might cause or, alternatively, might reinforce self-serving assessments of fairness. Thus, Hypothesis #2 is that litigants with high aspirations will be more likely than litigants with low aspirations to believe that a given potential settlement is unfair.

To test this hypothesis, subjects were given a scenario ("Age Discrimination") that asked them to play the role of the plaintiff's lawyer in a lawsuit in which some facts favored the position of each side, the plaintiff was seeking a specific award, and the plaintiff had established a relatively low reservation price. Version A subjects (low aspiration) received the following information:

You represent Henry Smith in an employment discrimination lawsuit against his former employer. Two years ago, Smith was fired by his employer, Electec Corporation, after 18 years of employment in a middle management position. Smith is now happily employed in a similar position in another company at the same salary level, but it took him a full year to find his new job. Smith recently filed a lawsuit against Electec claiming age discrimination and seeking damages of \$75,000—his annual salary of \$50,000 for the year he was unemployed plus \$25,000 for emotional damages (he has no interest in getting his old job back). Electec denies the charge and claims it has no legal liability to Smith.

Smith bases his charge of age discrimination on the following facts: He was fired almost immediately after he turned 60 years old. All of his performance evaluations have rated his performance as at least "very good." All other Electec employees promoted to his level over the past few years have been under 40 years old, despite the fact that many other employees eligible for such promotions have been older. Shortly before he was fired, Electec had been criticized by Wall Street investment analysts for having high pension liabilities compared to its competitors.

The company denies Smith's charge of discrimination, pointing to the following facts: A reduction in business last year forced it to lay off 10% of its workforce. The 10% was made up of younger and older employees. Smith's performance evaluations consistently rated him as "excellent" for his first 14 years with the company, but his rating has slipped substantially to "very good" for the last 4 years in a row. Five other employees at Smith's management level were over 60 years old at the time Smith was fired and are all still employed by Electec.

You are preparing to meet with Electec's lawyer to try to negotiate an out-of-court settlement. Given the uncertain outcome of a trial as well as the costs and distress involved, you have decided that you will reluctantly accept the best settlement offer you can get, as long as it is at least \$10,000. You have set \$25,000 as your negotiating goal—that is, you will try to convince Electec to pay at least \$25,000 to settle the case.

Version B subjects (high aspiration) received identical information, with the exception that the last sentence of the scenario provided that the subject's aspiration was \$50,000 rather than \$25,000.

All subjects were then asked, "What do you think would be a fair settlement amount in this case?" The answer sheet did not constrain the range of possible responses, although logically no answer could exceed \$75,000, the amount Henry Smith sought in the lawsuit. Actual responses ranged from a low of \$10,000 to a high of \$50,000. Version A subjects ($n = 24$)—those with the lower aspiration—responded, on average, that \$25,000 would be a fair settlement amount. Version B subjects ($n = 25$)—those with higher aspirations—responded, on average, that \$32,000 would be a fair settlement. The difference between the subject groups is statistically significant.¹⁷⁵

FIGURE 3: AGE DISCRIMINATION

Although it is doubtlessly true that many factors are relevant to a litigant's determination of what settlement outcome or range of outcomes would be fair under the circumstances, the results support the hypothesis that aspiration levels might play a role in this calculus. If a plaintiff believes that a particular settlement or range of settlement amounts would be unfair and therefore determines she would reject such settlements, she reduces the size of the bargaining zone, skewing what remains of the bargaining zone toward higher amounts and thus

¹⁷⁵ $p = .04$.

increasing the average desirability of possible settlements. In this way, the effect of aspirations on perceptions of fairness can operate similarly to the effect of aspirations on the litigant's reservation price: high aspirations can shrink the effective size of the bargaining zone, skewing possible bargaining outcomes to the advantage of the negotiator with high aspirations.

c. *Framing and Patience*

If losses have a greater utility consequence than do equivalent gains, it follows that individuals who find themselves below their reference point by a certain amount might choose to exert more effort to improve their situation than would individuals who find themselves equal to their reference point or above their reference point by an equivalent amount.¹⁷⁶ Building on this insight, Hypothesis #3 is that negotiators will be willing to bargain for longer—to demonstrate more patience—in an effort to increase the value of an agreement when a proposed settlement is inferior to their aspiration than when a proposed settlement is equal to or superior to their aspiration. That is, although Charles (\$20,000 goal) and Arnold (\$10,000 goal) might both prefer a \$15,000 settlement to litigating their cases,¹⁷⁷ Charles would be more willing than Arnold to incur additional bargaining costs in an attempt to improve the settlement terms due to the greater differential positive utility he would enjoy if he secured a higher settlement price.

