

A Behavioral Economics Analysis of Will Making Preferences: When to Begin and Who Should Have the Most Input?

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Abstract

The global COVID-19 pandemic has highlighted the need to plan for death, including the transmission of property through a valid will. Surprisingly little is known, however, about *when* people tend to make wills, *how* they go about doing so, and whether those practices vary from jurisdiction to jurisdiction. To begin building a foundation of knowledge, a research team comprised of United States and Australian lawyers and economists recently conducted the first-ever behavioral economics empirical study exploring these questions. This Article reports the results of the team's survey of both members of the Australian general public and estate planning lawyers in that country. The research aim was to elicit and compare the attitudes of members of both groups on three questions: (1) when people should begin to plan their estates in anticipation of death; (2) the relative role that the lawyer (compared to the client) should play in the

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estate planning process; and (3) whether remote witnessing rules for wills—newly adopted during the pandemic in several jurisdictions including states in Australia and the United States—have any impact on individuals' expressed preferences towards will making.

The study yields three significant findings. First, members of the legal profession in Australia tend to prefer the execution of a will at a much younger age than members of the general public do. Estate planning attorneys tend to cite age 29 as the “right” time to make a will, but the general public tends to think that age 47 is best. Second, laypeople in Australia tend to hold widely divergent opinions on the appropriate balance of client vs. professional input into the estate planning process. Those who already have engaged at least once in the will making process tend to desire far greater levels of input from estate planning attorneys than those who have never made a will. Attorneys, in contrast, have relatively uniform views about the same question, tending to cite 70% as the appropriate percentage of estate planning decisions that should be driven by the client. Finally, among both members of the general public and attorneys in Australia, expressed preferences on these matters appear to be largely unaffected by any stated benefits or drawbacks of remotely executed wills.

The survey's focus on Australia was intentional. Australia is an industrialized, democratic country with both a largely capitalist economic and a history of innovation in the law of wills, trusts and estates. Furthermore, Australia's population is smaller than that of the United States, making it easier to obtain a more representative sample. At the same time, we conceive of this study as the beginning point for further, cross-jurisdictional inquiries. Future research can explore whether or how attitudes about will making differ across jurisdictions, using the results reported here as a touchstone. Separate from any country-specific considerations, knowledge about *when* people make wills, *how* they do so, and differences between and among jurisdictions will allow lawmakers to make more informed decisions about whether to make permanent some of the pandemic-era rules that enabled the remote online audio-visual witnessing of wills.

Keywords: behavioral economics and law; cognitive bias; wills; estate planning; legal innovation; law and technology; legal profession

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INTRODUCTION

The COVID-19 pandemic has highlighted the stark reality of the fragility of the human condition and the inevitability of death. The pandemic has also focused attention on the need to plan for the effective transmission of property on death, predominantly by making a will.¹ Questions are therefore raised about not only when

1. See, e.g., Kelly Purser et al., *Wills Formalities Beyond COVID-19: An Australian-United States Perspective*, 5 *U.N.S.W. L.J.* 1, 1 (2020) [hereinafter *Australian-United States Perspective*] (“COVID-19 has focused attention on the need to increase access to valid will-making, including through the use of technology.”); Kelly Purser et al., *End of Life Decision-Making, Advance Care Planning and Estate Planning During a Pandemic*, in *PANDEMICS, PUBLIC HEALTH EMERGENCIES AND GOVERNMENT POWERS: PERSPECTIVES ON AUSTRALIAN LAW* (Belinda Bennett & Ian Freckelton eds., 2021); Bridget J. Crawford et al., *Wills Formalities in a Post-Pandemic World: A Research Agenda*, 2021 *U. CHI. LEGAL F.* 93, 94 (2021) [hereinafter *Formalities in a Post-*

and how people access valid will making, but also how members of the general public perceive these issues, as compared with legal professionals.

The legal requirements to make a valid will are well settled throughout Australia, with little hint in the pre-COVID-19 era of any significant law reform on the horizon.² To create a valid will mental and formal requirements must be satisfied. The testator must have the requisite testamentary intention and legal capacity to make a will free from any undue influence or fraud.³ The testator must also know and approve of the contents of the will free from any suspicious circumstances.⁴ The will must also meet certain formal requirements.⁵ Importantly, a will has to be in writing and signed by the testator in the physical presence of at least two witnesses not named in the written document (this is commonly known as the physical presence requirement).⁶ However, the pandemic public health responses requiring isolation and social distancing have meant that the physical presence requirement for making a valid will can be difficult, if not impossible, to fulfill.⁷ As such, emergency responses were introduced in several Australian jurisdictions including New South Wales, the Australian Capital Territory,

Pandemic World] (“The pandemic has brought into sharp focus the mismatch between traditional rules that govern valid will executions, on the one hand, and contemporary restrictions, practices, and preferences, on the other.”).

2. See *Australian-United States Perspective*, *supra* note 1, at 4–8 (providing an overview of the traditional requirements—common across both the United States and Australia—for the execution of a valid will).

3. See, e.g., *Lister v. Smith* [1865] 3 P 282 (Eng.); *Hatsatouris v Hatsatouris* (2001) NSWCA 408, ¶55 (Austl.); *Banks v. Goodfellow* [1870] 5 QB 549 (Eng.); *Nicholson v Knaggs* (2009) VSC 64, ¶24 (27 Feb. 2009) (Austl.); *Nicholson v Knaggs* [No.3] (2009) VSC 328, ¶703 (Austl.); *Stojic v Stojic* (2018) NSWCA 28, ¶133 (Austl.); *Li v Choi & Ors* (2020) QCA 131, ¶7 (Austl.); *Dore v Billingham* (2006) QCA 494, ¶16 (Austl.).

4. See, e.g., *Dore v Billingham*, QCA 494, *supra* note 3, ¶30.

5. See, e.g., Kelly Purser & Tina Cockburn, *Wills Formalities in the Twenty-First Century - Promoting Testamentary Intention in the Face of Societal Change and Advancements in Technology: An Australian Response to Professor Crawford*, 2019 Wis. L. REV. FORWARD 46 (reviewing wills formalities); Bridget J. Crawford, *Wills Formalities in the Twenty-First Century*, 2019 Wis. L. REV. 269, 273–74 (tracing the evolution of wills formalities from traditional English precedents to a more relaxed “harmless error” approach embraced in the Uniform Probate Code in the United States).

6. See, e.g., *Succession Act 2006* (NSW) s 6; *Succession Act 1981* (Qld) s 10; *Wills Act 1997* (Vic) s 7; *Wills Act 2000* (NT) s 8; *Wills Act 1968* (ACT) s 9; *Wills Act 1936* (SA) s 8; *Wills Act 1970* (WA) s 8.

7. See generally *Australian-United States Perspective*, *supra* note 1, at 2 (“compliance with the traditional presence requirements has become impossible due to social distancing restrictions” in the early months of the COVID-19 pandemic in many parts of both the United States and Australia); Purser et al., *supra* note 1, at 8.

Victoria, and Queensland to allow previously untested remote audio-visual witnessing of wills utilizing online platforms such as Zoom and Microsoft Teams.⁸ Similar approaches were also adopted in several international jurisdictions, including the United States.⁹ Even before the onset of the COVID-19 pandemic, four jurisdictions in the United States of America—Arizona, Nevada, Illinois, and Florida—had already moved toward allowing wills to be both witnessed remotely and executed electronically (with no reduction of the testator’s wishes to physical paper and no requirement of “wet” signatures by the testator or witnesses).¹⁰ The pandemic may have hastened even more U.S. jurisdictions to move in that direction and to adopt the Uniform Electronic Wills Act; that model law has been enacted or is pending in at least eleven other states or territories.¹¹

As the public health response throughout most Australian jurisdictions changes from a “COVID zero” strategy to one of “living with” the risk and reality of COVID-19 respiratory disease,¹² there is a pressing need to critically examine whether the emergency measures which have implemented technological responses should become permanent. Therefore, there have been calls for research to establish an evidentiary base before permanent legal reform, as opposed to simply assuming that technology is an appropriate or sufficient long-term response to the need to facilitate access to valid will making.¹³

8. See *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* (NSW) sch 1 pt 1(2); *COVID19 Emergency Response Bill 2020* (Qld) divs 2(29) & 2(33); *Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020* (Qld) pt 2(7); Supreme Court of Queensland, *Practice Direction No 10 of 2020: Informal Wills/COVID-19*, Apr. 22, 2020, ¶3(a); *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) pt 3.4(26)(112H)(1). For a discussion of the statutes, see generally *Australian-United States Perspective*, supra note 1, 8–11 (providing an overview of the pandemic-era measures adopted in several jurisdictions in the United States and Australia allowing the traditional “presence” requirement for witnesses to be satisfied by remote witnesses who could see and hear the testator and each other in real time, via audio-visual technology); Purser et al., supra note 1, at 9.

9. See *Australian-United States Perspective*, supra note 1, at 5–6 (discussing pandemic-era remote witnessing rules in Michigan and Connecticut in particular).

10. See ARIZ. REV. STAT. ANN. § 14-2518 (2020); FLA. STAT. ANN. § 732.522 (West 2020); IND. CODE ANN. § 29-1-21-4 (West 2020); NEV. REV. STAT. ANN. § 133.085 (LexisNexis 2019).

11. UNIF. ELEC. WILLS ACT (UNIF. L. COMM’N 2019).

12. *Australia Aims to ‘Live With Virus’ Instead of Eliminating It*, CNBC (Sep. 1, 2021, 10:01 AM), <https://www.cnbc.com/2021/09/01/australia-aims-to-live-with-virus-instead-of-eliminating-it.html>.

