What's Fair

Ethics for Negotiators

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To our inspiring friend and colleague Larry Susskind
whose teaching, writing, and practice all continue
to advance the greater good

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PREFACE

This is a book about how we should treat each other when we work with others to accomplish something. As two scholars, teachers, and practitioners of negotiation for close to two lifetimes of work, we came to this project because we felt that the issues of how people should deal with each other in negotiation were treated implicitly or secondarily in our major texts too often. As those texts and other writings about negotiation have proliferated in the past two decades, we noticed that often simplified oppositions of "principled" "problem-solving" or "integrative" bargaining to "competitive," "distributional," or "zero-sum" negotiating assumed similarly oppositional ethical precepts. Cooperation and trust, in search of joint gain, often assumes openness and sharing of information, equality of power or relationships between the parties, and goodwill on both sides. Competitive negotiations require hardball tactics and suspicion when dealing with parties on the other side, assumed to be taking advantage of us. Although both of us are clearly members of the "joint gain," problem-solving association of negotiation academics, we undertook this project because, as with most other things that academics look at, we saw the complexities of the ethics issues when we asked ourselves, our students, and real-world negotiators, What's fair in negotiation?

In working with the many wonderful people who have made this book a reality, we learned that it is not true, as in love and war, that all's fair (and really, we do not think all's fair in love and war, either). We decided to compile this book about what is fair in negotiation because we know that so many wise and

savvy people have reflected on these questions in many different contexts and have explored the many diverse dimensions of answers to profound ethical dilemmas that we face every day. And because we are both teachers of negotiation in theory and practice, we were committed to focusing on what happens to negotiation ethics as they are actually practiced, not only how they are thought about by moral philosophers who negotiate mostly with their academic peers. We have learned (and selected from) the writings, teachings, and practices of moral philosophers, legal ethicists, corporate and business negotiators, public interest lawyers, and others who serve as agents for the subordinated and from the founding generation of modern negotiation theorists.

We begin with two pieces of our own to set the stage for what has concerned us about assessing what's fair and just in negotiation: the big questions about what duties are owed to others; their sources in personal, religious, familial, role, and professional morality and ethics; and the practice of ethics in actual negotiations. We hope that the chapters in this book orient readers and negotiation practitioners to what we call a moral realist's negotiation compass: knowing what questions to ask of self and others, searching out directions (yes, even you men out there) from those who have gone before, and then applying some basic principles—of the relation of means to ends and relations to relationships, distributive fairness, and just resource allocation—to real negotiation situations. We follow with an overview of orienting ethical frameworks developed by several of the major leaders in modern negotiation theory. We then treat five of the major issues, as we see them, in negotiation ethics, as others have written about them: issues about truth telling, candor, and deception in negotiation; tactics and strategic behavioral choices; relationships with others (opponents, adversaries, partners, counterparts); relationships of agents and principals (and role morality) in negotiation; and the social influences on negotiators (antecedent to) and social impacts (consequences and effects) of negotiation outcomes. In each part of this book, we provide an introduction to suggest some questions and orient readers to what is a diverse, provocative, and sometimes conflicting collection of readings on particular ethical dilemmas. We have sought to demonstrate that while we are searching for some universal principles in negotiation ethics, situations, contexts, and variations in negotiation structures (dyadic or multiparty, direct or representational) and cultures make universal generalizations difficult. Yet just because universal abstractions are often falsified in the realities of practice does not mean that we should either avoid ethical deliberation or leave it all to situational or relativist ethics. Many of the authors represented here (including ourselves) suggest that it is time for negotiation theory and practice to be more explicit about the ethical and moral assumptions or foundations on which both descriptive and prescriptive advice is presented. What's fair in negotiation depends in large measure on what we are trying to

accomplish with other people: using them, aiding them, or collaborating with them to improve the situations we are all in from before the negotiation began.

Several rules of thumb guided us in selecting the chapters. First, our focus was on the negotiation process generally. For the most part, that meant that we have not included material that deals with substantive ethical issues that arise in specific negotiation contexts, such as in the representation of children's interests in divorce cases. Likewise, we left for another day a considerable amount of material on the ethical responsibilities of mediators, arbitrators, and other third parties. Finally, we did our best to include perspectives from a range of disciplines and practices.

We encountered some challenges in putting this collection together. There was a good news–bad news aspect to the fact that there has been a lot of thoughtful writing about negotiation ethics. Although the book expanded beyond our original expectations, we could not include everything that we would have liked, and many of the selections that are included had to be trimmed in the name of overall economy. Interested readers will certainly find additional useful concepts and illustrations in the original material that we have had to condense. The Bibliography suggests additional resources. Finally, other than our own essays and Larry Susskind's contribution (Chapter Thirty-One), all of the material in the book was written at different times for different purposes. We hope that the categories and sequence that we have created provide a useful structure for exploring negotiation ethics, but most of the chapters are too interesting and too complex to roost obediently in our pigeonholes. Readers are encouraged to let their own curiosity lead them wherever it may.

ACKNOWLEDGMENTS

We owe a large debt (some of which we have paid off in copyright permission payments; the rest will come as intellectual tribute) to all of the individual scholars and practitioners (and their publishers) who have agreed to share their thinking and words in this book.

If it is possible, we owe an even greater debt to those with whom we have created a working relationship in completing this project: Bill Breslin, Mary Alice Wood, and Rachel Campanga, who helped us compile and assemble the growing corpus of materials on this important topic; the research assistance of James Bond and Jaimie Kent; and the advice and commentary of many of our colleagues at the Program on Negotiation at Harvard Law School, the Harvard Business School Ethics and Law working group, and many of our students in law and business school courses and professional training programs who have helped us see, clarify, and examine the issues presented here.

We are grateful that Alan Rinzler, our editor at Jossey-Bass, was enthusiastic about our project and patient in seeing it through. We are delighted as well that this book continues the fruitful collaboration between Jossey-Bass and the Program on Negotiation.

The biggest debt by far is owed to Dana Nelson, research associate at the Harvard Business School, whose labors, both creative and organizational, are the glue that tie the pages of this book together. We thank her for all she did and hope that she found some value in the relationship she had with us.

Finally, of course, we both thank our families who allowed incursions into "quality," as well as "quantity," time in our relationships in order to allow us to complete this project. We remind them that it could have been worse: this is, after all, an edited, not authored, book. And what is somewhat of a departure for formal acknowledgments, we would like to publicly thank and acknowledge each other: the "negotiations" that resulted in this book have been a model of what good working relationships can be. We hope you think so too.

July 2003
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Introduction

What's Fair in Negotiation? What Is Ethics in Negotiation?

Carrie Menkel-Meadow

What do we owe other human beings when we negotiate for something that we or our clients want? How should we behave toward our "adversaries"—opponents, partners, clients, friends, family members, strangers, third parties, and future generations—when we know what we do affects them, beneficially, adversely, or unpredictably? How do we think about the other people we interact with in negotiations? Are they just means to our ends or people like us, deserving of respect or aid (depending on whether they are our "equals" or more or less enabled than ourselves)? How do we conceive of our goals when we approach others to help us accomplish together what we cannot do alone?

Perhaps after the question, "What should I do?" in negotiation (seeking strategic or behavioral advice), the next most frequently asked question is, "What may I do?" (seeking advice, permission, or approval for particular goals, strategies, and tactics that comprise both the conceptualizations and behaviors of the human strategic interaction that we call negotiation).

This book presents some answers to these questions, culled from a voluminous and growing literature on what we think is "good," "ethical," or "moral" behavior in negotiation, all of these things not being equal. Ranging from strategic advice that urges negotiators to take advantage of the other side in order to maximize individual gain, to longer philosophical disquisitions on the deontological (Kantian) versus consequentialist and utilitarian justifications for moral action, taking account of how negotiation actions affect not only the negotiators but those affected by a negotiation, including the rest of society, writers

about negotiation ethics know that they are creating what one philosopher, Simon Blackburn (2001), has called an "ethical climate." Many have suggested that negotiation, practiced in different contexts, creates its own ethical climate, where expectations are that negotiators (whether principals or agents) are seeking to maximize their own gain and are "using" the other parties, as means, not ends in themselves, to achieve their own goals.