To explore this hypothesis, two subject groups were given a scenario ("Slip and Fall") in which a settlement offer was made that is equivalent to or more desirable than the subject's reservation price, but the offer either satisfied or did not satisfy the subject's aspiration. Version A subjects were told the following:

You represent a supermarket chain named "Henderson's" in litigation matters. Henderson's has recently been sued by a customer, Mr. Jones, who slipped on a wet spot on the floor next to the meat counter in a Henderson's supermarket and suffered a severely broken hip. Henderson's has an employee mop the floors routinely to prevent this type of accident, but they occur from time to time nonetheless. It is unclear whether Henderson's was negligent and whether Mr. Jones might have been contributorily negligent. The exact extent of Mr. Jones's damages are also unclear. All of these

¹⁷⁶ Cf. Heath et al., *supra* note 3, at 85 ("[L]oss aversion implies that people who are below their goal by x units . . . will work harder to increase their performance by a given increment than people who are above their goal by x units."). This is also consistent with the prediction of goal theory that harder goals will increase persistence. See, e.g., Latham & Locke, *supra* note 91, at 228.

¹⁷⁷ See discussion *supra* Part III.A.2.

issues would have to be resolved by a jury if the case were to go to trial.

You met with Mr. Jones's attorney yesterday to try to negotiate a settlement. Before negotiating, you determined the maximum amount of money you would pay to settle the case is \$30,000 (if you could not settle the case for \$30,000 or less, you would take the case to trial). You set as your goal to pay no more than \$20,000 to settle the case. After a full day of negotiations, Mr. Jones's lawyer has reduced his settlement demand to \$30,000 (he originally demanded far more than that). Although paying that amount would be better than going to trial, you have scheduled another meeting to continue your negotiations.

Version B subjects were given identical information, except that they were told that Mr. Jones's lawyer has reduced his settlement demand to \$20,000 (rather than to \$30,000), after originally demanding far more. Both subject groups were then asked: "How many more hours will you negotiate with Mr. Jones's attorney in an effort to reduce his settlement demand before accepting his lowest demand?"

Subjects were required to respond with a number in the range of "0 hours (accept the \$20,000 [\$30,000] offer now)," to "10 or more hours." The mean response varied significantly between the two subject groups.¹⁷⁸ Version A subjects ($n = 12$) said, on average, that they would continue negotiations for 5.4 hours. Version B subjects ($n = 11$) said, on average, that they would continue negotiations for 2.6 hours.

The results are consistent with Hypothesis #3, which posited that aspiration levels might affect litigant patience in settlement negotiation. Specifically, litigants whose aspirations have been satisfied might bargain with less determination and for less time before reaching agreement than would litigants whose aspirations have not been satisfied, even when a settlement superior to their reservation price is obtainable. Because higher aspirations are less likely to be satisfied than lower aspirations, it follows that higher aspirations might cause increased patience in bargaining.

Although consistent with Hypothesis #3, this experiment is far from conclusive because it manipulates two variables, rather than one, between subject groups. Version A subjects' aspiration was not met by the plaintiff's demand, whereas Version B subjects' aspiration was met. But Version A subjects also faced a substantively less favorable demand (because of the higher absolute offer) than did Version B subjects. Thus, it is possible that Version A subjects said they would negotiate longer prior to settling because they faced a higher settlement demand, albeit one that satisfied the constraint of their reserva-

¹⁷⁸ $p = .04$.

tion price, and not because their aspiration had not been satisfied. For instance, Version A subjects might have inferred that there was more room between the proposed offer and the opponent's reservation price than did Version B subjects. If this were true, the difference between the responses of Version A and Version B subjects would be attributable to different estimations of the opponent's reservation price, not to differences in aspiration levels.

If the difference in patience was caused by the different utility consequences of having one's aspirations satisfied or not satisfied, however, we would expect a large difference in patience between litigants who face an offer that satisfies their aspiration and those who face an offer that does not satisfy their aspiration, but a much smaller difference between litigants who face an offer that minimally satisfies their aspiration and those who face an offer that substantially exceeds their aspiration. If the difference in patience was caused by the difference in the plaintiff's absolute demand, however, we would expect a more consistent decrease in subject patience as the absolute value of plaintiff demands decreases.

In an attempt to gain insight into the relative influence of the two possible causal factors (subject aspirations or plaintiff demands), three additional subject groups were given a slightly modified version of the "Slip and Fall" scenario: Versions C, D, and E.

Version C subjects (high demand) were told the following:

Before negotiating, you set as your goal to pay not more than \$20,000 to settle the case out of court (although you would be willing to pay substantially more than that to avoid the costs of a trial, the risk of an unfavorable jury verdict, and the bad publicity). After a full day of negotiations, Mr. Jones's lawyer has reduced his settlement demand to \$30,000 (he originally demanded far more than that).

Version D subjects (acceptable demand) were told that Mr. Jones's lawyer has reduced his demand to \$20,000 (an amount satisfying the aspiration). Version E subjects (low demand) were told that Mr. Jones's lawyer has reduced his demand to \$10,000 (an amount exceeding the aspiration). All subjects were then asked how many more hours they would negotiate in an effort to reduce Mr. Jones's settlement demand before accepting his best offer.¹⁷⁹

If differences in average responses result from the size of the offers faced, we would predict a linear decline in patience across Ver-

¹⁷⁹ Although Versions C and D substantively pose the same problem as Versions A and B respectively, the C and D stimulus materials are worded slightly differently than the A and B materials, but identically to the Version E materials (except, of course, for the difference in the plaintiff's settlement demand). Thus, Version E results are compared to Version C and D results, rather than Version A and B results.