13. See, e.g., *Australian-United States Perspective*, supra note 1, at 14 (arguing that pandemic-era rules allowing remote witnesses “should not be blindly adopted as the new normal. Questions regarding assessments of the testator’s capacity, as well

Calls for research about will making in this context are not surprising given that there is in fact very little empirical research about will making practices generally or of attitudes toward will making in present-day Australia,¹⁴ although some empirical research on estate contestation in Australia and elsewhere has been undertaken.¹⁵ Accordingly, before engaging in research questions about the role of technology in increasing access to valid will making, there is a need for broad-based, foundational evidence about the *when* and *how* of will making, including the perceptions of the general public and legal professionals in relation to these questions. Baseline measures are also necessary to effectively predict or measure the role and likely impact of technology. Consequently, prior to the question of technology itself, we need to understand: when do people subjectively think is the right time to start will making and what role do they see for professionals?

We therefore undertook a behavioral economics analysis to explore individuals' preferences in this context. Behavioral economics provides a robust, cross disciplinary, and theoretical approach to understanding the (ir)rationalities of human behavior—a presumably significant driver in will making or lack thereof. Statistical and econometric approaches thus facilitate novel exploration and analysis of decision-making processes of both legal professionals and the general public. Behavioral economic analysis has been used to empirically explore such inconsistencies in similar credence market settings where novice consumers struggle to ascertain and evaluate the value of the professional service they receive, both before and after purchase.¹⁶ Previous research has explored several common examples of credence markets, such as local pharmacy, elective surgery, and general practice medicine.¹⁷

as safeguarding the testator against fraud and undue influence, will require detailed and critical thought, especially given the increasing rates of elder abuse”).

14. *Id.*

15. See, e.g., Ben White et al., *Estate Contestation in Australia: An Empirical Study of a Year of Case Law*, 38 *U.N.S.W. L.J.* 880 (2015) (reviewing all publicly available judgments issued in succession law cases in Australia during the calendar year 2011); David Horton, *Partial Harmless Error for Wills: Evidence from California*, 103 *IOWA L. REV.* 2027 (2018) (analyzing 2,452 estates in Alameda County, California with activity on court calendar during period from January 1, 2008 to December 31, 2010); Cheryl Tilse et al., *Will-Making Prevalence and Patterns in Australia: Keeping It in the Family*, 50 *AUSTL. J. OF SOC. ISSUES* 319 (2016) (reporting on national rate of testation in Australia, among other issues).

16. Uwe Dulleck & Rudolf Kerschbamer, *On Doctors, Mechanics, and Computer Specialists: The Economics of Credence Goods*, 44 *J. ECON. LIT.* 5, 5–6 (2006).

17. Harriet Smith et al., *Pharmacist Compliance with Therapeutic Guidelines on Diagnosis And Treatment Provision*, 2 *JAMA NETWORK OPEN* 1, 2, 10 (2019); Stephen

However, there is no existing research that applies behavioral economics theory and explores the impact of cognitive bias issues such as framing on will making choices and practices. Understanding and accounting for the substantial differences in the way people process and respond to the information they receive is an important starting point for ensuring and helping individuals to make better decisions for themselves and for society more broadly.

Given this, we conducted an empirical analysis of both adult members of the Australian general public, all of whom are presumed to be current or potential will makers ($n=1202$) and current legal professionals ($n=112$). Through a behavioral economics lens, this study explores preferences for will making, differentiated by group. The results reveal certain behavioral responses or attitudes that may be relevant to the question of whether the emergency audio-visual remote witnessing provisions should be made permanent. Before exploring the findings from this research project, however, the role that behavioral economics can play in offering novel insights into foundational questions about will making in Australia will first be considered in Part I. The empirical project will then be discussed in Parts II and III. We set out the methodology before presenting and discussing the findings. Comments linking the empirical study to questions about the future role of technology in will making end the article.

I. APPLYING A BEHAVIORAL ECONOMICS LENS TO WILL MAKING

Behavioral economics is an important and novel lens through which to view will making and begin to collect the relevant evidence necessary to inform considered policy and law reform. It represents a broader theoretical approach to understanding human behavior because it expands on the traditional neo-classical economics paradigms of supply and demand when considering decision making under constraint. Behavioral economics incorporates psychological, cognitive, emotional, cultural and social factors to provide a more nuanced view of mechanisms that drive behavior and choice. Across recent decades many western democracies (the Obama administration in the United States, the Cameron Government in the

Whyte et al., *Knowledge, Consultation Time, and Choice In Breast Reconstruction*, 108 BRITISH J. SURGERY 168 (2021); Stephen Whyte et al., *Cognitive Bias And Therapy Choice In Breast Reconstruction Surgery Decision Making*, 149 PLASTIC & RECONSTRUCTIVE SURGERY 629 (2022); Stephen Whyte et al., *Cognitive and Behavioural Bias in Advance Care Planning*, 16 PALLIATIVE CARE & SOC. PRACTISE 1 (2022).

United Kingdom, and the Liberal National Party government in Australia) have developed their own behavioral economics units to explore and tailor more effective policy solutions in markets where historical “carrot or stick” forms of regulation have resulted in market failures and negative externalities.¹⁸

From an economist’s perspective, will making specifically and the broader legal discipline generally might be viewed as one potential market failure insofar as the very existence of laws reflects some lack of efficient market allocation. Bracketing the larger critique of law generally, any study of human behavior must engage a more intricate and holistic exploration. This is true in the market for professional legal services and legal advice; this market is what economists commonly call a “credence good.” Inexperienced consumers typically have difficulty making *ex ante* and *ex post* assessments of the value of professional services they receive.¹⁹ Understanding and accounting for the substantial differences in the way human beings process and respond to the information they receive is therefore an important starting point for ensuring and helping individuals to make better decisions for themselves and for society more broadly.

Behavioral economic analysis has been used to empirically explore cognitive inconsistencies in credence market settings similar to law.²⁰ This critical perspective can therefore be particularly useful for the domain of will making, moving beyond historical and simplistic neo-classical cost-benefit style analysis to incorporate cognitive and behavioral correlates. Furthermore, the fact that will making implicates nonmarket behavior provides a unique opportunity to tailor potential future policy design (such as remote audio-visual witnessing) to assist participants to maximize their outcomes.²¹ As such, utilizing key theories from behavioral economics to understand individual decision making can offer legal professionals, policy makers and members of the general public new and unique insights in the legal context.

To be sure, both the public and the legal professionals who

18. See, e.g., DAVID HALPERN, *INSIDE THE NUDGE UNIT: HOW SMALL CHANGES CAN MAKE A BIG DIFFERENCE* (2015).

19. See Dulleck & Kerschbamer, *supra* note 16.

20. See Smith et al., *supra* note 17, at 2, 10; Whyte et al., *Knowledge, Consultation Time, and Choice In Breast Reconstruction*, *supra* note 17, at 168–69; Whyte et al., *Cognitive Bias And Therapy Choice In Breast Reconstruction Surgery Decision Making*, *supra* note 17, at 629; Whyte et al., *Cognitive and Behavioural Bias in Advance Care Planning*, *supra* note 17, at 1.

21. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1522 (1997).

advise and represent them are subject to cognitive and behavioral bias in their decision making processes.²² Biases are systematic errors or patterns of deviation in the processing and interpretation of information, impacting our ability to make normal or rational judgments.²³ Indeed, the historical “rational actor” model in both law and economics is widely disputed.²⁴ Quantitative behavioral economics research has repeatedly shown that extraneous variables impacting cognition and behavior that, under the rational actor model, should not have any bearing on legal outcomes, can and in fact do have tremendous influence.²⁵ For example, behavioral economics has explored the problematic issue of framing: presenting the same legal content for consideration in different ways (frames) does not always result in the same decision or choice outcome.²⁶ However, research is yet to explore the impact of cognitive bias issues (such as framing) on will making choice and decision making.

We therefore conducted an empirical analysis of both the Australian general public (that is, potential will makers) and current legal professionals to explore preferences for will making, including the cognitive and behavioral responses of possible relevance to the emergency audio-visual remote witnessing technological responses. The next Part provides an overview of the project. It first sets out the methodology before presenting the results. Part III then discusses the findings.

II. EMPIRICAL PROJECT

Given the legal significance of will making, the impact of the pandemic in compelling some actors’ engagement with technology in

22. Ian Weinstein, *Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783 (2002).

23. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

24. Jolls et al., *supra* note 21, at 1473.

25. See Oren Gazal-Ayal & Raanan Sulitzeanu-Kenan, *Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment*, 7 J. OF EMPIRICAL LEGAL STUD. 403, 421–23 (2010); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 L. & HUM. BEHAV. 67, 76 (1995); Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. OF THE NAT'L ACAD. OF SCI. 6889 (2011); Darrell Steffensmeier & Chester L. Britt, *Judges' Race and Judicial Decision Making: Do Black Judges Sentence Differently?* 82 Soc. Sci. Q. 749, 761 (2001).

26. See, e.g., Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Can Judges Make Reliable Numeric Judgments? Distorted Damages and Skewed Sentences*, 90 IND. L.J. 695 (2015); Laura M. Garnier-Dykstra & Theodore Wilson, *Behavioral Economics and Framing Effects in Guilty Pleas: A Defendant Decision Making Experiment*, 38 JUST. Q. 224 (2021).

will making, and the limited knowledge and understanding of community attitudes towards will making and the roles of will makers and legal professionals in the will making process, there is a pressing need for research about will making preferences in Australia and beyond. This project was designed as a first step towards building the evidence base needed to understand will making preferences, using a behavioral economics framework. This Part will set out the research project. The study's method will first be explained before moving to the results. Subsequent Parts provide analysis of and discussion of the limitations of the study.