SOME ORIENTING ISSUES: THE RELATIONSHIPS OF ENDS TO MEANS

The past two decades of work on negotiation, in theory development and practice, has broadened our conceptions of what negotiation can be, as well as what is: we have learned to "seek joint gains," "expand the pie," "create solutions to problems" or "create value," and make "wise, robust, and efficient" agreements (Fisher, Ury, and Patton, 1991; Menkel-Meadow, 1984; Lax and Sebenius, 1986; Raiffa, 2002). Negotiation ethics are therefore as variable and changing as our theories, empirical and laboratory studies, and practices are revealing ever more complexity to our enterprise. Negotiation theorists have aspirations about making "better" human agreements at levels of dyadic contract formation or dispute resolution, multilateral peace and international cooperation, commercial and trade agreements, as well as in everyday human negotiations in family and work life (Kolb and Williams, 2003). These aspirations and newer approaches to negotiation raise questions about the relationship of goals and ends sought in negotiation to the behaviors chosen to meet those goals. Behaviors alone are neither good nor bad, effective or ineffective; we must also focus on the goals sought to be achieved by a particular negotiator and whether negotiators focus exclusively on themselves (or their principals, if they are agents) or whether they consider what effects their actions and outcomes will have on others outside the immediate negotiation activity. So the ethical climate of negotiation consists of more than behavior. It includes goals and ends sought, the context in which the negotiation is located, the relationship of parties and negotiators to each other, and, most controversial, the effects of the negotiated agreement, if there is one, on the parties themselves and on others outside the negotiation process.

LAYERS AND LEVELS OF ANALYSIS: THE ACTORS IN NEGOTIATION

"What's fair?" in negotiation is a complex and multifaceted question, asking us to consider negotiation ethics on many different levels simultaneously. First, there are the concerns of the individual negotiator: What do I aspire to? How do I

judge my own goals and behavior? What may I do? How will others judge me (my counterpart in a two-party negotiation, others in a multilateral negotiation, those with whom I might do business in the future, those who will learn of and judge my behavior or results in any negotiation that might become more public than the involved parties)? How do I calibrate my actions to those of the others with whom I am dealing? (Should I have a relative ethics that is sensitive, responsive, or malleable to the context, circumstances, customs, or personalities of the situation at hand?) What limits are there on my goals and behavior, set from within (the "mirror" test—how do I appear to myself at the end of the day?) or without, either informally (the "videotape test"—what would my mother, teacher, spouse, child, or clergyperson think of me if they could watch this?) or formally (rules, laws, ethics standards, religious or moral principles to which I must or choose to adhere)? With what sensibility should I approach each negotiation I undertake?

For those who negotiate as agents, there is the added dimension of what duty is owed a client or principal. When do agent and principal goals properly align? When are they different (incentive structures like contingent billing arrangements or long-term dealings in the particular field may separate agents from principals in their goals), and how are differences to be reconciled (Mnookin and Susskind, 1999)? When do legal rules, like the creation of fiduciary relationships, define the limits and obligations of negotiator-principal interactions?

Third, there is the question of duty, responsibility, or relationship to the Other (call him or her "counterpart," "opponent," "adversary," "partner," "boss" or "subordinate," spouse or lover, child or parent). Even the labeling of the other actors in a negotiation has moral or ethical weight. To name a relationship is to invoke thousands of years of thinking and writing on duties and obligations owed: fealty, loyalty, candor, obeisance, caretaking, skepticism, and other predetermined stances or assumptions that affect how we approach the Other. Do we follow some version of the Golden Rule and treat others as we would hope to be treated by them (a norm of aspirational reciprocity), or does the Golden Rule tarnish a bit on application in particular contexts? Don't competitive sellers and purchasers expect to be treated strategically or with lack of full candor in bargaining for price in exotic souks (Lubet, 1996) or contested mergers and acquisitions (Freund, 1992)? And once we choose an ethical sensibility, to what extent do we change our approach and behaviors when others act on us, demonstrating the strategically, as well as biologically, robust "cooperative" program of tit for tat ("reciprocate, retaliate, but forgive"; Axelrod, 1984).

When we expand the Other to include, more realistically in modern negotiations, multiple Others (agents and principals in both dyadic and multiparty negotiations), we are then faced with the complexity of dynamic and sequential negotiation ethics. How firm is a commitment to hold to a coalition or interest-based or strategically based subgroup? How many participants in a multiparty setting must agree for a negotiated result to have legitimacy? What

duties do the parties have to each other to provide adequate voice, participation, and involvement in agreements with mixed resources, mixed interests, and power imbalances? Adding more than two parties almost always adds dimensions of the ethics of transparency, privacy, conspiracy, publicity, defections, and betrayals that are not present in the same way in dyadic negotiations. How do multiparty negotiators police themselves and others? Withdrawal or withholding by one will not (as in dyadic negotiations) terminate the proceedings.

If negotiations are successfully concluded, meaning some agreement is reached, what are the ethical implications of follow-through, promise keeping or breaking, implementation, and enforcement? What is left to trust, and what must be formally drafted for, with clear enforcement, penalty, and incentive structures specified? How are the actors from within the negotiation to judge if they have done well and created a fair agreement? Do they measure themselves by client or self-satisfaction? By distributional effects (how are considerations of equity or distributional fairness made by parties to a negotiation)? By the robustness or longevity of the agreement? How do we judge our negotiated American constitutional agreement (Lansky, 2000), with its Civil War, scores of amendments, interpretive contests, but stable and lasting power, both symbolic and real?

THE EFFECTS OR OUTCOMES OF NEGOTIATIONS

How do those outside a negotiation judge its ethical externalities, or social effects? Has a particular negotiation done more good than harm? For those inside the negotiation? Those affected by it: employees, shareholders, vendors and clients, consumers, the public? And to what extent must any negotiation be morally accountable for impacts on third parties (children in a divorce, customers in a labor-management negotiation, similarly situated claimants as in mass torts, employees in an acquisition) and for its intergenerational effects (future generations in environmental disputes)? What efforts can third parties, like mediators, make to ensure accountability to those both inside and outside a particular negotiation? Are third parties, like mediators, ever morally responsible for the outcomes they preside over (Bernard and Garth, 2002; Susskind, 1981)?

At a level of ethical policy and social effects of negotiation, one can think of such macroethical issues (as distinguished from the still-important microethical concerns of particular individual ethical behavioral choices) as what the practice of plea bargaining does to our criminal justice system and the enforcement of society's ultimate moral rules and sanctions; what settlements secretly arrived at, and protected with confidentiality agreements, in our civil justice system do to civil law enforcement and knowledge of human wrongs and corrected remedies; and whether a culture of negotiation is itself ultimately a social good in promoting reasoned, as well as preference-driven, deliberation and

mutual fair dealing or whether it promotes an assumption of self-interested, unprincipled compromise or self-aggrandizement. As modern political theorists and philosophers have recently noted, the very use of negotiation processes is itself an ethical and moral question (Hampshire, 2000; Elster, 1995; Forester, 2001; Pennock and Chapman, 1979).

CONTEXT IN NEGOTIATION ETHICS

Ultimately, whether there are any universal principles of negotiation ethics or whether ethics in negotiation must be related to specific negotiation cultures, whether professional (law and business), functional (horse trading and souk bargaining or political and institutional deal making), role based (family, friend, agent-principal, diplomatic or commercial, long-term or one-shot relationship), or social grouping (national "culture"; Avruch, 1998; Acuff, 1997), religion, gender, or socioeconomic status, remains an intriguing, if unanswerable, question, hanging like an uninvited moral philosopher or clergyperson above the table at any negotiation session. The selections in this book move through many layers of generalizations and assertions (some supported with empirical data, most not) about what constitutes fair or morally defensible conduct in negotiations in specific contexts.