sion C, D, and E subjects, parallel to the linear decline in demands faced by the subjects in the different groups. In contrast, if differences in average responses are driven by whether aspirations are satisfied, then we would expect a large difference between the responses of Version C and D subjects, but little if any difference between the responses of Version D and E subjects. The results support the latter hypothesis. Version C subjects ($n = 12$) reported that they would continue to negotiate for 4.75 additional hours on average, significantly more than the 1.67 hours reported by Version D Subjects ($n = 21$).¹⁸⁰ Version E subjects ($n = 21$), in contrast, reported that they would continue to negotiate for 1.14 additional hours on average, a number only slightly smaller and not significantly different than that reported by the Version D subjects.¹⁸¹

FIGURE 4: SLIP AND FALL

Recall that the standard model of settlement predicts that negotiators with more patience will achieve more-desirable outcomes than those with less patience.¹⁸² A litigant who is a more persistent bargainer imposes greater transaction costs and delay costs on his opponent. If these costs are high, the opponent will accept a smaller share of the cooperative surplus than she otherwise might have in order to bring the negotiation to a close and stop incurring these costs. Thus,

¹⁸⁰ $p = .00$.

¹⁸¹ $p = .20$.

¹⁸² See *supra* text accompanying notes 42–47.

if Hypothesis #3 is correct, negotiators with high aspirations should achieve more-profitable settlements, on average, than negotiators with low aspirations.

d. *The Opponent's Frame and Patience*

Whether patience is indicated in settlement bargaining depends on the amount of utility the litigant stands to gain from obtaining a more desirable settlement. It also depends, however, on the likelihood that bearing the costs of patience will result in such a gain. The probability of success depends, in turn, on the amount of patience that the opposing litigant is likely to exhibit; a negotiator who demonstrates fortitude in the bargaining process will not improve her outcome if her opponent is willing and able to demonstrate the same degree of fortitude. This analysis suggests that a negotiator should be less willing to bear the costs of ongoing bargaining if she believes that her opponent will ultimately prove to be relatively more patient than if she believes that her opponent will prove to be relatively less patient. If higher aspirations translate into an increased willingness to bear the costs of patience, as the previous experiment suggests, it is conceivable that the *opponent's* aspirations will affect a litigant's degree of persistence in settlement bargaining.

In many circumstances, of course, a litigant will not have knowledge of his opponent's aspirations, because aspirations are not externally visible. In some circumstances, however, relevant clues might be available, whether stemming from the opponent's reputation or information conveyed at the bargaining table. Hypothesis #4 posits that litigants will be less patient when they have reason to believe their opponent possesses high aspirations than when they have reason to believe that their opponent possesses low aspirations.

To test this hypothesis, in the following scenario ("Insurance Defense"), subjects were asked to take on the role of the defendant's attorney in a lawsuit. They were asked to consider a situation in which they have spent an afternoon negotiating with the plaintiff's lawyer, at the end of which the plaintiff's lawyer reduced his settlement demand to a point somewhat below the defendant's reservation price. Version A subjects (high-aspiration opponent) were provided with the following information:

Mr. Green and Mr. Brown had a car accident, and Mr. Green filed a lawsuit against Mr. Brown alleging that the latter's negligence caused the accident. You are a lawyer for National Insurance Company ("National"). Mr. Brown is covered by an insurance policy with National, and you have been assigned to represent him in the lawsuit. After examining the facts of the case, you decided that National would be better off paying Mr. Green up to \$40,000 to settle the case out of court rather than risk a trial. (National would be

better off going to trial than paying any amount greater than \$40,000.) You have full authority to settle the case on behalf of your client.

Mr. Green's lawyer, Pat Westin, is a very competent and aggressive lawyer with a reputation for trying to get "top dollar" for every case. Through your contact with other plaintiffs' attorneys, you had heard that Westin set a goal for himself of obtaining a settlement of \$60,000 in this case.

After spending an afternoon vigorously negotiating the matter, Westin has offered to settle the case if you will agree (on behalf of National) to pay his client \$35,000. You have scheduled another negotiating session, at which you hope to convince Westin to reduce his settlement demand even further.

Version B (low-aspiration opponent) subjects were provided the same first and third paragraphs, but the middle paragraph was altered, as follows:

Mr. Green's lawyer, Pat Westin, is a very competent and reasonable lawyer with a reputation for having realistic settlement goals. Through your contact with other plaintiffs' attorneys, you had heard that Westin set a goal for himself of obtaining a settlement of \$20,000 in this case.

All subjects were then asked how many additional hours they would negotiate, in an attempt to convince Attorney Westin to lower his demand further, before settling the case. Answer options ranged from "0 hours (settle now for \$35,000)" to "10 or more hours." Version A subjects ($n = 30$)—those facing a plaintiff's attorney with high aspirations—reported that they would negotiate for an additional 2.1 hours, on average. Version B subjects ($n = 30$)—those facing a plaintiff's attorney with low aspirations—reported that they would negotiate an additional 5.3 hours, on average. The responses of the two subject groups are significantly different,¹⁸³ suggesting that negotiators might be more patient when their opponents have low aspirations than when their opponents have high aspirations. Because patience is a settlement lever, more patience on the part of a negotiator can translate into more-desirable outcomes.