A. METHOD

The study adopted a socio-legal method, drawing on our collective research expertise in both law and behavioral economics. This section will set out the ethics approval, data collection and sample size before discussing the survey design.

1. Ethics, Data Collection and Sample Size

This study was conducted in accordance with the relevant University human research ethics review approval. There were two groupings of participants, namely the general public and legal professionals (with a focus on those lawyers practicing in succession and estate planning law, although respondents were not required to have a particular focus or level of expertise in succession law to participate in the study). Data from the general public group ($n=1202$) was collected via the commercial research company *Lucid* using survey software built in *Qualtrics*. The survey was open for forty-eight hours across 20-21 October 2021, with the only pre-requisite for participation being that participants were a current Australian resident and eighteen years or older at the time of the survey.

Data collection from the legal professional group ($n=112$) was more challenging, with capture running from August 3, 2021 to November 23, 2021, also using the same online survey software. Legal professionals throughout all Australian jurisdictions were invited to participate via regular newsletters/broadcasts sent by their state-based law societies, as well as through the Society of Trust and Estate Practitioners (STEP) Australia.²⁷ STEP is a

27. To recruit participants to complete the survey, invitations to complete the survey were sent to the following legal professional bodies: State Law Societies (Qld,

prestigious professional organization whose members practice in the focus area of succession and estate law. Legal professionals who participated went into a random prize draw for two cash prizes of \$500AUD. Given a provision in the Queensland University of Technology Human Research Ethics Committee University clearance, participants from both groups were not required to fill out any question they did not wish to answer, but participants could continue on to complete the survey. For that reason, some variable totals in the results section are less than the complete sample size for both populations.

2. Survey Design

The study comprised two separate surveys, one each for the general public group and the legal profession group. This is because we hypothesized that members of the two groups might have different perspectives, experiences, knowledge, biases, and behaviors in the context of will making. Both surveys were designed not only to capture participant preferences regarding will making, but also to measure any correlating cognitive bias, by utilizing a battery of questions commonly used in behavioral economics and applied psychology research.²⁸ As discussed, the collection of these data provides a more complete picture of the factors at play when individuals make important large-scale decisions such as will making. Accordingly, the survey incorporated tests for six different cognitive biases: conjunction fallacy, illusion of control, endowment effect, herd bias, confirmation bias, and loss aversion. These six biases were selected for incorporation into the current study, as they have been shown to be present in the cognitive processes people employ in similar large-scale financial and investment decision making settings.²⁹ See Table 1 for definitions.

Because contexts for the initiation of will making discussions can be so different, complex and challenging depending on the life

NSW, Vic, SA, WA, Tas and ACT); Society of Trusts and Estates Practitioners (Australia, Qld, NSW, Vic, SA, WA, Tas); Australian Lawyers Alliance (a not-for-profit national association of lawyers, academics and other professionals established for the benefit of the community, and community members who have a particular need by reason of youth, age, infirmity or disablement, poverty or social or economic circumstances); and State Public Trustees (Qld, NSW, Vic, SA, WA, Tas and NT). Invitations to complete the survey were also sent to multiple law firms based in Australian capital cities.

28. MICHAEL POMPIAN, *BEHAVIORAL FINANCE AND WEALTH MANAGEMENT: HOW TO BUILD INVESTMENT STRATEGIES THAT ACCOUNT FOR INVESTOR BIASES* (2d ed. 2011).

29. *Id.*

stages at which they may occur, this study may be useful in identifying whether specific groups or members of groups have particular preferences and/or engage in uniform behaviors of the type which are associated with cognitive errors in the will making decision process. From a behavioral perspective, asking participants what outcomes they hope to achieve from a will is already known. Asset protection, income continuity, redistribution, beneficiary security, change in family structure and philanthropy are all common reasons put forward for contacting a solicitor to complete a will.³⁰ But from a behavioral perspective, these intended outcomes of consumption of the will making process do not provide any insights into an individual's personal preferences for will making, how they process information relating to will making, or how their preferences and cognition influence their behavior and choices. Utilizing a reduced and more simplistic model, this study explores these core points exclusive of any and all individual, financial or social benefits, current endogenous conditions (e.g., health, age, etc.) or exogenous shocks (e.g., global pandemic, job loss, marriage etc.), focusing on the following two key stated preference questions:

1. At what age do people prefer to have an initial discussion with a legal professional regarding engaging in the will making process?
2. As between the individual and their legal advisor, who should have the most input into the content of any resulting will?

The survey did not further define the meaning of "input," making no distinction between dispositive and administrative provisions of a will, for example. Thus, while the survey questions may appear to be simplistic or even abstract without context, the two preference questions provide the study with two quantitative dependent variables of interest for empirical analysis, and the ability to use multiple regression analysis to control for individual differences across our sample populations. Econometrically controlling for such individual differences provides a more nuanced image of the interplay of factors associated with the will making decision process. Both survey groups were thus asked the same two key stated preference questions.

30. Michael Nathanson et al., *Estate Planning and Why It's Really So Important*, in PERSONAL FINANCIAL PLANNING FOR EXECUTIVES AND ENTREPRENEURS 133, 135 (2d ed. 2021).

The online survey also incorporated an attribute framing experiment to assess how framing specific to new remote audio-visual witnessing proposals may impact participants' expressed preferences towards will making.³¹ The study asked participants to rank, from their most preferred to their least preferred, five different reasons (ease of access, cost to the client, cost to the firm, expedition of the will making process, and opportunity to give effect to testamentary intention) for engaging in remote audio-visual witnessing for will making. Participants were randomly allocated (split) into two groups, either a positive or negative experimental treatment group. In one group, the five reasons to choose from and rank were framed as benefits (e.g., remote audio-visual witnessing may reduce financial costs to the testator) and in the other treatment group, reasons to choose and rank were framed as drawbacks (e.g., in-person witnessing may increase financial costs to the testator).

For the legal profession sample, we collected demographic data about professionals' age, sex, and number of years of legal experience in their current role. For our general public sample, the survey collected additional information, such as education level, annual income, primary language, and religious and political views.

Table 1: Behavioral bias definitions³²

<i>Bias</i>	<i>Definition</i>
1. Conjunction fallacy	Occurs when an individual chooses a specific condition (that is the combination of multiple alternatives) to be more probable than a single general option.
2. Illusion of control bias	The tendency for individuals to believe they have control over specific events that are patently not within their influence.
3. Endowment (effect) bias	That is, an individual's maximum willingness to pay to acquire a good or service is typically lower than the least amount they are willing to accept to give it up.
4. Herding bias	Occurs when an individual demonstrates a tendency to follow, mimic or copy the majority without taking into consideration their own independent assessment or judgment.

31. See, e.g., Irwin Levin et al., *All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects*, 76 *ORG. BEHAV. & HUM. DECISION PROCESSES* 149 (1998).

32. See *id.*

5. Confirmation bias	Occurs when an individual selectively searches for, interprets or favors information that solely supports their prior beliefs or values, and ignores independent data or facts that are not supportive.
6. Risk aversion	Risk aversion in economics refers to the tendency of individuals to favor outcomes with lower uncertainty compared with those with higher uncertainty.

Table 2. Summary statistics by group

<i>Australian general public (n=1,202)</i>	Mean	SD	Min	Max
Male (%)	65.8%			
Female (%)	34.2%			
Age	49.47	(18.44)	18	96
Age (female)	46.41	(17.73)	18	88
Age (male)	51.06	(18.61)	18	96
Ideal age for initial will making discussion	45.37	(16.29)	16	80
Share of legal professional's input in will content	65.41	(33.18)	0	100
<i>Legal professionals (n=112)</i>	Mean	SD	Min	Max
Male (%)	40.18%			
Female (%)	59.82%			
Age	42.1	(14.5)	22	84
Age (female)	41.5	(14.1)	24	84
Age (male)	43.1	(15.3)	22	75
Years of experience	13.1	(11.76)	0	50
Ideal age for initial will making discussion	28.2	(10.7)	16	80
Share of legal professional's input in will content	70.23	(23.0)	0	100

Table 3. General public descriptive statistics – categorical variables

	N	Percent
Education level:		
- <i>Below Grade 10</i>	4	0.61%
- <i>Grade 10 or 11</i>	83	12.71%
- <i>Grade 12</i>	62	9.49%
- <i>Technical/Pre-vocational</i>	84	12.86%
- <i>Undergraduate</i>	217	33.23%
- <i>Postgraduate</i>	183	28.02%
- <i>Doctor/PhD</i>	20	3.06%
Total	N=1202	
Income level per annum:		
- <i>\$10,000 or less</i>	94	8.33%
- <i>\$10,001 - \$20,000</i>	116	10.28%
- <i>\$20,001 - \$30,000</i>	169	14.98%
- <i>\$30,001 - \$40,000</i>	93	8.24%
- <i>\$40,001 - \$50,000</i>	98	8.69%
- <i>\$50,001 - \$60,000</i>	104	9.22%
- <i>\$60,001 - \$70,000</i>	92	8.16%

- \$70,001 - \$80,000	72	6.38%
- \$80,001 - \$90,000	54	4.79%
- \$90,001 - \$100,000	44	3.90%
- \$100,001 - \$110,000	43	3.81%
- \$110,001 - \$120,000	15	1.33%
- \$120,001 - \$130,000	22	1.95%
- \$130,001 - \$140,000	13	1.15%
- \$140,001 - \$150,000	22	1.95%
- \$150,001 - \$160,000	15	1.33%
- \$160,001 - \$170,000	7	0.62%
- \$170,001 - \$180,000	6	0.53%
- \$180,001 - \$190,000	7	0.62%
- \$190,001 - \$200,000	11	0.98%
- More than \$200,000	31	2.75%
Total	N=1128	
English first language:	1086	90.42%