What is clear through the contextual variety of situations in which questions of what's fair in negotiations comes up is that negotiation ethics issues arise at both process and outcome levels. As the different actors in negotiation approach each negotiation, they must ask not just what they may do behaviorally and processually; they must also consider what goals to set for themselves as they begin, how those goals change when dynamic interaction and more information become available during a particular negotiation, what relationships, if any, they create (or destroy), and how a final settlement or agreement is to be morally, as well as instrumentally, assessed at its conclusion. Negotiation ethics are contextually complex, but they are also temporally dynamic. What looked fair today may look different tomorrow.

Is what's fair in negotiation negotiable itself, depending on the context of the matter or the relationships of the parties? Are one-shot litigation settlement negotiations or one-off company or material goods purchases (cars, houses, washing machines) closer to each other in internal morality than to repeat player litigation (class actions, employee-employer, supplier-customer) or venture capital transactions? Is dispute resolution negotiation, regardless of parties' relationships or numbers, necessarily more adversarial or competitive than transactional deal-creating negotiations, or are these distinctions more illusory in practice (when deal makers try to grab advantage in contract clause drafting and risk allocations)? Do entities (companies, organizations, unions, governmental agencies, universities) and clients have ethical reputations of their own

that they value when choosing agent negotiators or when shifting leadership (Wolgast, 1992; Nash, 1993; Paine, 2003)? Do friends, family members, and others who know each other expect different conduct than when dealing with strangers (Bazerman and Neale, 1995)?

The negotiator's understanding of what ethical principles or precepts may apply to him, to help him (and us) evaluate and morally judge what we and he does, are quite varied, as the chapters in this book demonstrate. Whether from personalistic, familial, religious, or early moral teachings, there are principles of right human conduct (the Ten Commandments, the Golden Rule of doing unto others as you would have them do unto you) that we are taught should apply to everyone always (Kantian imperatives). These may be modified by more specialized teachings and learning in professional norms (for lawyers, the Model Rules of Professional Conduct in formal rules and, more important, the behavioral norms and expectations of specific practice settings) or in special contexts, such as anonymous commercial dealings (Caveat emptor!). Wise negotiators learn that often (not always) instrumental, pragmatic, or market ethics (your reputation for truth telling, value creation, and follow through, which enhances trust and market value; Norton, 1989; Gilson and Mnookin, 1994, 1995) may conform to more aspirational ethics (to do the right or fair thing). Finally, there are formal rules and laws (notably the law of fraud and misrepresentation; Shell, 1991), which can void a deal or subject a negotiator to legal penalties and even professional discipline and sanctions.

EVALUATING ETHICAL CLAIMS

There are many ethical issues in negotiation, though many treatments of the subject focus almost exclusively on questions of deception, truth telling, and candor in negotiation. This book presents a wider variety of ethical issues and dilemmas, treated by a broad spectrum of scholars and practitioners working from many different conceptual frameworks and practical settings. As each negotiation ethics issue is presented here, it may be useful to ask the following questions:

1. What are the author's underlying assumptions about the purpose of the negotiation discussed?
2. What implicit or explicit norms of value or behavior does the author rely on?
3. What data or empirical support does any author present for claims made about how negotiations are conducted in a particular setting or culture? Are such data sets (or their absence, in the form of assertions or claims) persuasive to you?

4. To what extent are claims made about what is permissible, prohibited, or advisable in negotiations dependent on the context of the negotiations? Is all fair in arms-length business negotiation, with fewer tactics being fair in family or international diplomatic negotiations? What distinguishes one context from another?
5. Should negotiation ethics track what is (empirical realities or customary expectations), or should they aspire to what should be (aspirational) fair to both those engaged in or outside of the particular negotiation?
6. What is the best way to socialize or educate negotiators about both good and best practices in negotiation?
7. How can negotiation ethics best be effectuated (expressed, monitored, enforced, sanctioned, made accountable) when there is little agreement on universal or foundational principles to be applied and negotiation is practiced in so many different contexts, but most often in confidential, nontransparent settings?

We hope that by presenting many different perspectives on what is fair or appropriate or advantageous in negotiation, we will be offering something of a moral realist's compass—some clarifying markers and directions, with points along the way illuminated by those who have gone before—but ultimately, it is you, the traveler, who has to decide where you are going. As editors of this book, we have our own points of view: if there is no true north for all destinations, there are certainly better ways to get from one point to another. We do believe that analytic rigor, practical and philosophical deliberation, and humanistic concern for our fellow negotiators should produce better negotiations, in terms of quality solutions to negotiated problems and to better relationships between parties and future generations. A central theme of this book is to present multiple voices that consider whether changing theories, norms, and approaches to negotiation (from distributional strategies to integrative ones) have changed the underlying ethical climate with which negotiators now approach each other, especially after several decades of scholarly, pedagogic, and practical attention to negotiation, particularly in business and law schools.

THE CORE ISSUES

This book explores a number of the key issues confronting all negotiators, most often presented by several different treatments of those issues. We begin with an overview of several different statements of what some core values might be in conducting fair negotiations. Some of the key negotiation theory founders of the modern generation—Roger Fisher, Howard Raiffa, David Lax, and James

Sebenius—suggest that every negotiation presents the negotiator's dilemma: whether to act as you would want others to act toward you (with candor, in search of a good joint solution for both parties) or as you might expect them to act in a world of assumed scarce resources and competition (with lack of full disclosure and with the intention of taking advantage of you).

Whether termed an issue of what candor is required or expected or what misrepresentations might be permissible in custom, or actionable at law, or simply whether to approach the other side with trust or suspicion, this is what Howard Raiffa has labeled the "social dilemma game"—only it is not a game. In virtually every negotiation, the initial ethical orientation to oneself and to the Other can be quite serious, with iterative consequences for all players. Whether termed a behavioral question of cooperate or defect, claiming or creating value, or being open and trusting or skeptical and closed, this behavioral choice is really a proxy for a much bigger question of what one hopes to accomplish in a negotiation for the self (or client), for the Other, and for the long-term consequences of both the negotiated agreement and the relationships of all affected parties. Although in "the long run, we will all be dead," said John Maynard Keynes, the long run in negotiation is often longer than the short run of a particular deal. Thus, most modern treatments of negotiation ethics ask us to consider from the outset not just this deal or this lawsuit settlement, but also the possible long-term effects of the agreement itself and the reputation of the negotiators.

Instrumental ethics (making a good, enforceable, and lasting deal) here can be coextensive with aspirational ethics. In Howard Raiffa's terms, "All of us are engaged in a grandiose, many person, social dilemma game where each of us has to decide how much we should act to benefit others. . . . We have to calculate, at least informally, the dynamic linkages between our actions now and the later actions of others. If we are more ethical, it makes it easier for others to be more ethical" (1982, pp. 354–355).

Deciding whether to behave ethically toward others implicates at least five common issues, which we explore in separate parts of this book: (1) what duty we owe to others to tell the truth, or something like the truth, in our negotiated dealings with them; (2) what tactics and behaviors we choose when interacting with others; (3) what the duties and responsibilities are with respect to our relationships with clients and principals in negotiation (agent-principal issues); (4) what relationships we seek to create with the Others in our negotiation activity; (5) the social influences and distributional fairness of outcomes and of negotiated agreements on the parties themselves; and the social impact of negotiation agreements on others who are, or might be, affected by the negotiation result.

These ethical issues are significant for both those inside the negotiation, who must make choices about what to do and how to evaluate their own behavior and that of others, and for those who stand outside and seek to evaluate or judge both negotiation behaviors and outcomes. Some will be more concerned with process issues: How do individuals treat each other? Are they honest, candid, and well

meaning? Do they take advantage of power or informational asymmetries to maximize gain? Do they threaten force or coerce concessions or gains in monetary or other ways? Have all necessary parties participated? Is the agreement likely to be complied with? Others will be more concerned with the outcomes or effects of negotiation. Have resources been fairly or optimally allocated? Is there "waste" left under or over the table? Are absent parties (children, future generations) considered fairly? What are both the short-term and long-term effects of negotiated agreements on parties and others?