Negotiators with high aspirations will tend to be patient in bargaining due to their desire to avoid disutility associated with settling for less than their aspiration. But if an opponent has high aspirations, the negotiator might decide to exhibit less patience because there is likely less ground to be gained. In contrast, patience might be indicated when the negotiator faces opponents with low aspirations, because such opponents are likely to be less patient themselves. An

¹⁸³ $p = .00$.

FIGURE 5: INSURANCE DEFENSE

additional hypothesis is that if high aspirations cause inflated reservation prices and/or inflated views of what settlement amounts would be fair, then the negotiator facing a high-aspiration opponent might infer that the available portion of the bargaining zone is likely to be small relative to what it would be if the opponent had low aspirations. A smaller bargaining zone might suggest that less effort is warranted, because the risk of impasse is relatively high, and the amount of cooperative surplus that could possibly be gained from the added effort is relatively low.

e. Framing and Bluffing

Assuming that litigants might use aspirations as reference points from which they evaluate the utility of potential settlements, prospect theory suggests that there are potential implications for litigants' risk preferences and patience that might impact settlement negotiation outcomes. Recall that, according to the standard model of settlement, litigants will reject settlement proposals superior to their reservation price if the expected gains from potentially convincing the opponent to agree to an even more desirable settlement exceed the expected costs from the possibility of impasse.¹⁸⁴ This prediction begs the question of how litigants will assess and compare the utility consequences of a safe choice (accepting a certain settlement that exceeds the liti-

¹⁸⁴ See *supra* notes 38–39 and accompanying text.

gant's reservation price) with a risky choice (rejecting a proposed settlement) that carries the potential of obtaining a more desirable settlement but also the possibility of causing an impasse.

Rational choice theory generally assumes that litigants will be risk averse when comparing the expected value of agreeing to a particular settlement to the expected value of rejecting it.¹⁸⁵ Prospect theory predicts, however, that individuals will behave in a risk-seeking manner in the face of losses, taking larger risks to avoid losses than they would be willing to take to achieve gains of equal size.¹⁸⁶ This suggests that a litigant who evaluates prospective settlements in reference to his aspiration level will tend to engage in riskier behavior when a certain settlement is inferior to his aspiration level than when the same settlement is superior to his aspiration. This, in turn, leads to Hypothesis #5: litigants evaluating a settlement proposal that is inferior to their aspiration level will be more likely to reject the proposal in hopes of obtaining a more desirable settlement than will litigants evaluating a settlement proposal that exceeds their aspiration level.

To test this hypothesis, subjects were given a scenario ("Construction Contract") that asked them to play the role of the lawyer for a plaintiff who had received a settlement offer higher than her reservation price and had to decide whether to reject the offer in an effort to "bluff" the defendant into making a higher offer. Subjects receiving Version A (high aspiration) of the scenario learned the following:

You have been hired to represent LiveMore, Inc., a property development firm, in a dispute with Buildem Construction Company. Buildem recently completed construction of a multimillion dollar apartment complex for LiveMore. LiveMore charges that Buildem failed to comply with a number of specifications in the contract, using somewhat shoddier materials than those that were specified. The apartment complex is operating and is fully functional, but LiveMore believes that the complex will require more maintenance and repairs in the future than would have been the case if Buildem had followed the contract specifications exactly. Buildem concedes that it did occasionally substitute some materials for those specified in the contract, but it claims that the substitutions were insignificant and never compromised quality, and that LiveMore has suffered no damages as a result. LiveMore has given you full authority to decide on its behalf whether to settle the case out of court or litigate the matter.

Prior to meeting with Buildem's lawyer to discuss the possibility of settlement, you examined the evidence, consulted with experts in the construction industry, and reviewed the relevant law in your jurisdiction. Your conclusion was that some of LiveMore's claims are

¹⁸⁵ See *supra* note 24 and accompanying text.

¹⁸⁶ See, e.g., Heath et al., *supra* note 3, at 93.

very strong and some are less strong. Given the damages a court would likely award, the uncertainties associated with litigation, and the costs of litigation, you determined that LiveMore would be better off settling the matter out of court rather than litigating if Buildem would pay LiveMore at least \$100,000. (If Buildem would not pay at least \$100,000, you determined that LiveMore should litigate the matter.) Wanting to recover as much money as possible for your client, however, you set as your negotiating goal to convince Buildem to pay LiveMore at least \$250,000 to settle the matter.

After a series of meetings between you and Buildem's attorney at which preliminary offers and counteroffers were exchanged, Buildem has offered to pay \$175,000 to settle the matter out of court. You are now considering whether—as a negotiating strategy—to tell Buildem that you will litigate the matter unless Buildem substantially increases its offer. Such a statement would not be true, of course, but it is the type of “bluff” sometimes used in settlement negotiations. Such a bluff might cause Buildem to increase its settlement offer, but it also would create some risk that negotiations would break down entirely.

Version B subjects (low aspiration) received identical information, except that the last sentence of the second paragraph read:

Wanting to recover as much money as possible for your client, however, you set as your negotiating goal to convince Buildem to pay LiveMore at least \$150,000 to settle the matter.