	Total	N=1201
Religion:		
- <i>Christianity</i>	599	49.88%
- <i>Atheism</i>	218	18.15%
- <i>Buddhism</i>	51	4.25%
- <i>Islam</i>	46	3.83%
- <i>Hinduism</i>	27	2.25%
- <i>Judaism</i>	5	0.42
- <i>Other</i>	255	21.23
	Total	N=1201
Political affiliation:		
- <i>Labor party</i>	380	31.61%
- <i>Liberal Party</i>	359	29.87%
- <i>The Greens</i>	112	9.32%
- <i>National Party</i>	44	3.66%
- <i>Centralist</i>	70	5.82%
- <i>Non-partisan</i>	132	10.98%

- Other	105	8.74%
Total	N=1202	

B. RESULTS

1. Ideal Age of First Will Making Discussion

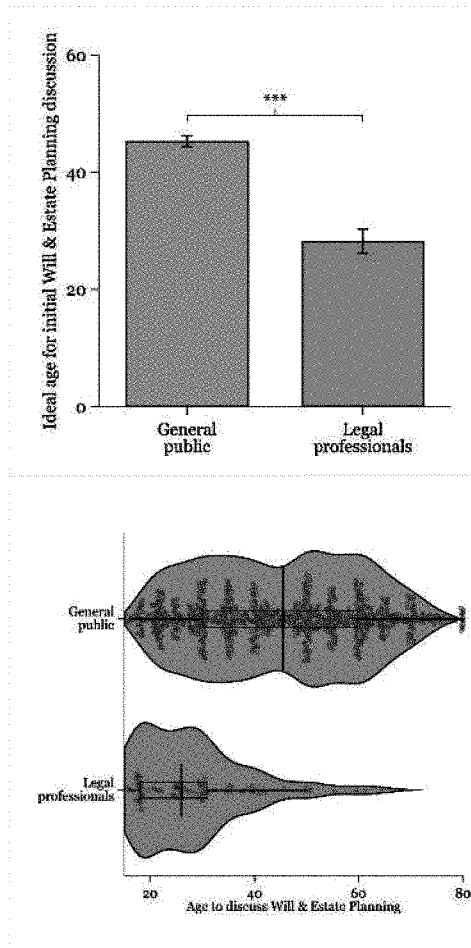


Fig 1A&B. Ideal age of first will making discussion by group (A), and distribution (B)

Notes: 1A: Two sample t-tests presented with 95% confidence intervals. *** represents 0.1% level of significance with Bonferroni's correction for multiple comparison.

In response to the question about the ideal age for an initial discussion regarding will making, there is a statistically significant difference (diff.=17.14 years, $p<.0001$) between the general population sample's mean and the legal professional sample's mean, with the latter preferring first discussions of will making at a much younger age ($M=28.72$) than the general population ($M=47.39$) (see Fig 1). The general public also exhibits a larger variation in opinion compared to the sample of legal professionals; the former's variance is significantly larger than the latter (two-sample variance-comparison test $p<0.0001$). In our general population sample, we find males compared to females ($p<.0001$) select a higher initial age (approximately 6 years older). No such sex difference is observable between legal professionals ($p=0.696$).

Our pairwise correlation analysis of the general population shows a small negative relationship between age of the survey participant and the expressed preference for the year of a first will making discussion ($r = -0.08$, $p=0.0056$, Fig. 2a), which is statistically driven by male participants ($r = -0.094$, $p=0.0065$) (for female, $r = -0.063$, $p=0.169$). For the legal professional sample, we observe a significantly larger negative correlation ($r = -0.392$, $p<0.0001$, Fig. 2b), with both older males ($r = -0.470$, $p=0.0015$) and females ($r = -0.331$, $p=0.0075$) recommending first will making discussion at a younger age.

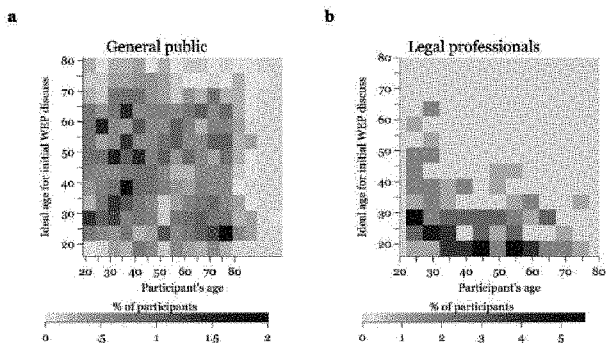


Fig 2. Correlation between participant age and preferred age of initial will making discussion, by sample

Notes: Color shows the proportion of participants.

2. Shared Decision making in Will Making

Regarding participant preference for the share of contribution from clients and legal professionals to potential will making, we find that, on average, legal professionals perceive that clients should exert about 70% input in the decision-making process. As noted above, the survey question did not distinguish between decisions about dispositive provisions, on the one hand, and matters about which a lawyer would ordinarily be expected to have input, on the other, such as the powers of a trustee appointed under a discretionary trust created under the will, or the like. Nonetheless, views of legal professionals were not statistically significantly different from the view of members of the general public (around 65% are client's input, $p=0.141$, see Figure 3). However, the public hold more mixed views than legal professionals about the share of input that the client versus the legal professional should have towards will content (two-sample variance-comparison test $p<0.0001$, see also Table 1).

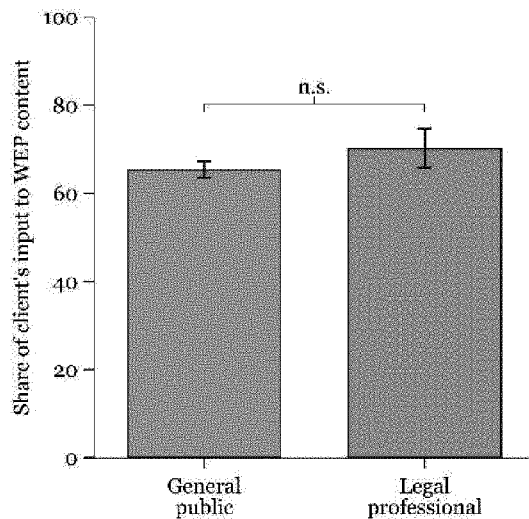


Fig 3. Share of Client-Legal Professional contribution in will making decision making, by sample

Notes: Error bars represent 95% confidence intervals.

3. Cognitive and Behavioral Bias

In Figure 3 we present our six cognitive bias measures, differentiated by our two sample populations. We find statistically significant results ($p < 0.0001$) for two of these biases (confirmation and endowment). Members of the general public are almost twice as likely as legal professionals to exhibit an *endowment bias* (56.7% vs 31.5%, two-sample test of proportion $p < 0.0001$). In contrast, legal professionals (68.2%) are more likely than members of the general public (49.3%) to exhibit *confirmation bias* ($p = 0.0002$). Although the other biases (conjunction, fallacy, illusion of control, loss aversion, and herding bias) are similarly prevalent in both sample populations (with loss aversion being the least common), there is no statistically significant difference between members of the general public and legal professionals. The potential implications of these biases are discussed later in the article.

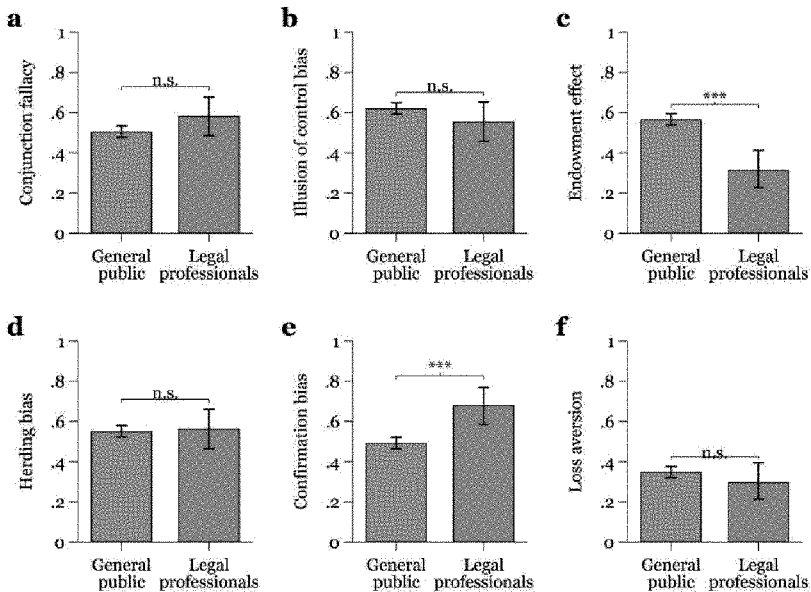


Fig 3: Cognitive bias two sample comparisons, by group

Notes: Two-sample tests of proportion presented with 95% confidence intervals. *** represent 0.1% level of significance with Bonferroni's correction for multiple comparison. n.s. represents not statistically significant.

4. Cognitive Bias and Will Making Decision making

Figure 4 illustrates the relationship between the six cognitive bias results and the key dependent variables of interest: participant preference for age of first discussion of will making (panel a and b) and share of contribution to will making content (panel c and d). Each bar in Figure 4 represents the difference in the dependent variable between those who exhibit the bias and those who do not. Legal professionals show no statistically significant relationship between any of the six biases and the two variables of interest (Fig. 4b and 4d).