The chapters in this book span a full range of approaches to these issues, from James J. White who argues, from his assumptions of the empirical reality of legal negotiations and commercial sales, that the negotiator's job is like that of the poker player—"To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation" (1980, pp. 926–927); to philosopher Sissela Bok (1978), who argues for more transparent behavior in both public and private negotiations; to legal commentators like Richard Shell (1999) and Alan Strudler (1995), who remind us that the degree of candor in a negotiation is one of the few things regulated by law (fraud and misrepresentation law, in both contracts and torts). We present advice from those who suggest that difficult adversarial negotiations with more powerful parties might justify tactics otherwise thought problematic in other contexts (Meltsner and Schrag, 1974; Freund, 1992), a claim of justified retaliatory, reactive, or protective tactics, sometimes supported by game theorists and other social scientists (Axelrod, 1984). The old adage of "when in Rome, do as the Romans" (Weiss, 1994a, 1994b) implies a kind of morality of reciprocity, common in treatments of negotiation norms that can serve not only to justify mirroring tactics or cultural conformity but in some cases has been argued to justify the paying of bribes in negotiation (when not otherwise declared unlawful by the Foreign Corrupt Practices Act; Acuff, 1997). While some commentators distinguish between statements made about fact or opinion or material representations about value or quality and merely ancillary matters to a commercial negotiation about price, there is little expectation in modern negotiation writings that parties will be totally honest about what they are really willing to pay or settle for, at least as an initial offer.

What can be said for those who enter into negotiations without knowing the culture or unwritten rules or norms? Should there be an obligation on the part of more knowledgeable negotiators to socialize, instruct, or serve those on the other side of the table? The cultures of American business and law seem to deny such obligations with their expectations of adversarial practice in which each side is master of his or her own fate or negotiation agent. There is little formal duty to take care of the other side, either informationally or substantively.

Some authors represented in this book are interested in what we can learn about the claimed empirical effectiveness of particular tactics or truth-telling variations. Is it really more efficient to have two sides attempt to maximize their gain while dividing whatever "surplus value" exists within the zone of possible

agreement? And what happens to strategic considerations of candor and truth telling when there are alternative sources of information (whether publicly or privately available), especially when there are more than two parties to a negotiation?

More analytic and thoughtful (and, dare one say, academic) treatments of issues about tactics and candor in negotiation are concerned with the conditions under which negotiators are more or less likely to be candid or use more collaborative or joint-gain-seeking activity (Cramton and Dees, 1993). Thus, the empirical and instrumental are used to test the aspirational in different contexts and with different sets of negotiators. Are women more likely to be honest or seek joint gain (Menkel-Meadow, 2000; Kolb and Williams, 2003)? Do friends and those who trust each other fail to exploit opportunities for substantive gain and more efficient outcomes (Bazerman and Neale, 1995)? Does one act of lying or discovered deception ruin one's reputation and "marketability" for trust in future deals (Norton, 1989; Gilson and Mnookin, 1994)? Can the use of other tactics (more probing and more direct questioning) reduce the dangers of dissembling and deception in others (Schweitzer and Croson, 1999)? To what extent can the instrumental (better skills) correct for bad manners or ethics by others?

Clashes of tactical advice presented here (and in the popular negotiation literature reviewed by Michael Wheeler in this book) not only reveal contrasting philosophies of the purposes of negotiation, but present interesting opportunities for challenges to different worldviews. Whether it is necessary for two negotiators to share the same frameworks or orientations to negotiation remains one of the field's million-dollar questions, but knowledge here surely is power. To the extent that a "tactic perceived is no tactic" (Cohen, 1980, p. 138), description of and revelation of particular tactics allows even those of different negotiation religions to attend each other's churches (or at least seek a neutral ground). Good preparation, probing questions, seeking other sources of information: all of these instrumental skills of negotiation can often expose or correct for those who seek to gain advantage from less-than-forthcoming practices.

If changed norms or improved skills do not level the ethical playing field, then at least in the realm of commercial and legal negotiations, there are some limits. Regulation of negotiation occurs at several different legal levels, and no negotiator should leave home without some knowledge of how formal rules, regulations, and sanctions may affect them. The law of fraud and misrepresentation in the state law of contracts and fraud may make some negotiation conduct actionable in several ways. Negotiated agreements may be declared void for such reasons as intentional, reckless, or negligent misrepresentation, and misrepresentation (as defined by state law) may encompass not only false statements but misstatements, failures to correct misunderstandings, and even, in some cases, silences

and omissions. Mistakes, whether mutual or bilateral, may also be grounds for voiding a contract (the result of most negotiations).

Contracts procured by outright fraud, coercion, and unconscionability can lead not only to voiding of a negotiated agreement but also to punitive and restitutionary damages. Modern corporate law also regulates what negotiators can say to each other when selling stock, whole companies, or even negotiating employment contracts and other deals in publicly traded companies. Recent corporate scandals involving misrepresentations of company value in both public and private settings are beginning to spawn another generation of corporate and professional laws, regulations, and legal common law decisions, calling for not only greater candor in internal and public dealings but greater sanctions when candor and public trust norms are violated.

Although the law provides some outside limits on what negotiators can do, legal philosophers have long noted the line of separation between positive law and morality (Fuller, 1964; Hart, 1961), and negotiation is no exception. What Oliver Wendell Holmes's "bad man" can get away with under the law does not hold a candle to what a "bad" or immoral negotiator can still do without fear of legal sanction, in large measure because so much of what negotiators do, they do in private, where no one can see them. Efforts to peer into and assess, whether by common morality or more formal legal sanction, the negotiation behaviors and outcomes consummated in private have been controversial and are continuing. For some negotiators, professional regulations attempt some minimal control of particular tactics and obligations for candor and fairness. The lawyer's Model Rules of Professional Conduct, for example, provides, "A Lawyer shall not, in the course of representing a client, make a false statement of material fact or law to a third person; or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client (unless disclosure is prohibited by Model Rule 1.6, the client confidentiality rule)" (American Bar Association, 2003, Rule 4.1). However, commentary to this rule makes it clear that certain statements in negotiation, which are merely "opinions" (such as of value) and are not "fact," are not subject to this rule. According to the Comment, there are "generally accepted conventions in negotiation" in which no one really expects the truth will be told and several specific kinds of statements made in negotiation are exempt from the rule. Lawyer negotiators need not tell the truth about "estimates of price or value placed on the subject of a transaction," a party's intention as to an acceptable settlement of a claim or value, and the existence of an undisclosed principal (say, Donald Trump or Harvard University in real estate negotiations). Thus, what the professional rule seems to "give" or require, the Comment to the rule taketh away. The Comment further recognizes that negotiators may "puff" or exaggerate about value, and this too is within the tolerable limits of the law. Efforts made twice in recent years (1983 and 2000) to toughen up the lawyers' rules of ethics to require candor and fairness to

other parties (including a proposal to limit a lawyer's ability to negotiate a substantively "unconscionable" agreement; Schwartz, 1978) have been defeated in formal recognition of a professional culture that deals with regularity in expected deception.

Other legal jurisdictions, like the United Kingdom, are just beginning to review these issues; solicitors there have a duty of good faith and frankness when dealing with other solicitors (see Rules 17.01 and 19.01 of the Law Society's *Guide to the Professional Conduct of Solicitors*, 1999). For example, courts have voided an agreement or ruled on legal proceedings as a sanction for bad and "misleading" behavior in a negotiation (see *Ernest and Young* v. *Butte Mining*, PLC, 1 WLR 1605, 1996), in which one lawyer deliberately misled another lawyer about a procedural matter in order to take advantage of that lawyer and dismiss the case; O'Dair, 2001.