All subjects were then asked to rate on a scale of 1–10 (1 meaning “definitely not” and 10 meaning “definitely”) how likely they were to “bluff” in this situation. Version A subjects ($n = 30$)—those with an aspiration level higher than the settlement offer—gave an average response of 5.2; Version B subjects ($n = 31$)—those with an aspiration level lower than the settlement offer—gave an average response of 4.1. Thus, subjects with high aspirations were more likely to take the riskier action of rejection, with its possibility of greater rewards but also its greater risk. Subjects with low aspirations were more likely to take the safer action of accepting the settlement proposal that was clearly inside the bargaining zone. The difference between the average responses of the two groups, although not large in an absolute sense, is marginally significant.¹⁸⁷

If a litigant rejects a settlement proposal and demands a more favorable proposal, impasse might result. In the absence of impasse, however, the litigant will obtain an outcome that is superior to what he would have obtained had he accepted the original offer. Thus, once again, the results suggest that high aspirations can lead to more-desirable settlements for litigants than can low aspirations.

¹⁸⁷ $p = .08$ (one-tailed $p = .04$).

FIGURE 6

3. *Qualifying the Experimental Conclusions*

This Part has presented the reference point theory of aspirations, which is consistent with, but requires a modification of, the standard theory of settlement. It has further defined the contours of the theory by developing a series of specific, testable hypotheses. Finally, this Part has provided the results of a series of experiments that are consistent with the theory. The results demonstrate that the theory provides a plausible description of reality. It is important to note, however, that the experimental results are not offered as proof of the theory, nor do they prove that the theory is correct, even for the population of experimental subjects. Thus, this Article should be understood primarily as an exercise in theory building rather than theory testing, as the latter task calls for further research.

The experimental results do not, alone, prove the reference point theory, because they cannot distinguish between two possible explanations for the results: that aspirations affect settlement levers, and that settlement levers affect aspirations. The theory posits the following causal relationships between aspirations, settlement levers, and settlement bargaining outcomes:

ASPIRATIONS → SETTLEMENT LEVERS → OUTCOMES

Although the experimental results are consistent with the posited set of causal relationships, they are also consistent with the following set of causal relationships:

ASPIRATIONS ← SETTLEMENT LEVERS → OUTCOMES

High aspirations might have affected subjects' determinations of their reservation prices, their views about what would constitute a fair outcome, and their determinations of how much patience to display and the level of risk to prefer. Alternatively, the high aspiration provided by an experimental scenario might have caused subjects to assume that the given aspiration level reflected certain material facts about settlement levers. For example, subjects might have inferred from the aspiration level that they had a higher likelihood of prevailing in court than the instructions otherwise suggested, that fairness norms suggested a high settlement value, that they were playing the role of a litigant who is patient or risk-preferring, or perhaps that they must have an undisclosed reason to believe their opponent had a low reservation price.¹⁸⁸ If subjects interpreted a high aspiration as a signal of particular values of settlement levers, rather than as independent variables, then their responses to the questions posed in the hypothetical scenarios might reflect their understanding of these signals rather than of the independent causal power of aspirations.¹⁸⁹

The conventional view of aspirations within negotiation scholarship implicitly assumes that aspirations are a psychological construct determined independently of the variables herein labeled "settlement levers." This assumption is implicit because the widespread prescriptive advice that negotiators should set high aspirations suggests that aspiration levels are a matter of choice for individual negotiators, even in the face of a fixed set of external constraints. If settlement levers such as reservation price, views of fairness, or estimates of the opponent's reservation price completely determined a negotiator's aspirations, then it would make little sense to advise negotiators to "change" their aspirations. This advice would make as much sense as advising a person to change his height. Consequently, it is important for future research to unpack further the correlation between aspiration levels and settlement levers, and to determine in which direction causation runs. Such research would test not only the reference point theory of aspirations, in particular, but also might determine, more generally,

¹⁸⁸ Cf. Henrik Kristensen & Tommy Gärling, *Determinants of Buyers' Aspiration and Reservation Price*, 18 J. ECON. PSYCHOL. 487, 490 (1997) (hypothesizing that aspirations are determined by the negotiator's belief about his opponent's reservation price).

¹⁸⁹ It is worth noting that the considerable social science literature on the effect of goals generally suffers from this same problem. People are more likely to choose goals that they think are appropriate and attainable. See Latham & Locke, *supra* note 91, at 220. Most experiments concerning goals are structured so that subjects are assigned goals by the experimenters. Cf. *id.* at 233 (noting that most goal setting experiments do not explicitly emphasize self-regulation because the experimenters assign the goals). In these experiments, it is always possible that subjects might infer information from the provided goal (for example, that it is appropriate and attainable), making it uncertain whether differences in goals provided—rather than information inferred from those goals—are driving study results.

whether and to what extent negotiators can manipulate their own aspirations.

This research program, while important to developing a better understanding of aspirations, will be challenging to implement. In any between-subject experimental design (such as the experiments presented in this Article) in which aspirations are presented to subjects as exogenous variables and manipulated between groups of subjects, it is always difficult to ensure that subjects will not interpret a given aspiration level as a signal about the value of one or more endogenous variables (such as settlement levers, for example).