However, members of the general public who exhibit *herding bias* are more likely to choose a later age for first will making discussion (diff. 3.67 years, $p=0.0001$). In regard to the preferred degree of input into the content of a will, we find that members of the public who exhibit *herding bias* ($p<0.0001$), *illusion of control* ($p<0.0001$), or *loss aversion* ($p=0.0116$) are more likely to prefer greater legal professional contribution. Those exhibiting *conjunction fallacy* ($p=0.0266$) or *confirmation bias* ($p<0.0001$) are more likely to prefer greater relative client (personal) contribution to will formation.

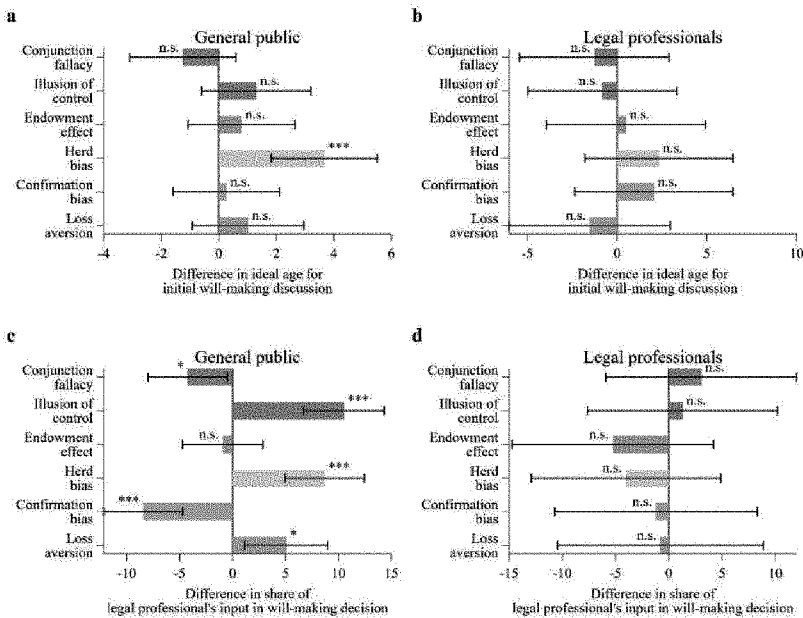


Fig 4: Cognitive bias and will making decision making process

Notes: Two-sample *t*-tests presented with 95% confidence intervals. Mean differences are calculated by subtracting the average value of those who exhibit the bias from those who do not exhibit the bias. *, **, and *** represent 5%, 1%, and 0.1% levels of significance, respectively. N.s. represents not statistically significant.

5. Multivariate Analysis

Tables 4 and 5 present the regression analysis results with multiple model specifications exploring links between individual differences of participants of the two sample populations and the two key dependent variables of interest. Table 4 demonstrates the ideal age for the first will making discussion. Table 5 indicates the preferred share of legal professional (compared to client) input into a will's content. For the sample of members of the general public, the results include participant's age, gender, whether they have prior experience with will making, and additional socio-economic variables (i.e., education, income, religion, and political affiliation) as control variables in a stepwise manner. For the legal professional sample, we include age, gender, and years of experience in the legal profession.

In Table 4, relating to the cognitive bias measures, the data confirm the observation that participants from the general public sample exhibiting *herding bias* are more likely than members of the general public who do not exhibit this bias to select a later age for the first will making discussion, while accounting for other biases and additional control variables. On the other hand, as suggested by the above descriptive analysis, none of the six biases correlates with expressed preference for the age of the first will making discussion in the legal professional sample.

Male participants from the general public sample, compared to their female counterparts, are also more likely to select a later age. Older participants are more likely to select a younger age. In the legal professional sample, after controlling for age, those with greater years of legal experience are more likely to select a younger age for the preferred first will making discussion.

Table 4: Multivariate regression analysis for age of first will making discussion

	General public				Legal professionals		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Conjunction fallacy	-1.013 (.9403)	-7879 (.924)	-7998 (.9243)	-8322 (.9491)	-1.647 (2.127)	-2466 (2.055)	.16 (2.04)
Illusion of control bias	.8991 (.9931)	1.063 (.9927)	.9747 (.9957)	.9654 (1.026)	-2429 (2.14)	-1.771 (2.048)	-1.325 (1.992)
Endowment effect	.6892 (.9497)	1.062 (.9357)	1.015 (.9359)	1.221 (.9637)	.682 (2.623)	1.052 (2.313)	.725 (2.18)
Herd bias	3.565*** (.945)	2.916** (.9307)	2.83** (.9324)	2.802** (.9792)	2.236 (2.048)	1.893 (1.904)	1.697 (1.865)
Confirmation bias	.5394 (.9477)	.9959 (.9382)	1.062 (.9435)	1.034 (.9781)	2.296 (2.093)	1.437 (1.95)	1.739 (1.895)
Loss aversion	.7352 (.9926)	.6941 (.9783)	.6567 (.9761)	.6111 (1.012)	-1.508 (2.01)	-2.277 (1.864)	-2.319 (1.862)
Participant's age		-.0781**	-.0733**	-.0707*		-	-1.055
						.3199***	
		(.0259)	(.0261)	(.03)		(.0751)	(.0856)
Male dummy		6.386*** (.967)	6.298*** (.9679)	6.614*** (1.046)		1.994 (1.992)	3.106 (2.004)
Will making experience			1.019 (1.206)	.2735 (1.245)			
Years of experience							-
							.3327** (.1118)
Constant	42.44*** (1.331)	41.8*** (1.945)	41.52*** (1.969)	40.22*** (2.954)	26.73*** (2.864)	40.2*** (4.429)	34.54*** (4.296)
Socio-economic variables	No	No	No	Yes	No	No	No
N	1202	1196	1196	1122	107	107	107
R ²	.0157	.053	.0536	.0823	.0301	.193	.238
Adjusted R ²	0.011	0.047	0.046	0.063	-0.028	0.127	0.167
AIC	8.4	8.4	8.4	8.4	7.7	7.5	7.5
BIC	1625.6	1590.2	1596.6	1634.6	339.3	328.9	327.4

Notes: Dependent variable: ideal age of first will making discussion. Socio-economic variables include education, income, religion, and political affiliation. Standard errors (robust) in parentheses. † $p < .10$; * $p < .05$; ** $p < .01$; *** $p < .001$.

Table 5 explores factors impacting participant preference for share of input in the will making decision making process. Relating to the cognitive bias questions, comparing those in the general population sample exhibiting a particular bias to those in the same sample who do not exhibit that bias, there are five noteworthy observations. First, those who exhibit *herding bias* state a preference for greater legal professional involvement in will formation. Second, those who exhibit *confirmation bias* prefer greater client (personal) input. Third, those who demonstrate illusion of control bias are also more likely to state that they prefer a larger share of will content input from legal professionals. However, the effect is not statistically significant, once participant's socio-economic variables are controlled. Similar to the above, there is no evidence suggesting that the behavioral biases play a significant role in determining the share of will making decision making for legal professionals. Fourth, older participants (compared to younger) and women (compared to men) show greater preference for client input. Fifth, members of the general public with some history of will making indicate stronger preferences for legal professional involvement.

In looking at the impact of cognitive biases in the sample of legal professionals, there are two relevant observations. As is true in the general population, there is no evidence suggesting that the behavioral biases play a significant role in determining the preferred level of input into will making decision making. However, more experienced legal professionals indicate a stronger preference for larger client input in the will making process.

Table 5: Multivariate regression analysis for share of decision process regarding will making

	General public				Legal professionals		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Conjunction fallacy	-2.982 (1.871)	-1.216 (1.775)	-1.375 (1.749)	-.107 (1.794)	4.069 (4.505)	6.74 (4.224)	7.412 ⁺ (4.321)
Illusion of control bias	8.978 ^{***} (1.887)	4.418 [*] (1.871)	3.245 ⁺ (1.86)	3.053 (1.888)	1.127 (4.816)	-3.251 (4.573)	-2.515 (4.432)
Endowment effect	-2.585 (1.88)	-2.424 (1.802)	-3.048 ⁺ (1.782)	-2.41 (1.82)	-6.467 (4.837)	-4.695 (4.298)	-5.236 (4.15)
Herd bias	7.566 ^{***} (1.855)	7.01 ^{***} (1.775)	5.865 ^{***} (1.764)	6.047 ^{***} (1.814)	-4.007 (4.72)	-5.348 (4.384)	-5.673 (4.344)
Confirmation bias	- 7.732 ^{***} (1.867)	- 6.969 ^{***} (1.773)	- 6.089 ^{***} (1.756)	-5.662 ^{**} (1.786)	-1.64 (4.542)	-4.509 (4.362)	-4.009 (4.344)
Loss aversion	4.179 [*]	2.208	1.712	2.185	-1.735	-2.067	-2.137

Participant's age	(1.986)	(1.864)	(1.836)	(1.894)	(5.257)	(4.63)	(4.603)
		-	-.526***	-		-	-.3173
		.5899***		.5694***		.6718***	
		(.0504)	(.051)	(.058)		(.1314)	(.2653)
Male dummy		5.13**	3.962*	4.641*		-6.57	-4.732
		(1.967)	(1.966)	(2.061)		(4.051)	(4.021)
Will making experience			13.55***	12.61***			
			(2.363)	(2.459)			
Years of experience							-.55 [†]
							(.2975)
Constant	30.17***	58.42***	54.67***	54.73***	32.72***	66.51***	57.15***
	(2.601)	(3.812)	(3.812)	(5.689)	(5.999)	(8.172)	(10.11)
Socio-economic variables	No	No	No	Yes	No	No	No
N	1202	1196	1196	1122	107	107	107
R ²	.0576	.156	.182	.218	.0294	.212	.239
Adjusted R ²	0.053	0.151	0.175	0.202	-0.029	0.148	0.168
AIC	9.8	9.7	9.7	9.6	9.2	9.0	9.0
BIC	3282.6	3152.8	3123.6	3047.3	503.2	490.3	491.3

Notes: Dependent variable: share of legal professional (compared to client) input into will content. Socio-economic variables include education, income, religion, and political affiliation. Standard errors (robust) in parentheses. [†] $p < .10$; * $p < .05$; ** $p < .01$; *** $p < .001$.