Although some other professionals have internal ethics rules (real estate brokers, accountants, doctors), there are vast numbers of professional negotiators, including most daily business negotiators, who are entirely unregulated. Although professional discipline for violating a lawyer's duty of candor in negotiation is virtually nil, there is still some regulation through voiding of contracts and some legal scrutiny of a small class of legally settled cases, such as class actions. In other professions, scrutiny of negotiation behavior is virtually nonexistent (with the exception of some specialized consumer protection laws and similar specialized areas of regulation, such as residential real estate and securities sales). While lawyers may be heard to complain that subjecting them to overly "restrictive" ethical mandates (such as candor and fair dealing) will cause them to lose business in the multidisciplinary professional tournament of business getting, there is barely a whisper that perhaps stronger ethical mandates might themselves be a marketable advantage in the competition for getting and keeping clients.

Related to the issue of the private location of most negotiations is the more recent development of privacy and confidentiality agreements negotiated for in lawsuit settlements. If an assessment of the fairness and justness of a particular outcome is part of the ethics of negotiation, then failure to make public or disclose settlements of publicly filed lawsuits impedes such inquiries and has recently drawn the attention of legal commentators who suggest that it is morally unacceptable for settlement agreements to be privatized, especially when public issues such as health, safety, and social welfare are at stake (Luban, 1995).

Such concerns about the privatization of negotiated agreements are relatively new since for most of our social, economic, and legal history, most negotiations, both litigational and transactional, have been conducted in private. There is some evidence that more legal cases are settled (less than 3 percent of all civil cases filed in federal courts are currently completed with a public trial), but settlements of lawsuits have long accounted for a great majority of publicly filed lawsuits. With the advent of Sunshine Laws and the Freedom of Information

Act at both federal and state levels, at least governmental negotiations probably have more transparency than ever before. With new negotiation processes involving multiple parties, such as negotiated rule-making (Harter, 1982) and consensus-building forums (Susskind, McKearnan, and Thomas-Larmer, 1999) in which multiple stakeholders meet together to negotiate governmental allocations, environmental issues, and complex federal and state regulations, there is probably more public access to those kinds of negotiations. There are, however, complex legal issues about the conflicts presented when assurances of confidentiality are made in mediated settings that may conflict with public accessibility laws (Pou, 1998). However, where, as in the American legal system, so much is decided by common law lawsuits, the increased private settlement of class actions and individual lawsuits about product liability, consumer rights, securities fraud, and civil rights has caused those who care about outcome measures of justice to be concerned about the social impact of increasingly private negotiations.

Like the general public, clients of lawyers, brokers, and other agents may also not know all that has been done (or not done) on their behalf. The use of agents to negotiate on behalf of principals has long been justified on grounds of efficiency, superior knowledge, and stress reduction for the principals. However, with different incentive structures (in payment, negotiation reputation, repeat player possibilities), agents may not always be working in the best interest of their clients, and this has led to serious questioning of the separate ethics duties and responsibilities that agents (some as formal fiduciaries) may have to their clients. Where principals may not even be present at negotiations, as in many legal negotiations, assessment of the behavior of lawyer negotiators on behalf of their client-principals may be difficult to view for both process and outcome assessment.

The claim that specified roles allow for role-specific morality has also been claimed for professionals engaged in work on behalf of others. Whether as lawyers, brokers, or business negotiators, the claim has been long articulated that agents may do for others what they might not be able to do for themselves. If soldiers can kill in war, which other humans cannot do without impunity under most conditions, then lawyers and business agents are permitted, in common understandings of role morality, to be slightly more rapacious, aggressive, or deceptive in trying to extract gain for their clients. In this book, we present an excerpt of Arthur Applbaum's discussion of adversarial role morality, featuring the ultimate role moralist, M. Henri Sanson, executioner, who survived the many regime changes of the French Revolution because of his complete commitment to craft, and not political or social values. Sanson represents the ultimate in role morality: he was a professionally sanctioned killer who performed with such skill that those who were sentenced to death often requested his services. Applbaum attempts the philosopher's defense of a role so well played (and all in the name of laws

passed by the various regimes of the French Revolution) that the role player is not to be judged for what he does (killing, which is sanctioned by the law, like the lawyer's "puffing") as is the ordinary citizen, but judged simply by the quality of his craft. Is the negotiator to be judged by a craft well exercised (maximizing interests of the client, finding creative solutions), by standards of the craft or profession alone, or, unlike executioners, for both what they do and how they do their work as ordinary citizens? Applbaum likens the role performed by Sanson (a profession well executed, so to speak) to that of lawyers whose professional job is to "try to induce others to believe in the truth of propositions or in the validity of arguments that they themselves do not believe" (Applbaum, 1999, p. 42).

If role morality or the quality of performance in role is to be a measure of what is good or well done as a negotiator, then perhaps the person for whom the work is performed should be its judge. The work of agents raises questions about whether client satisfaction is enough of a moral standard by which negotiators should evaluate what they do and whether the rest of us can be satisfied with the role morality justification.

Role morality neglects consideration of a category of ethical concerns that concludes this book. Client satisfaction and efficient and effective role performance assess the ethics of negotiation from one side only. Modern considerations of ethics in negotiation go beyond the achievement of client goals and the behavioral choices of individual negotiators. We are interested in evaluating whether outcomes have been good for the parties—fair in a distributional sense and often fair in a procedural sense as well. Some empirical work suggests that the norm of reciprocity is not only a procedural one, of alternating and more or less equal concession patterns, but that negotiators do move toward a reciprocal sense of what is fair in distributions of surplus, though not in all situations and not with perfect equity (Bazerman and Neale, 1995; Thompson, 2000). Determining whether an outcome of a negotiation is fair or good for the parties includes evaluations of prior and postnegotiation endowments, whether the negotiation has made the parties better or worse off than they would have been without the negotiation, and whether all relevant issues between them have been considered.

Beyond considerations of fairness are issues of implementation, follow-through, and commitment to any agreements and, where relevant, continuing relationships of the parties. Should we judge a negotiator by how well he behaves as a promise keeper and trustworthy implementer of what has been agreed to? Reputations for following through on commitments and promises may be as significant as what negotiators do in the process of reaching agreement. Often implementation and resolution of postagreement disputes or issues may be even more visible than the actual negotiations themselves, and thus they may be subject to scrutiny of others besides the principal actors or beneficiaries to the negotiation.

Beyond the immediate parties, many now believe that in considering the morality of a negotiation, concerns for those outside the negotiation (future

generations, others affected, especially those who could not participate) require us to consider the effects on third parties—whether intentional, as when negotiators make representations of value that are relied on by others, such as investors who are not the negotiator's immediate client (Langevoort, 1999), or nonintentional, as in environmental decisions affecting the nonpresent or future generations (Susskind, 1981).

Negotiated outcomes, whether public or private, have social effects on the parties immediately present in the negotiation, of course, but others are affected as well, such as employees, other customers, other claimants, and other family members. To what extent negotiators should feel morally responsible for those affected by their work is at present a difficult question that has not been much studied. Political and social movements seek to make international organizations (like the World Bank, the International Monetary Fund, the United Nations) morally responsible for investment and debt negotiations and social and relief action that affect huge populations; environmentalists seek to make developers responsible to whole communities when they are negotiating with single sellers of land or with governmental agencies. Mediators seek to involve insurers in simple two-party negotiations about liability. Modern negotiation theory has begun to take account of the multilateral nature of most negotiations. Whether structured as dyadic negotiations between plaintiffs and defendants or buyers and sellers, so many negotiations now implicate or affect other parties that questions of inclusion at the process level and fairness at the justice level are woven into many disputes and transactions we negotiate about. How should we take account of the externalities, or effects of negotiated outcomes on those who are not present? What are the social effects of individually arrived at negotiated solutions to commercial sales, property deals, settled lawsuits, and negotiated rule making?