Rather than manipulating experimenter-provided aspirations, researchers could ask subjects to determine and report their own aspirations, and could use regression analysis to evaluate the strength of the correlation between self-chosen aspirations and settlement levers. This technique would avoid the problems caused by subjects inferring different informational signals from experimenter-provided aspirations, because all subjects would respond to the same external facts concerning the negotiating context. However, this technique would raise other questions. For example, if, compared to low-aspiration subjects, high-aspiration subjects were to report higher reservation prices, higher "fair" settlement amounts, more patience, or a greater preference for risk, it would be unclear whether the difference in responses was caused by the difference in aspirations, or whether some third factor had a causal influence on both the reported aspiration levels and the reported dependent variable levels. For example, it is conceivable that self-confident subjects might report high aspirations with, say, high reservation prices.¹⁹⁰ If results were to show that subjects who set high aspirations also set high reservation prices, one still could not conclude with certainty that high aspirations caused high reservation prices, because it would be possible that optimism caused subjects to establish both high aspirations and high reservation prices.¹⁹¹

¹⁹⁰ Cf. Cynthia Kay Stevens et al., *Gender Differences in the Acquisition of Salary Negotiation Skills: The Role of Goals, Self-Efficacy, and Perceived Control*, 78 J. APPLIED PSYCHOL. 723, 733 (1993) (finding that self-efficacy and perceived control affect goal-setting behavior in negotiation).

¹⁹¹ Careful experimenters might respond to this possibility by having subjects complete a diagnostic device designed to judge optimism, and then test the correlation between aspirations and reservation prices holding optimism constant. But a virtually unlimited number of factors that could conceivably affect aspirations and settlement levers, making it all but impossible for experimenters to rule out conclusively the "third variable" possibility.

IV

REVISITING PRESCRIPTIVE ADVICE: SHOULD NEGOTIATORS SET
HIGH ASPIRATIONS?

A. Benefits of High Aspirations

Negotiation texts that present a normative view of aspirations uniformly argue that high aspirations are desirable because they help negotiators achieve better bargaining outcomes for themselves or their clients.¹⁹² The reference point theory of aspirations described in Part III suggests that the descriptive claim underlying this advice might be accurate for a variety of reasons:

1. Negotiators with high aspirations might set higher reservation prices, thus skewing the range of mutually agreeable outcomes in a way that is beneficial to the negotiator.
2. Negotiators with high aspirations might determine that fairness requires a more profitable outcome for themselves, thus skewing the range of possible settlements in their favor.
3. Negotiators with high aspirations might demonstrate more patience at the bargaining table, which should, on average, improve the negotiator's payoff when a settlement is reached.
4. Negotiators with known high aspirations might cause their opponents to demonstrate less patience and thus to accept less desirable settlements than they otherwise would.
5. Negotiators with high aspirations might be more likely to reject offers that are superior to their reservation price, thus forcing the opposing party to make concessions in order to assure an agreement.

The reference point theory of aspirations, however, also implies that establishing high aspirations can have undesirable consequences. The theory implicitly suggests that high aspirations carry with them two types of costs: a higher risk of bargaining impasse,¹⁹³ and less satisfaction with settlements that eventually are reached.¹⁹⁴ In determining whether high aspirations are desirable on balance in a particular bargaining context, negotiators must carefully weigh these two costs against the notable benefits. This conclusion suggests that, in contrast to the conventional wisdom, there is no context-independent answer to the question of whether high aspirations will benefit a litigant more than would low aspirations.

B. Increased Risk of Impasse

All of the reasons for the reference point theory's suggestion that high aspirations might lead to more-desirable bargaining outcomes

¹⁹² See sources cited *supra* note 87.

¹⁹³ See discussion *infra* Part IV.B.

¹⁹⁴ See discussion *infra* Part IV.C.

simultaneously imply a higher risk of bargaining impasse. For example, holding all other variables equal, litigants with higher reservation prices should obtain more-desirable settlements *if* their opponent's reservation price is sufficient to create a bargaining zone. But a higher reservation price also reduces the likelihood that there will be a bargaining zone, and thus increases the risk of impasse.

For example, if a defendant has a reservation price of \$100,000, a plaintiff with a reservation price of \$80,000 should be expected, on average, to achieve a higher settlement amount than would a plaintiff with a reservation price of \$20,000. The range of possible settlement values is smaller for the high-reservation-price plaintiff and skewed toward larger dollar figures. But if the defendant's reservation price is \$60,000, rather than \$100,000, the plaintiff with an \$80,000 reservation price will find herself with no settlement at all, while the plaintiff with a \$20,000 reservation price is likely to reach an agreement for some amount between \$20,000 and \$60,000. To the extent that high aspirations might cause litigants to establish higher reservation prices than they otherwise would, the resulting reduction in the size of the bargaining zone carries with it an increased risk of impasse.