III. DISCUSSION

A. FINDINGS

This study provides unique empirical findings of both client and legal professional preferences and bias in the context of will making. To the best of the authors' knowledge, this is the first such study using a behavioral economics lens to empirically explore cognitive issues for both populations, controlling for individual differences. The legal professional results are robust even when controlling for age, sex, and years of experience in their role as a legal professional.

In this section we will analyze our findings about the ideal age for the first will making discussion in the context of earlier studies about will making propensity and prevalence. We also consider our findings regarding input into the will decision making process in the context of a shared decision-making framework. Finally, we consider the implications of our framing experiment in the context of earlier studies, and the implications for advertising or marketing campaigns

and legal professional training and engagement of the general public in the context of using audio-visual technology in will making.

The average age for the preferred first will making discussion reported by the general population was 47.39 years, with females on average more likely to engage in will making at an earlier age (41.50 years) as compared with males (47.39 years). As previously noted, there has been limited research about how and when people plan for death, access valid will making, and the role of legal professionals in drafting wills in Australia. In 2012, Tilse and others conducted a large-scale, broad-based, nationally representative survey specifically focused on will making in Australia.³³ The Tilse study found that approximately 59% of Australian adults (n = 1,425) had a will, with most of the testate population being older and wealthier than the intestate population. Other characteristics such as gender, ethnicity, and relationship status were found to have limited impact on will making propensity.³⁴ The Tilse study found that the younger a person is, the less likely they are to have a will, with more than 90% of respondents aged between 18 and 29 not having a will, compared with more than 90% of those aged 70 years or older having wills.³⁵

Our findings about *preferences* for the age of first discussions about will making are consistent with actual will making practices documented by not only the Tilse study, but also earlier studies that have demonstrated that will making *prevalence* increases with age, from 58% of Australians aged 18 and above having wills,³⁶ increasing to 79% prevalence in Australians aged above 35,³⁷ and 96% prevalence in Australians aged above 50.³⁸ Our study about *preferences* is also consistent with findings in the Tilse study that will making “procrastinators” tend to be relatively young (average age 40 years) and owned assets worth less than \$500,000.³⁹ Furthermore, our finding that females are more likely to prefer engaging in the will

33. See Cheryl Tilse et al., *Making and Changing Wills: Prevalence, Predictors, and Triggers*, SAGE OPEN, Feb. 15, 2016, at 1.

34. *Id.* at 4, 8.

35. *Id.* at 4.

36. *Id.* at 2 (citing AUSTRALIAN GOVERNMENT DEPARTMENT OF FAMILY AND COMMUNITY SERVICES & PRIME MINISTER'S DEPARTMENT OF BUSINESS, *GIVING AUSTRALIA: RESEARCH ON PHILANTHROPY IN AUSTRALIA* 35 (2005)) (noting that the interview was conducted by telephone and had a sample size of 6,209 participants).

37. *Id.* (citing JILL WILSON & CHERYL TILSE, *WILL MAKING IN QUEENSLAND* 6 (2012)) (noting that there was a sample size of 820 participants).

38. See *id.* at 2 (citing DIANA OLSBERG & MARK WINTERS, *AGEING IN PLACE: INTERGENERATIONAL AND INTRAFAMILIAL HOUSING TRANSFERS AND SHIFTS IN LATER LIFE* (2005)).

39. *Id.* at 5–6.

making discussion at an earlier age, is consistent with the earlier Tilse study, which found that slightly more females had wills than males.⁴⁰

Regarding relative differences in preference between the legal profession sample and those in our general population sample, there are clear differences in age preference for the first will making discussion. Legal professionals favor having an initial conversation almost two decades earlier than the general public does (late twenties as opposed to late forties). We also find a consistent negative relationship between age of legal professional and their preference for year of first will making discussion. The preferences of legal professionals, particularly experienced lawyers, for the first will making discussion to occur at an earlier age is likely reflective of their experience and understanding of the law and its practical application. This knowledge includes personal experience dealing with intestate clients, which logically increases with years of practice and specialization. Practical and legal reasons why it is important to engage in will making at an earlier age include the accumulation of assets and the desirability of avoiding adverse consequences of dying intestate. While younger people may perceive that there is no need for them to engage with will making until they are older and have accumulated more assets,⁴¹ the reality, as highlighted so effectively by COVID-19, is that death can occur at any age and most people may start accumulating assets at a relatively young age. This is at least true, for example, upon entry into the paid workforce, given compulsory superannuation (saving for retirement) in Australia and the fact that many superannuation policies also contain significant life insurance benefits.⁴² While superannuation assets may not necessarily form part of the estate of the deceased fund member, it may be that, absent a valid binding death benefit nomination to the contrary, the trustee of the superannuation fund determines that the death benefits are payable to the estate. Careful consideration of, and planning for, the disposition of superannuation interests that may come into the estate can therefore be an

40. *Id.* at 5 (proportion of males with wills 55%, compared with 64% for females). This finding was consistent with other earlier studies considered by Tilse et al. See Christopher Baker & Michael Gilding, *Inheritance in Australia: Family and Charitable Distributions from Personal Estates*, 46 AUSTRL. J. SOC. ISSUES 273 (2011); Ruth Gaffney-Rhys, & Joanna Jones, *Where There's a Will There's a Way: Attitudes to Inheritance Planning Amongst Small Business Owners*, 55 INT'L J. L. & MGMT. 103 (2013).

41. See Tilse et al., *supra* note 33, at 8 (discussing KAREN ROWLINGSON & STEPHEN MCKAY, ATTITUDES TO INHERITANCE IN BRITAIN (2005)).

42. *Id.*

important part of the will making process. There are therefore various adverse social and economic implications of dying without a will and becoming subject to the intestacy laws.⁴³ While the intestacy laws are intended to approximate the testamentary intention of the average person, these provisions have arguably not kept pace with cultural norms,⁴⁴ societal changes, and evolving concepts of “family,”⁴⁵ all of which highlight the need for early will making discussions to avoid intestacy.⁴⁶ This is consistent with earlier research which has found that the general public has limited understanding of the consequences of dying intestate,⁴⁷ even though it has been found that this does not impact on the decision whether or not to make a will.⁴⁸

Our behavioral bias analysis identifies individuals’ differences in preference for will making in the general population sample, with those exhibiting herding bias preferring the first will making discussion at an older age, and those exhibiting confirmation bias preferring greater personal input into the will making process. From a practical standpoint, identifying the presence of particular cognitive or behavioral bias is imperative to establishing the mechanisms that drive individuals’ choice in the will making setting. For example, identifying that *herding bias* plays a role in the age at which members of the general public first initiate discussions allows legal professionals to logically communicate and explain to clients that their decision process may be based on bias, social or peer factors rather than an independent assessment of what is in their best interest. Decision making tools can then be utilized or implemented in practice.

43. See *Administration and Probate Act 1929* (Act) pt 3A (Austl.); *Succession Act 2006* (Nsw) ch 4 (Austl.); *Administration and Probate Act 1969* (Nt) pt III divs 4, 4A, 5 (Austl.); *Succession Act 1981* (Qld) pt 3 sch 2 (Austl.); *Administration and Probate Act 1919* (Sa) pt 3A (Austl.); *Intestacy Act 2010* (Tas) (Austl.).

44. See, e.g., *Eatts v Gundy* [2015] 2 Qd R 559 (Austl.) (holding that a person recognised as a “child” under Aboriginal culture was not held to be a “child” for the purposes of intestacy (or family provision) legislation in Queensland, namely *Succession Act 1981* (Qld) pt 3 sch 2 (Austl.)). For a critique of the intestacy provisions in the context of Indigenous persons, see Prue Vines, *Wills as Shields and Spears: The Failure of Intestacy Law and the Need for Wills for Customary Law Purposes in Australia*, 5 INDIGENOUS L. BULL. 16 (2001).

45. See Fiona Burns, *The Changing Patterns of Total Intestacy Distribution Between Spouses and Children in Australia and England*, 36 UNIV. N.S.W. L.J. 470, 472–76 (2013) (Austl.).

46. See *Australian-United States Perspective*, *supra* note 1, at 8.

47. Tilse et al., *supra* note 33, at 8 (discussing KAREN ROWLINGSON & STEPHEN MCKAY, *ATTITUDES TO INHERITANCE IN BRITAIN* (2005)); Reid Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 878 (2012).

48. Tilse et al., *supra* note 33, at 8; Weisbord, *supra* note 47, at 877.

This empirical study is descriptive in nature and provides an important primer identifying several biases relevant to will making in Australia. Future research should focus on design, implementation, and empirical testing of both educational and decision tool interventions that account for such bias, to assist both legal professionals and their clients in the decision process.