Some would go even further and claim that negotiation itself, as a process, should be considered on moral grounds. When is it appropriate to negotiate or settle matters between the parties (with their consent), and when should matters be ruled on publicly, by an authoritative agent or government official, where the stakes are significant for the larger public outside the dispute (Luban, 1995; Menkel-Meadow, 1995)? Does negotiation suggest an ideology or ethics of compromise with lack of principled outcomes? Philosophers and others have argued that compromise is not necessarily unethical, especially when compromise itself is a moral commitment to peace, continued relations with others, or achievement of a more "precise justice" or presents an opportunity to attempt to satisfy the good of the greatest number, the utilitarian defense of negotiation (Pennock and Chapman, 1979; Machiavelli, 1961; Menkel-Meadow, 1995). Here we offer no definitive answers to these questions. The questions are raised because they present issues of systematic ethics or macroethics and justice in the negotiation process, and we think they deserve further study and elaboration.

WHY NEGOTIATION ETHICS MATTER

To the extent that we continue to have competing theories about the goals of negotiation (individual gain maximization, joint gain, or peaceful coexistence, with or without agreed-to foundational principles) and competing practices about how those goals might be achieved (economic efficiency, distributional strategies, property and legal entitlement claims, integrative and creative solution-seeking collaborative methods, moral-desert claims), with little empirical or phenomenological accounts of how negotiations are actually conducted in different contexts (outside of social psychology laboratories), it will be difficult to develop any metatheory of negotiation ethics.

Every attempt to construct a metanarrative or analysis of how negotiation is conducted at a very abstract level is immediately resisted by different accounts (see Fisher and Ury, 1981; White, 1984; Cohen, 1980). So it goes with attempts to construct a metaethics of negotiation. It is bad to lie or deceive others (Bok, 1978; Hazard, 1981), but it is impossible to regulate private behavior or use unenforceable professional regulations or law to change common everyday expectations and negotiation culture (White, 1980). Adversarialists or professional role theorists tend to see negotiation as inherently distributional, competitive, and economically wealth maximizing, justifying a wide range of behaviors that puts each negotiator firmly on his or her own two legs, with little responsibility for anyone else. Those who see negotiation as an opportunity for mutual gains, learning, and human coordination to solve human problems see trust, nonstrategic communication, and sharing or creation (not division) of resources as animating principles. Can these different worldviews about negotiation coexist, and if they do coexist, how do we choose our goals and actions in negotiations?

Our assumptions and starting points can become self-fulfilling prophecies. As Sissela Bok (1978) noted when she began her study of lying and moral choice in public and private life, the expectation of "telling little white lies" accumulates and in turn lowers our expectations of each other and the system as a whole. So when we come to expect that generally accepted conventions of negotiation allow us to puff, dissemble, and exaggerate our preferences and needs, our expectations soon are experienced as requirements or defenses to how others are likely to behave. They become self-rationalizing and reflexive rather than reflective, and most often they call forward reactive and mirroring behaviors from others. It becomes dangerous to tell the truth or express what your client or principal really wants because you will be taken advantage of.

Some of us who study, teach, and practice negotiation have recognized that exaggerations and failures to disclose information or to take the needs and preferences of the other side really seriously do not produce efficient solutions but often produce economic and social waste with incomplete information, falsely expressed preferences, and weak split-the-difference compromises. Suboptimal

arrangements or monetary proxies for a host of other terms, needs, and issues are the result of suboptimal disclosure, strategic deception, and boilerplate solutions. Those of us who believe this (or have watched it happen time and time again in real-world negotiations, as well as in classrooms and laboratories) prefer to engage in a thought experiment that we hope these readings will illuminate: Suppose we really did treat everyone as we hoped, not expected, to be treated (how about a "Golden Rule of Candor" in negotiation? Menkel-Meadow, 1990)? What if we really did consider how what we do in negotiations has the power to affect the lives of our clients, the other parties across the table, and others who might be affected by what we do together? What incentives would we need to make these hopes a reality?

It is often said that we cannot require truth in negotiation because then the other side would not do its due diligence and proper investigation or that superior skill at negotiation and information management would no longer determine outcomes. Imagine that what is fair in negotiations might turn on the merits rather than on the strategic skill or energy of the negotiator! Some years ago, a savvy real estate broker suggested to me that regardless of what ethical and disciplinary authorities do, eventually all middle persons or brokers would likely have to become more ethical, or at least more information disclosing, as increased information (pricing; past deals; availability of products, land, and services; more pictures; more endorsements and public complaints; not to mention more legal documents and boilerplate clauses and do-it-yourself deals) becomes available to all comers and principals on the Internet (perhaps that is too optimistic about the "truth" available on the Internet) and clients would feel more empowered to represent themselves. What value-added will agents, lawyers, and businesspeople bring to negotiations in such a world? If skilled negotiators cannot offer something in addition to strategic information manipulation, what can they offer?

Consider how much more efficient and just, as well as fair, negotiations might be if the presumptive expectations about information and the purposes of negotiation were reversed from current assumptions and expectations. Clients and negotiators might say what they really wanted, needed, or expected and would be required to produce information to support such needs and claims. As Howard Raiffa (1996) and other negotiation analysts have pointed out, we already do this in negotiations with people we already trust (spouses, colleagues, partners, friends, children, some relatives, and some business associates, even with some "intimate adversaries," like trusted superiors at work or in long-term contractual relationships like management and labor (Walton, Cutcher-Gershenfeld, and McKersie, 1994; Follett, 1995), or with those with whom we are required to behave honorably (fiduciaries and accountants), with people whose help we need (doctors), or who interact with us frequently enough to know when we are telling the truth ("repeat players"). Consider that we might actually be able to begin to specify degrees of trust or relationships that might alter the conventional

expectations about what we owe to other people by beginning with those to whom we owe the most and altering our negotiation practices to reflect increasing levels of trust and collaboration, rather than assumptions of arm-distant unfair dealing—family members, fiduciaries; continuing relations; legally created relations of good faith and fair dealing (regulated industries, banks, securities, truth-in-lending, residential real estate sales); special relations of parties (doctors-patients, lawyers-clients); care-dependent, special needs parties (unable to develop own information sources, poorly resourced, "incompetent" negotiators)—and only then to more distant relations of open market transactions, communal governmental issues, organizational and intergroup relations, and finally to disputes, lawsuits, and distrusted domestic and international adversaries. Most of our understandings of ethical norms in negotiation begin at the bottom of this list, assuming adversary distrust. And what does adversary distrust produce? More of the same. Perhaps reversing expectations of trust and care might also beget more of the same (Axelrod, 1984).

We are not suggesting that completely open, information sharing, trusting, and joint-solution-seeking behavior will be appropriate or fair in all settings. Trust must be earned or well established and demonstrated. (This is why I always counsel negotiators to ask questions of their counterparts they already know the answer to. This is a competitive tactic in the service of testing and establishing trust for strategic collaboration.) Trust is hard won and easily lost. And trusting relationships are not the only measure of fairness in negotiation, at either the process or outcome level. Some suggest that law and legal endowments should be the measure of fairness or justness of negotiated outcomes (Luban, 1995; Condlin, 1985). We believe that fairness or justness in negotiation processes has many measures, but they are more varied and complex than only legal legitimacy, economic efficiency, or single-party maximization.

This book offers different treatments or nuggets of writings, teachings, meditations, and speculations on what is ethical, moral, or fair in negotiation because we think there are many ways to think about and assess what is fair in both process and outcome measures. We think that more analysis, reasoning, and even feeling about the subject will cause us to make better behavioral choices in negotiations and suggest broader criteria by which to measure whether we have accomplished good outcomes. We close by suggesting some questions to think about in contemplating the fairness of negotiations suggested by some of the readings that follow and our own thinking:

1. Is the structure of a particular negotiation fair? (Are all relevant parties included? Are the physical space and time appropriate for the negotiation? Are there significant structural imbalances between the parties that might impair the process: economics, information, or quality of representatives, for example?)