Precisely the same analysis applies if higher aspirations increase litigants' likelihood of rejecting offers that exceed their reservation price, either because high-aspiration litigants are more likely to perceive a particular settlement proposal as unfair, or because high-aspiration litigants are more likely to determine that the expected benefits of bluffing outweigh the countervailing risks. In either circumstance, assuming a settlement agreement is reached, a high-aspiration plaintiff is likely to obtain a more favorable settlement price than would a low-aspiration plaintiff, because the former will reject proposals that are at the lower end of the bargaining zone (close to her reservation price). If the defendant's reservation price is low, however, the higher settlement requirements of the high-aspiration plaintiff might exceed the defendant's reservation price, thus causing a bargaining impasse. Even if the defendant's reservation price is high, he might refuse to accept settlements that are acceptable to the high-aspiration plaintiff if his own aspirations are also high. That is, the defendant might reject as unfair or for purposes of strategic bluffing settlement proposals that are lower than, but close to, his reservation price, just as the high-aspiration plaintiff might reject possible settlements higher than, but close to, her reservation price.

If aspirations affect litigants' patience in settlement negotiations, high aspirations can increase the risk of impasse for related but slightly different reasons. First, the more patient a litigant's bargaining behavior, the more likely it is that his opponent will conclude that no bargaining zone exists (even when this conclusion is mistaken)

and consequently break off settlement talks. Second, over the course of a protracted bargaining process, the relative preference of one or both litigants for settlement over adjudication may decrease, potentially eliminating a bargaining zone. For example, if trial preparation (including discovery) proceeds concurrently with settlement negotiations, the cost advantage of settlement relative to adjudication will decrease the longer negotiations proceed. This, in turn, can cause rational plaintiffs to increase their reservation prices and rational defendants to reduce theirs. In time, a defendant's reservation price that was comfortably higher than a plaintiff's reservation price on the day suit was filed can fall below that plaintiff's reservation price, making impasse inevitable. In addition, even when patience enables a litigant to obtain a more desirable settlement price, the marginal improvement must be balanced against the costs of exercising the marginal patience.

Impasse in settlement negotiations is not always an undesirable outcome, of course. When informed litigants diverge in their estimates of the expected value of adjudication,¹⁹⁵ or when one or both parties perceive that adjudication can provide a benefit that settlement cannot (such as public vindication),¹⁹⁶ it is possible that no settlement amount will be mutually beneficial relative to adjudication. In such situations, adjudication is appropriate. But when a mutually beneficial settlement is possible, failure to reach a settlement is unfortunate for each of the litigants, and is socially inefficient as well. Therefore, while high aspirations provide negotiators with the benefit of an improved chance of obtaining a more favorable settlement, they carry with them a significant cost for litigants, as they make it more likely that settlement negotiations will fail when the potential for a mutually beneficial accord exists.

C. Reduced Satisfaction with Outcomes

A second cost to litigants of adopting high aspirations is the potential that they will obtain less utility from any eventual settlement amount than they might have enjoyed had they instead maintained lower aspirations. Recall that in the "Arnold and Charles" scenario¹⁹⁷

¹⁹⁵ See, e.g., Priest & Klein, *supra* note 18, at 12–13 (stating that a sufficient condition for trial is $P_p - P_d > (C \cdot S) / J$, where P_p = plaintiff's estimate of his percentage chance of winning at trial, P_d = defendant's estimate of plaintiff's chance of winning at trial, C = the litigants' combined trial costs, S = the litigants' combined settlement costs, and J = the expected amount that will be awarded to the plaintiff if he succeeds at trial).

¹⁹⁶ See, e.g., Korohkin & Guthrie, *supra* note 65, at 113–14 (stating that settlement will be less likely if the parties do not have equivalent stakes in the dispute, such as when one party is a repeat player—like an insurance company—that wants to establish favorable precedent for future claims).

¹⁹⁷ See *supra* Part III.A.2.

nearly all subjects thought Arnold, who had a \$10,000 aspiration and obtained a \$15,000 settlement, would be happier than Charles, who obtained the same settlement but had an aspiration of \$20,000. The higher a litigant's aspiration, of course, the less likely she will be to achieve the aspiration, often resulting in less satisfaction for the litigant, even holding outcomes constant.

Research on goal setting provides a body of support for the general finding that, in a variety of contexts, higher performance goals result in lower participant satisfaction with outcomes.¹⁹⁸ In the negotiation context, experimental evidence suggests that higher aspirations will have negative utility consequences for bargainers, even when both parties' aspirations are superior or both are inferior to the amount of the negotiated agreement. For example, Leigh Thompson presented subjects with a scenario in which they were asked to imagine that they were the seller of a boat, that they sold the boat for \$175,000, and that they had a reservation price considerably lower than that amount.¹⁹⁹ She then manipulated given aspiration levels between subjects, but all subjects were given aspiration levels comfortably above the sale price.²⁰⁰ When asked to rate how successful they felt about the outcome of the hypothetical bargain, subjects who were told their aspiration level was \$250,000 reported feeling significantly more successful than subjects with an aspiration level of \$300,000; subjects with the \$300,000 aspiration reported feeling significantly more successful than subjects with a \$350,000 aspiration level.²⁰¹ These results suggest that higher aspirations are likely to have a negative effect on litigant satisfaction with a settlement outcome, even when the increase in aspiration level does not cause a litigant to perceive a settlement amount as a loss rather than a gain.²⁰²

¹⁹⁸ See, e.g., Latham & Locke, *supra* note 91, at 222; Anthony J. Mento et al., *Relationship of Goal Level to Valence and Instrumentality*, 77 J. APPLIED PSYCHOL. 395, 403 (1992) ("The differences between people with high standards and those with low standards is that the former must accomplish more to satisfy themselves than the latter."); cf. Oliver et al., *supra* note 100, at 269 (finding that higher negotiator expectations decrease satisfaction with outcomes).