In the context of relative input into the will making decision making process, participants with some history of will making indicated that they prefer greater legal professional involvement. As for the legal profession sample, more seasoned legal professionals prefer greater client input in the will making decision making process. Our study about roles in the will making *decision making* process no doubt reflects the reality that lawyers have professional obligations to obtain clear instructions from their clients, and where a capacious client (remembering the presumption of capacity) gives coherent instructions, the lawyer has a duty to act and prepare the will promptly.⁴⁹ Furthermore, lawyers require client input in the form of detailed instructions from clients as to the nature, extent and ownership structures of the client's assets so that they can fully advise the client as to various alternative ways of dealing with those assets, including as part of the client's estate that is in their will, so that the client can then make a decision and provide further instructions for the lawyer to draft their will to give legal effect to these wishes. In some cases, especially where clients are high net worth individuals who may have complicated legal and financial structures in place, it may be necessary for a multidisciplinary team approach to be adopted, including the client's accountant and/or financial advisor in the will making process so that a validly made will best gives effect to the client's wishes.

Effective engagement by individuals in the will making decision making process is enhanced by improved levels of financial literacy.⁵⁰ A study by Agnew and others found that aggregate levels of financial literacy in Australia were similar to comparable countries, and that younger, less educated and unemployed persons were most at risk of having low levels of financial literacy.⁵¹

49. *Strange v Redmond* [2001] QDC 356 (Austl.); *White v Jones* [1995] 2 AC 207 (Austl.); *Fischer v Howe* [2013] NSWSC 462 (Austl.); *but see Howe v Fischer* [2014] NSWCA 286. *See also* QUEENSL. L. SOC'Y, AUSTRALIAN SOLICITORS' CONDUCT RULES r. 8.1 (2012) [hereinafter ASCR] ("A solicitor must follow a client's lawful, proper and competent instructions.").

50. *See generally* AUSTR. SECURITIES AND INVESTMENTS COMM'N, REP. 230: FINANCIAL LITERACY AND BEHAVIORAL CHANGE (2011).

51. Julie Agnew et al., *Financial Literacy and Retirement Planning in Australia*, 6 NUMERACY, no. 2, at 1, 3 (2013) (customized survey to a representative sample of

Interestingly, this study also found that financial skills increase with age,⁵² which is consistent with our findings that people generally believe that they do not need to consider will making until they are older, and that people with a history of will making prefer more legal professional input in will making decision making. To empower actors to engage in effective will making and actively participate in shared decision making in this context, it is important that the level of financial literacy of all Australians, particularly those in these at-risk groups is improved and maintained.⁵³

Under a shared decision making model, both the client and the legal professional contribute to the legal decision making process and agree as to what is included in the will.⁵⁴ Effective models of shared decision making are imperative for informed consent and are common in other credence markets, particularly in health settings such as elective surgery and end of life decision making.⁵⁵ Shared decision making is a hallmark of good legal professional practice, an ethical imperative,⁵⁶ and it enhances client engagement in the will making process. While genuine shared decision making is the gold standard in all lawyer-client interactions, it is especially important in will making. In will making, there may not be a single clearly superior option and it involves a preference-sensitive decision, as the various options for the transfer of property on death may have different inherent benefits and drawbacks, and the decision is likely to be strongly influenced by clients' preferences and values.⁵⁷ The role of legal professionals is therefore to explain the law and options to clients and assist their client in choosing the option which best aligns with the client's preferences as to the transmission of their property on death and also aligns with their views and wishes, including personal and cultural beliefs. The mere transmission of

1,024 Australians to examine the relationship between financial literacy and retirement planning).

52. *See id.* at 17.

53. AUSTRALIAN GOVERNMENT, NATIONAL FINANCIAL CAPABILITY STRATEGY 2018 (2018); Sharon Taylor & Suzanne Wagland, *Financial Literacy: A Review of Government Policy and Initiatives*, 5 AUSTRALASIAN ACCT., BUS. & FIN. J. 101 (2011).

54. This analysis draws on literature in the medical decision-making context. *See, e.g.,* Hoffman et al., *Shared Decision Making: What Do Clinicians Need to Know and Why Should They Bother?*, 201 MED. J. AUSTRALIA 35 (2014).

55. *See* Whyte et al., *Cognitive and Behavioral Bias in Advance Care Planning*, *supra* note 17, at 1.

56. *See* ASCR, *supra* note 50, r. 8.1 ("A solicitor must follow a client's lawful, proper and competent instructions.").

57. *See* Hoffman et al., *supra* note 54, at 35; Müller-Engelmann et al., *When Decisions Should be Shared: A Study of Social Norms in Medical Decision Making Using a Factorial Survey Approach*, 33 MED. DECISION MAKING 37, 37 (2013).

legal information from lawyer to client alone is not sufficient; under a shared decision making model the client is supported and empowered to take a more active, rather than passive role.⁵⁸ Benefits of adopting a shared decision making approach in the will making context may include fostering more detailed and nuanced provision of information about assets and clients' preferences, with a view to incorporating these instructions into the will making process; improving client understanding and more accurate perception of risk; fostering enhanced lawyer–client communication; reducing client experiences of decisional conflict, and minimizing the potential for clients to feel uninformed and disengaged, thereby contributing to the management of the risk of implementing ineffective provisions in wills.⁵⁹ This is important given case law concerning the obligations of lawyers to advise clients regarding potential family provision application (FPA) claims,⁶⁰ noting that when taking instructions for a will, the solicitor's duty includes giving proper effect to the testator's intentions and advice about possible FPA claims.⁶¹

In this context, a focus on the validity of the will and the need for the input of legal professionals as experts in the will making process to manage the risk of time consuming and expensive legal challenges, including those relating to testamentary capacity and construction of clauses in the will, as well as family provision applications, is important. While empirical data is lacking, there is also an increased risk of a lack of compliance with the formal and mental requirements without the additional safeguard of the physical presence of lawyers.⁶² Self-drafted or home-made wills may give rise to a unique

58. In the medical context, see Hoffman, *supra* note 54. See generally Natalie Joseph-Williams et al., *Knowledge is not Power for Patients: A Systematic Review and Thematic Synthesis of Patient-Reported Barriers and Facilitators to Shared Decision Making*, 94 PATIENT EDUC. & COUNSELING 291 (2014); Martin Härter et al., *Policy and Practice Developments in the Implementation of Shared Decision Making: An International Perspective*, 105 ZEFQ 229 (2011).

59. For a discussion of benefits of shared decision making in the medical context see generally Hoffman et al., *supra* note 54; Alexander Kon, *The Shared Decision-Making Continuum*, 304 J. AM. MED. ASS'N 903 (2010); Cathy Charles et al., *Shared Decision-Making in the Medical Encounter: What Does It Mean? (Or It Takes at Least Two to Tango)*, 44 Soc. SCI. & MED. 681 (1997).

60. See *Calvert v Badenach* [2015] TASFC 8 (Austl.).

61. See *Badenach v Calvert* [2016] HCA 18 (Austl.).

62. See, e.g., *Re Sheehan* [2021] QSC 89 (Austl.) (In this case, the will was witnessed under the emergency online witnessing provisions, namely *COVID-19 Emergency Response Act 2020* (Qld) and the *Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020* (Qld). A solicitor prepared the will, but unfortunately during the signing process the testator missed signing one page, which meant that the will was not validly executed according to the legislation. An application for probate of an informal will under section 18 of the *Succession*

set of construction issues.⁶³ For example, will making without the benefit of the involvement of legal professionals might mean that the testator lacks knowledge about family provision application risk mitigation strategies. Another possible challenge with self-drafted wills is the possibility that a testator might not understand whether or how they might effectively transfer interests in particular property. An example of this is property held in a discretionary trust for the benefit of a named individual (the beneficiary). The beneficiary may believe that she has the power to control the disposition of the trust assets upon her death, and that may or may not be the case, depending on how the trust deed is drafted. If the beneficiary does have a power of appointment by will, for example, the trust deed may include very specific rules that must be followed for the exercise of the power of appointment to be valid and effective. Without professional advice, the beneficiary may not be aware of these particular rules and purported dispositions of their interest under the trust may not be effective.

Most interestingly, we found that in asking about attitudes toward audio-visual technology in will making, framing has no impact on both the general public or legal professionals.⁶⁴ That is, promoting remote audio-visual technologies as either a benefit or risk to valid will making, does not change peoples' attitudes about will making. From a practical standpoint, targeted advertising or marketing campaigns directed to the general population that emphasize the risks versus the benefits, or vice versa, likely would make absolutely zero difference to the attitudes of either members of the general public or legal professionals. This key finding of the framing experiment should be taken into account when considering legal professional training and engagement of the general public.

This study's findings support similar findings in the Tilse study. Tilse and colleagues found that not many will makers perceived themselves to be prompted to make a will by generic advertising or a suggestion from a third party such as a lawyer or family member. Most will makers believed that they were motivated entirely by self-reflection.⁶⁵ In terms of input into the will making decision making process, the Tilse study also found that once the decision to make a

Act 1981 was necessary to uphold the will. The Court determined that the solicitor acted with a high degree of competence and diligence and was not at fault).

63. See, e.g., *O'Brien & Anor v Smith & Anor* [2012] QSC 166 (Austl.) (holding that one cannot use evidence of testator's intention under section 33C(1)(c) to resolve ambiguity in the will).

64. See *infra* Appendix, Figure 1A.

65. See Tilse et al., *supra* note 33, at 7.

will was made, the will maker was most likely to seek advice from their closest family of personal advisors and/or their lawyer.⁶⁶

While some earlier studies have found that there were perceptions that will making was too costly, complicated, and obscure,⁶⁷ the Tilse study found that only a limited number of will makers identified high cost and complexity as barriers to will making.⁶⁸ Our study's finding that framing has no influence on would-be testators supports that conclusion.

