

Book Note: Law, Psychology, And Morality: The Role Of Loss Aversion, by Eyal Zamir

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Abstract

RATIONAL CHOICE THEORY, as a descriptive theory of human behaviour, claims that individuals seek to maximize their expected well-being.² But cognitive psychologists have shown this to be false through experimental and empirical research.³ Instead, human behaviour is predictably subject to cognitive biases, resulting in judgments and decisions considered “irrational” by rational choice theorists. One such bias is loss aversion, whereby people prefer not losing some good over gaining a good of equal value.⁴ In *Law, Psychology, and Morality: The Role of Loss Aversion*, Eyal Zamir argues that loss aversion provides a partial explanation for many features of human behaviour within legal contexts and procedural and substantive legal principles.

Book Note

***Law, Psychology, And Morality: The Role Of Loss Aversion, by Eyal Zamir*¹**

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RATIONAL CHOICE THEORY, as a descriptive theory of human behaviour, claims that individuals seek to maximize their expected well-being.² But cognitive psychologists have shown this to be false through experimental and empirical research.³ Instead, human behaviour is predictably subject to cognitive biases, resulting in judgments and decisions considered “irrational” by rational choice theorists. One such bias is loss aversion, whereby people prefer not losing some good over gaining a good of equal value.⁴ In *Law, Psychology, and Morality: The Role of Loss Aversion*, Eyal Zamir argues that loss aversion provides a partial explanation for many features of human behaviour within legal contexts and procedural and substantive legal principles.

The book is divided into nine chapters. Chapter 1 discusses prospect theory as a psychological explanation of loss aversion. An alternative to rational choice theory, it claims that “people ordinarily perceive outcomes as gains and losses, rather than as final states of wealth or welfare.”⁵ Indeed, loss aversion has been

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1. Eyal Zamir, *Law, Psychology, and Morality: The Role of Loss Aversion* (Oxford: Oxford University Press, 2015).
 2. *Ibid* at xiii.
 3. See e.g. Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011); Richard H Thaler & Cass R Sunstein, revised ed, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven: Yale University Press, 2008); Dan Ariely, revised ed, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (New York: HarperCollins Publishers, 2010).
 4. Zamir, *supra* note 1 at xiii.
 5. *Ibid* at 5.

observed in laboratory experiments and empirical studies.⁶ It may also have a neural basis,⁷ as it seems to be rooted in evolutionary psychology.⁸ Loss aversion shapes professional and group decision making,⁹ and is related to other observed cognitive biases, such as the status quo bias,¹⁰ the endowment effect,¹¹ and the sunk cost fallacy.¹²

Chapters 2-4 discuss the role of loss aversion in understanding human behaviour within legal contexts. Chapter 2 addresses general features of consumer behaviour, which is often shaped by how prices are framed,¹³ the perception of limited availability,¹⁴ escalating consumer commitment to purchasing decisions,¹⁵ and lenient return policies.¹⁶ Chapter 3 turns to the market for legal services, arguing that loss aversion explains why plaintiffs prefer contingency fee arrangements over fixed fees,¹⁷ while the reverse is true for defendants.¹⁸ Chapter 4 argues that loss aversion explains why litigants fail to settle cases when litigation would be more costly,¹⁹ why they settle cases when litigation would be less costly,²⁰ and why they are generally reluctant to pursue alternative dispute resolution.²¹

Chapter 5 demonstrates that loss aversion explains the existence of some fundamental procedural principles of common law systems, such as default rules,²² argumentative burdens,²³ and temporary legislation.²⁴ Chapter 6 argues that loss aversion explains features in a wide range of areas of substantive law—from the distinction between torts and unjust enrichment,²⁵ to the distinction in

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6. *Ibid* at 13.
 7. *Ibid* at 45.
 8. *Ibid* at 42.
 9. *Ibid* at 33-38.
 10. *Ibid* at 17.
 11. *Ibid* at 21.
 12. *Ibid* at 29.
 13. *Ibid* at 56.
 14. *Ibid* at 59.
 15. *Ibid* at 61.
 16. *Ibid* at 63.
 17. *Ibid* at 72.
 18. *Ibid* at 78.
 19. *Ibid* at 85.
 20. *Ibid* at 87.
 21. *Ibid* at 90.
 22. *Ibid* at 101.
 23. *Ibid* at 109.
 24. *Ibid* at 112.
 25. *Ibid* at 120.

criminal law between causing and allowing harm,²⁶ to the distinction between tax exemptions and tax withholding.²⁷ In all these cases and others, the law consistently regards losses as worse than comparable gains. Chapter 7 contends that such procedural and substance legal principles are shaped not by concerns about efficiency or social welfare,²⁸ but rather by the incentives facing potential litigants—which are, in turn, shaped partly by loss aversion.²⁹

Chapter 8 shifts to a discussion of ethics, focusing on how both deontological theories and commonsense morality regard harming as morally worse than not benefitting.³⁰ Zamir then endorses the widely held view that the law should be informed by morality,³¹ suggesting that loss aversion in the law is also morally justifiable. At the same time, Zamir also argues that morality is largely innate, having evolved as a mechanism for social cooperation.³² Thus, he aims to demonstrate a correspondence between psychology, morality, and the law. Zamir argues further in Chapter 9 that loss aversion is not irrational.³³ Accordingly, it is crucial that legal policymakers take it under consideration: They should ensure that individuals' loss aversion is not exploited,³⁴ frame options such that loss aversion can be used to help people reach desirable outcomes,³⁵ and pursue law reform cautiously to avoid generating losses.³⁶

While Zamir's central thesis is quite modest, his exploration of a wide range of issues makes that thesis highly compelling. The impressive breadth of his research comes at a cost, however. While he offers a summary and critical assessment of the existing literature, most of the issues discussed are only afforded a brief and rather superficial analysis. Still, his text provides an invaluable introduction for students, scholars, and practitioners, and surely will be foundational for further research on the appropriate role of psychology in the law.

26. *Ibid* at 139.

27. *Ibid* at 153.

28. *Ibid* at 168.

29. *Ibid* at 171.

30. *Ibid* at 189.

31. *Ibid* at 193.

32. *Ibid* at 195-96.

33. *Ibid* at 205.

34. *Ibid* at 216.

35. *Ibid* at 220.

36. *Ibid* at 224.