2. Are rules of process and proceeding clear to all? (Are issues for the agenda transparent to all? Do all of the parties understand the rules of the game being played? Has one party controlled the development of the rules or the agenda in an unfair way?)
3. Do the parties understand their respective purposes and goals? (Does it matter if the parties do not share distributive or integrative problem-solving orientations to the negotiation? Is one party trying to create a long-term relationship while the other is not?)
4. Do the parties have a fair shot at achieving a mutually satisfactory solution, or is one party "unfairly" positioned to take advantage of the other side?
5. Do the parties share expected criteria for assessing outcomes? (Must outcomes track legal endowments or entitlements? Can a party agree to an outcome he or she knows might cause substantial injustice to another party?)
6. To what extent should the justice of negotiated outcomes be measured by principles outside the parties' own criteria: equity, equality, need, social welfare, precedential value, likelihood of enforcement, and effects on others?
7. Should we assess the fairness of a negotiated outcome after we see what it actually achieves or accomplishes for the parties? For others? (Should all negotiated agreements be available for public scrutiny and assessment? When should the parties' agreements for confidentiality and secrecy be honored?)

To ask these questions of each negotiation we are engaged in or asked to evaluate is to probe the various dimensions of the difficult question of what's fair in negotiation. We hope the chapters that follow explore some of these questions. Some will provide provocative and clarifying answers; others might pose more questions.

Stuart Hampshire, the social philosopher, recently suggested that since we will never agree "on the substantive good," we can at least agree on the process by which a civilized society decides how it will act to decide the good, by "hearing the other side *(audi alteram partem)*" (Hampshire, 2000). This approach sees justice as procedural and implicates even private negotiations in considerations of what is fair process. Negotiators, whether they operate dyadically in private to make contracts, create business ventures, or buy or sell land and goods, or settle lawsuits or operate in larger groups of politicians, diplomats, lawmakers, and citizens to make decisions, combine to form the ethical climate of negotiation activity. To the extent that we are all morally responsible for the system of negotiation that we create by our individual behaviors, might we not create a

better ethical climate by at least asking these questions of ourselves and others and aiming to produce negotiation processes and outcomes that seem fair to those who participate in them? Perhaps if we could do this, then, in the words of one modern ethicist, we might "live so that we can look other people, even outsiders [as well as ourselves] in the eye" (Blackburn, 2001, p. 128).

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Swimming with Saints/Praying with Sharks

Michael Wheeler

The two best-selling negotiation books—*You Can Negotiate Anything* (1982) by Herb Cohen and *Getting to Yes* by Roger Fisher and William Ury (Fisher, Ury, and Patton, 1991)—were published within a few months of each other in the early 1980s.[1] Both are still in print and influential today.

More than anything else written in the field, these books have both reflected and shaped popular attitudes about negotiation. They have also marked the territory for scores of other authors who have followed since. Cohen's book is regarded as the standard field manual for hard bargainers and *Getting to Yes* the bible for so-called principled problem solvers.

Neither book neatly matches its reputation, however. There are ambiguities and inconsistencies in each of them. It actually is Cohen, not Fisher and Ury, who uses the phrase "win-win negotiation," just as he is the one who invokes Jesus Christ and Socrates as "ethical negotiators." He notes that both men "deliberately used many of the collaborative techniques I will teach you through this book" (Cohen, 1982, p. 20).

Readers have been split, however, on whether Cohen delivers on that promise. At least one reviewer commended his book for its high ethical standards: "Cohen has taken a subject that is normally associated in the public's eye with a sleazy purveying of snake oil and shown it to be a needed methodology that can be practiced not only with a clear conscience, but with honor" (George, 1981, p. 1158). Another reviewer had a very different reaction, noting that although Cohen "preaches the gospel of bargaining so that everybody

wins," that optimistic message is "nearly lost in a book laced with enough manipulative ploys to make Niccolo Machiavelli nervous" (Press, Glass, and Foote, 1981, p. 86).

Getting to Yes has drawn fire from exactly the opposite direction. Some readers found the book sanctimonious in spite of the authors' disavowal that it "is not a sermon on the morality of right and wrong; it is a book on how to do well in negotiation" (Fisher, Ury, and Patton, 1991, p. 154).[2] One reviewer friendly to its overall approach admitted being put off by "a certain take-it-or-leave-it righteousness in the new religion" (Menkel-Meadow, 1983, p. 919). Other critics have been harsher. One panned the book as "condescending" (Goldhirsh Group, 1982, p. 140), and another felt it was written as though "there were one and only one definition of appropriate negotiating behavior handed down by the authors" (White, 1984, p. 117).

Swimming in ethical waters is perilous business: it is open season on both sharks and saints, though sometimes it is hard to know precisely what the fuss is about. Readers often have a visceral reaction to the stance of the book but do not specify what constitutes a manipulative ploy or when pleas for ethical conduct slip over into self-righteousness. Given the continuing impact of these classic texts on negotiation theory and practice, it is worth reexamining their ethical implications. Although neither book purports to define negotiation ethics comprehensively, their prescriptions and examples reveal implicit attitudes about what negotiators owe one another in respect to candor, fairness, and the use of pressure tactics.

The first part of this brief essay examines a seemingly simple negotiation that Cohen describes in *You Can Negotiate Anything* and uses it as an ethical litmus test. Some readers may regard aspects of his approach as wholly acceptable, while others may have their doubts, just as two of Cohen's reviewers had markedly different reactions. A case that teeters on the edge should tell us more about ethical boundaries than conduct everyone agrees is egregious. The next part of the essay explores the same case through the lens of *Getting to Yes* to illuminate what it is about the book that strikes some people as preachy. The piece concludes by examining self-interest in negotiation, a notion that is important to both books.

GAMESMANSHIP

Herb Cohen's *You Can Negotiate Anything* is constructed around a series of vignettes, many from his everyday personal experience. In one he tells a story of chatting up an owner of a small appliance store, spending time with the fellow, commiserating with him about how big shopping malls were crushing mom-and-pop businesses like his. Only after twenty-five minutes of seeming

small talk did the author get around to dickering over a VCR: "I don't know what these things cost," he said. "In fact, I haven't the faintest idea. I'll trust you when it comes to a fair price" (p. 174).

But when the store owner started to write out the sales slip, Cohen emphasized that he would be relying on the owner's honesty: "I want you to make a reasonable profit, John . . . but, of course, I want to get a reasonable deal myself" (p. 175).

A moment later, Cohen casually asked if the remote control was part of the package. He hinted that if the price were fair, he would buy another set in a few months, though added: "But, John, if I should find out that my trust was misplaced, this disappointment will prevent me from giving you any additional business" (p. 175).

Throughout all this, the owner was scribbling down numbers, crossing them out, and recalculating the price. Cohen blandly inquired if, instead of taking a credit card for the purchase, the owner would find it "more convenient" to accept cash. Most certainly, was the eager answer, after which Cohen said, "You'll install this for me, right?" (p. 176).

The deal was made, and the owner even threw in a stand that Cohen had not thought to ask for. True to his word, he bought a second VCR two months later, and by his account has since developed a "close, trusting relationship" with the store owner.

Cohen relates the story to illustrate the importance of trust building in negotiation. Some people may see his approach as manipulative, while others may see it as perfectly normal business behavior. Three aspects of this transaction deserve attention. First is whether the way Cohen used the casual relationship to get a better price should give us any qualms. Second is his use of ethical norms of trust and fairness as psychological leverage. Third is the sly cash deal that avoided taxes for both parties.

Cohen may be on strongest ground in respect to how he crafted a relationship with the store owner in order to get a sweeter deal, though there is a slight whiff of deception in the exchange. It is doubtful Cohen would have spent any time with the store owner if he did not want something in return. Had he been talking instead to a Wal-Mart sales clerk on the outskirts of town, his patter about the local business environment might have been very different.

Cohen understands that small talk often is anything but that. Here it establishes that "mutual trust is the mainspring of collaborative Win-Win negotiations" (p. 164). There is certainly empirical support for that proposition. Experiments confirm that negotiators who schmooze for just a few minutes are more likely to reach agreement—and more creative agreements at that—than those who just plunge into the substance of the transaction. Glad-handing salespeople know this well when they heartily shake your hand and offer you a cup of coffee (Cialdini, 1993). Seen in this light, Cohen was only engaging in a

familiar dance, though he was striving to lead rather than follow. By shooting the breeze, he was hoping the owner would drop his defenses and treat him differently from customers who just barge right up to the counter.