Our study effectively highlights the roles that both clients and legal professionals play, and should play, in will making and estate planning, and the related issue of access to quality estate planning advice. This is especially important given that any errors in the making of a will, for example, may not become known for decades – and after the person best placed to give evidence as to their intentions, the testator, has died. The resolution of any consequent issues and disputes can be expensive, both financially in terms of legal and court fees but also in terms of time and the emotional toll of having to deal with the consequences of an invalid or disputed will while grieving the loss of a loved one. Additionally, our study raises important questions about whether members of the general public or the legal profession see the need for audio-visual technology in will making, or whether the availability of such technology would, in fact, simply increase rates of will making. After an acknowledgment of our study's limitations, the article considers our conclusions, including further questions about which more research is needed.

B. LIMITATIONS

The current study is not without limitations. Firstly, sex ratios in both samples are somewhat skewed with more males in the general population and more females in the legal professional sample when compared to the national average. Secondly, there is an unavoidable selection bias in both samples; participants self-selected into the survey, as is common in social science surveys advertised to the general public. For example, selection bias may result in more altruistic, socially aware or engaged participants relative to the general population, and those who possibly derive some form of utility from completing online surveys, and certainly those who are

66. *See id.*

67. *See id.* at 8 (discussing KAREN ROWLINGSON & STEPHEN MCKAY, ATTITUDES TO INHERITANCE IN BRITAIN (2005); *see also* Weisbord, *supra* note 47, at 877.

68. *See* Tilse et al., *supra* note 33, at 8.

more cyber literate compared with those who are not. Thirdly, participant responses are stated preference, not revealed preference.⁶⁹ Moving forward, data collected from legal professionals and their clients, both at the initial point of consultation and at the will-signing stage, would enhance future research into stakeholder preferences.

CONCLUSION

There is a dearth of research about will making behavior in Australia and other countries. Accordingly, there exists a pressing need to understand preferences and attitudes to will making so that reformers can incorporate such insights into new policies that remove real and perceived obstacles to valid will making, legal and otherwise, as possible. Because wills and other estate planning documents traditionally do not have great uptake in Australia or other common law jurisdictions,⁷⁰ it is important to understand the reasons why, before assuming, possibly erroneously, that access is the issue and technology is the solution. Behavioral economics provides an important and novel disciplinary lens through which to analyze will making and to collect the relevant evidence necessary to inform data-based reforms of policy and law.

This paper makes an important original contribution to the evidence base in this area by adopting a unique approach of applying behavioral economics theory. Our approach answers two foundational questions about will making perceptions, from the perspective of general population and legal professional samples in Australia: (1) when to start the conversations about will making; and (2) the relative percentage of document contents that “should” be driven by the client as opposed to the legal professional. Further studies could compare cross-jurisdictional attitudes on these same questions, assess similarities and differences, and determine whether certain insights from the Australian study are translatable to jurisdictions with different policies, laws, and traditions.

Our empirical insights into attitudes towards will making also highlight the need for community education; in particular, guidance on the best time to make a will and the roles of will-makers and legal professionals in the drafting process. Our research is also fundamental to the effective future design, development and delivery

69. Stephen Whyte & Benno Torgler, *Preference Versus Choice in Online Dating*, 20 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING 150, 150 (2017).

70. See Tilse et al., *supra* note 33, at 8.

of community education, including school curriculum development, and public advertising by governments and legal professionals providing will making services to promote the importance of early access to valid will making and financial literacy to enable active participation in shared decision making during the will making process. Our study also highlights the need for targeted continuing professional education programs for legal professionals and in relation to the design and development of such programs, in particular the shared decision-making model and risk management strategies. Finally, this study invites questions about perceptions of the drawbacks and the need for education about audio-visual technology's role in will making, and challenges in communicating its benefits and drawbacks.

Consider our findings about the difference in lay versus professional perceptions about when the ideal time is to start thinking about will making, and the roles that client and legal professional should play in the process. Together with the results of our framing experiment, our study can contribute to the broader debate regarding technology's role in increasing access to valid will making. In this context, the potential permanent adoption of technology in will making, such as in online witnessing of wills, would constitute significant reform of Australian law. Such transformational change requires wide consultation with relevant stakeholders, and a rigorous and relevant evidence base.⁷¹ While arguments both for and against the use of various technologies in will making exist, caution should be exercised before presuming that adoption of technology itself will necessarily facilitate valid will making, especially by those who might not otherwise have had the ability or inclination to make a will.⁷² Likewise, it would be naïve to assume that will making can remain immune from technology. The growth of companies offering semi-customized wills created by "smart" technology are evidence that this has already occurred.⁷³ Indeed, the U.S. Uniform Law Commission was prompted to bypass some of its customary law reform processes in order to fast-track the development of model legislation that could limit the influence of for-profit companies in this space.⁷⁴ While some may argue that

71. See *Formalities in a Post-Pandemic World*, *supra* note 1, at 126 (suggesting further research questions).

72. See *id.* at 95, 123; see also Purser et al., *End of Life Decision-Making, Advance Care Planning and Estate Planning During a Pandemic*, *supra* note 1, at 14; *Australian-United States Perspective*, *supra* note 1, at 14.

73. See Adam J. Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. REV. 827, 846-51 (2020).

74. See Susan N. Gary, *The Electronic Wills Act: Facing the Inevitable*, 55 REAL

technology-based will making tools are far removed from the traditional gold standard of in-person will making consultations and individualized legal advice and counselling, technologically facilitated online will making may have a mass appeal; and this may mean that the use of technology in will making becomes the norm. In this context, the need for careful consideration as to *whether*, and if so *how*, technology should be implemented to best support a testator to make a valid will

Further multi-disciplinary research, including in behavioral economics, is needed to provide additional evidence informing legal and policy reform efforts related to will making, including technology-facilitated will making. Further research should focus on design, implementation, and empirical testing of both educational and decision tool interventions that account for bias and assist both legal professionals and their clients in the decision process. Future studies can add to the evidence base by investigating the following: (a) how legal professionals and the general public rank various decision making options; (b) the impact of personal circumstances, including socioeconomic and cultural factors, on will making preferences; and (c) perceptions of the benefits and risks associated with adopting technology in will making, including in online witnessing of wills.⁷⁵ Further, investigators can examine whether the availability of remote witnessing impacts the propensity of individuals to engage in will making. The collection and analysis of broad-based, foundational data about when and how will making processes occur in different jurisdictions, data which includes the perceptions of key lay and professional stakeholders, is necessary before reforms are adopted. The statistical and econometric approaches of behavioral economics facilitate novel exploration and analysis of decision-making processes of both legal professionals and the general public. Understanding, and accounting for, substantial differences in the way people process and respond to information marks an important first step. From this reference point, practitioners and reformists can help individuals make better-informed decisions that yield economic and social benefits both for the individual and the broader society.

PROP., TR. & EST. L.J. 305, 314 (2020) (discussing unusual procedures followed by the drafting committee for the Uniform Electronic Wills Act).

75. See *Formalities in a Post-Pandemic World*, *supra* note 1, at 123–126.

APPENDIX

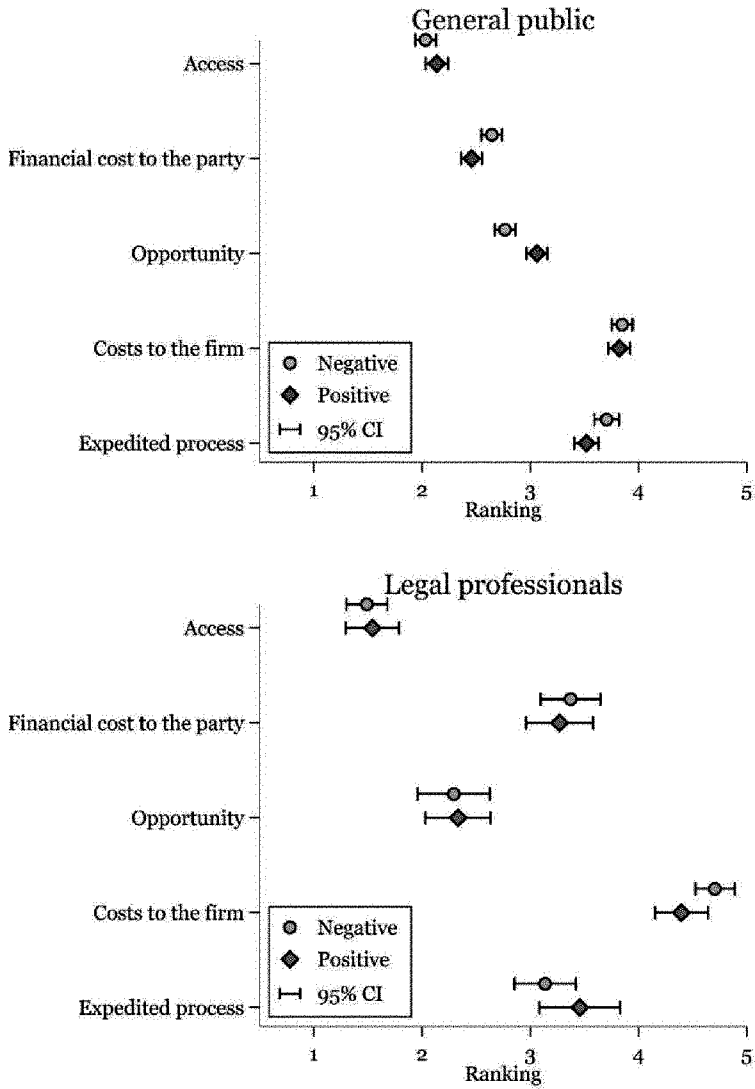


Fig 1A: Framing experiment mean ranking, by type