¹⁹⁹ Leigh Thompson, *The Impact of Minimum Goals and Aspirations on Judgments of Success in Negotiations*, 4 GROUP DECISION & NEGOTIATION 513, 516 (1995).

²⁰⁰ *Id.* at 517.

²⁰¹ *Id.* at 518; see also Polzer & Neale, *supra* note 119, at 12-13 (finding that negotiation subjects given easy, specific goals reported more satisfaction with their negotiated outcomes than did subjects given "do-your-best" goals).

²⁰² In addition to reduced utility gained from the negotiated agreement in question, low subjective satisfaction with an outcome can have negative tangible effects on negotiators in some situations. For example, evidence suggests that negotiators' desire to negotiate with a particular partner in the future depends in large part on satisfaction with previous outcomes. Oliver et al., *supra* note 100, at 270. If future negotiations with that partner could be profitable, a reduced desire to negotiate with her could be costly to the negotiator. Because litigants rarely have the luxury of choosing their negotiating partner

From a prescriptive perspective, whether negotiators should permit the utility consequences of aspirations to affect the aspirations that they adopt prior to settlement negotiations is a difficult question, for two different reasons. First, it might be possible for the negotiator to mitigate the negative utility consequences of high aspirations by choosing to ignore her *ex ante* aspiration level when evaluating an agreement *ex post*. Galinsky and his coauthors found that, holding constant a reservation price and a higher target price, subjects told to focus attention on the latter reported better objective outcomes but less satisfaction with their outcomes than did subjects told to focus attention on the former.²⁰³ However, when the subjects told to focus on their target price during the negotiation were asked to write down their reservation price after the negotiation, but before rating their level of satisfaction with the agreement, these subjects were as satisfied with their outcomes as were the subjects originally told to focus on their reservation price.²⁰⁴ If negotiators are able to take conscious steps to avoid the potential negative utility consequences of high aspirations, there is no reason for them to alter their behavior based on those consequences.

Second, in settlement negotiations, a lawyer-negotiator might be able to shield her client from the psychological costs of high aspirations. For a litigant negotiating on his own behalf, any expected monetary benefit of high aspirations relative to low aspirations must be weighed against the lower expected level of satisfaction. One defining feature of litigation bargaining, however, is that the principal parties are almost always represented by lawyer-agents. If the agent establishes bargaining aspirations but does not communicate them to the client, the subjective utility consequences of those aspirations should affect only the agent's satisfaction with the outcome, and not the client's.

Assuming that the benefits of high aspirations outweigh their costs to the *client* (a debatable assumption given the increased risk of impasse caused by high aspirations), a faithful agent should ignore the subjective utility consequences to himself. The agent's fee can be viewed, in part, as compensation for shielding the principal from these negative utility consequences of high aspirations, and the ability to avoid these costs can be viewed as a benefit to clients of employing lawyer-agents rather than negotiating on their own behalf.

or choosing not to negotiate with an undesirable partner, however, this negative consequence of low satisfaction is unlikely to be relevant in the litigation settlement context.

²⁰³ Galinsky et al., *supra* note 120, at 11–22.

²⁰⁴ *Id.* at 20–21.

CONCLUSION

Negotiation experts, including members of the legal academy, routinely assume that aspirations affect bargaining outcomes, and there is empirical evidence that supports this assumption. Nevertheless, there has been very little in the way of specific, theoretical descriptions of the mechanism or mechanisms by which aspirations affect bargaining outcomes, and no empirical testing of the few theoretical descriptions that do exist. Perhaps more troubling, the standard model of litigation settlement, developed over two decades by interdisciplinary scholars working first in the law-and-economics tradition and later in the law-and-behavioral-science tradition, implicitly assumes that aspirations are not at all relevant in the settlement context.

This Article has attempted to advance the study of the role of aspirations in litigation settlement specifically, and in negotiation generally, by proposing a conceptual framework that incorporates aspirations into the standard model of settlement. The reference point theory of aspirations posits that, by serving as a reference point for various decisions facing negotiators in the bargaining process, aspirations have an indirect causal effect on settlement outcomes by directly affecting the "settlement levers" recognized as relevant by the standard model of settlement. The experimental results reported in Part III.B demonstrate that the reference point theory is plausible, but this study is clearly only a small step toward a deeper understanding of the role of aspirations in settlement negotiations.

If the reference point theory of aspirations is correct, high aspirations will help a negotiator achieve more-favorable bargaining results when a deal is reached, but at the cost of a higher risk of bargaining impasse and less overall satisfaction with bargaining outcomes. Thus, the reference point theory not only offers a new way of thinking about the role of aspirations in settlement from a descriptive perspective, it also presents a challenge to the usual prescriptive advice that negotiators should always set high aspirations.