Where should the line be drawn, however? Most of us properly take relationships into account when we negotiate. We bend over to be fair to people we like and do not haggle when we sell an old car to a cousin or the teenager next door. If we are dealing with a stranger or car salesman, by contrast, we may leave it to the other to determine if the price we put on the table is fair.

Perhaps the issue turns on the difference between taking into account an existing relationship and ingratiating ourselves for the sole purpose of securing personal advantage. When we give or get a break negotiating with a friend or family member, after all, the deal is incidental to the relationship, not the other way around. Those relationships are mutually developed and enjoyed for their own sake, not as bargaining chips. At some point, the idea of friendship, even simple civility, loses something if it is practiced for selfish ends. That may be a quaint position to take, of course, in a day and age when networking is celebrated as the key to professional advancement.

Intent and impact are important factors in thinking about negotiation and relationships. Two hypotheticals may define ends of a spectrum. Consider two strangers who happen into conversation while waiting at a bus stop and discover that one of them is selling a VCR and the other is looking to buy one. Contrast them with a suitor who falsely swears love in order to win the heiress's heart and fortune. In the first case, neither party enters the relationship intending to manipulate the other; in the latter, the gold digger dupes his fiancée into surrendering real value in return for a worthless relationship.

Cohen's banter with the store owner is innocent compared to the cad's behavior, though his intent is no less result oriented. He may be absolved because the owner in his story was not deeply invested in the relationship. This kind of behavior still may have some social cost in the aggregate if it contributes to a general sense that smiles conceal hidden agendas and that someone who extends a hand is reaching for your wallet. Using relationships with others as means to private ends may make us devalue simple acts of kindness on the part of others.

Cohen may be on less defensible ground in regard to the second issue, specifically his cheerful account of invoking ethical norms of honesty and trust to coax the owner into making repeated concessions. While lauding collaboration in the abstract, he treats ethics in practice as just another tool for gaining leverage. Cohen observes that people reared in Western traditions like to think of themselves as fair, and then concludes, "That's why, if you *lay morality on people* in an unqualified way, it may often work" (p. 80, emphasis added).

Cohen's technique was almost subliminal. He methodically dealt out potent words like *fair, reasonable,* and *trust,* and the store owner responded each time

by cutting his price or tossing something else into the package. This velvety patter was followed by a steely threat to sever the relationship if it turned out that the owner had not been fair.

Car salesmen do much the same thing, of course, cooing stock phrases about "earning your trust" and "treating you fairly," but then warning you that another customer will snap up the vehicle if you do not buy it right now. Cohen himself notes that the common practice of sticking a price tag on an item is simply a technique that retailers use to confer a kind of legitimacy on what often should be regarded as only a first offer in negotiation.

Cohen's deliberate use of words with an ethical aura thus might be excused as fighting fire with fire, though there is a cynical tone to his phrase "laying on morality" that debases the very notions that he invokes. Fairness and trust become part of the lexicon of spin, much like "new and improved" from decades ago. In his conversation with the store owner, his language seems hollow, as he does not offer a standard of fairness or invite his counterpart to propose criteria that might be mutually acceptable.

Using ethical language as rhetoric to promote self-interest may make us jaded when it comes to reading other people's motivations. Cohen himself seems prone to this. He remarks, for example, that "Mahatma Gandhi is generally revered as a practitioner of nonviolence, but his tactical means were just a variation on the old guilt ploy" (p. 137). Well, that's one way of looking at it. Another would be that Gandhi's nonviolent tactics were ends in their own right, a way of respecting values regardless of their practical consequences. Gandhi's reputation can survive this jaundiced view of his motivations. It is Cohen's loss not being able to recognize virtue when he sees it.

An instrumental view of ethics can lead any of us to easy rationalizations, citing certain principles when they justify our behavior and finding some convenient way of ignoring them when they do not. To be sure, many of our choices involve balancing different considerations and sometimes choosing between "right and right," as Joseph Badaracco (1997) has put it. Depending on the context, the scales might tip one way or the other in different cases. Relativism in that sense, however, seems quite distinct from the kind of bootstrapping that Cohen describes.

Cohen is most vulnerable to criticism in regard to the third issue: his ingenuous question about whether the owner would prefer cash. Here the breach seems clear even if the practice is common. The owner jumped on the suggestion, of course, as cash would not show up on the company's books. The government cannot tax income it does not see, nor can any partners claim their share of the profit. A cash deal may also save the buyer sales tax.

It is no defense to say that tax compliance is the store's responsibility, not the customer's. Making it a cash deal expanded the pie for both parties at the corresponding expense of other stakeholders not at the table. Cohen first floated

the cash idea with the innocent air of offering to do the other guy a favor, but as soon as the owner seized on the proposal, Cohen tacked on a stipulation that the dealer include installation. In addition to the substantive quid pro quo, this minitransaction tightened the bond between Cohen and the store owner. Nothing had to be said directly about skirting the tax laws. With a wink and a nod, they were a couple of old sharpies who understood how the game is played.[3]

Ethical norms sometimes require more than compliance with the law, but can they ever encompass less? If not, then we had better creep down the interstate at 55 mph while the rest of the traffic whizzes by at 70. Speeders can say, of course, that they comply with the unwritten law that adds a grace factor to the posted limit. Is that any different from people who justify the "convenience" of cash deals by citing the enormous underground, off-the-books economy? The cases are different, however, because pushing the speed limit is a visible act—one that is implicitly condoned by the troopers parked at the side of the road. By contrast, the very purpose of a cash transaction is to evade detection by the authorities.[4]

Cohen describes the petty dodge without comment or apology, nor does he reflect on how he uses relationship building or "lays on morality" for bargaining advantage. The choices he makes are unexamined. Whatever justification is implicit in the fact that a deal was reached between a willing seller and a willing buyer, neither of whom was under duress. Cohen got his bargain only because the price worked for the store owner too. If the parties are satisfied and the outcome is legitimate, maybe that ends the ethical analysis. Apparently that was enough for Cohen.

CHANGING THE GAME

Getting to Yes (Fisher, Ury, and Patton, 1991) does not deal with gray areas where strict legal requirements may require one thing but common practice another. Unlike *You Can Negotiate Anything,* however, none of its examples involve skirting the law. The book does treat at length the other two highlighted dimensions of the VCR story: cultivating relationships to get a better bargain and using principles, including the norm of fairness, as a method for winning agreement. Predictably, the *Getting to Yes* approach would result in different conduct in some important respects, though in other ways there are some surprising parallels to Cohen's recommendations.

Getting to Yes is ambiguous when it comes to relationship issues.[5] One of the book's central themes is the importance of "separating the people from the problem." That precept is an aspect of the rational problem-solving orientation of the book. It also supports the notion of maintaining a consistent negotiation strategy that is not contingent on the good or bad habits of others. Fisher, Ury,

and Patton also push the issue of trust aside, maintaining that no one at the bargaining table should be expected to make leaps of faith. Instead, rational assessment of interests and identification of objective criteria should generate solutions that each side sees as superior to stalemate. If so, it becomes in everyone's individual interest to embrace the deal and make it work.

Getting to Yes is not utterly depersonalized, however. It grants the inevitability of emotion in many negotiations, for example, and emphasizes the importance of good communication. Of particular relevance here is its advice on developing a relationship before the actual negotiating begins. "The more quickly you can turn a stranger into someone you know, the easier the negotiation is likely to be. You have less difficulty understanding where they are coming from. You have a foundation of trust to build upon in a difficult negotiation" (p. 37).

Standing on its own, this sounds very much like how Cohen engaged the store owner before he got down to negotiating for the VCR. Indeed, the authors approvingly cite Benjamin Franklin's technique of asking an adversary if he might borrow a particular book. That adversary would be flattered and left with "the comfortable feeling of knowing that Franklin owed him a favor" (p. 37). If Cohen's approach verges on being manipulative, he is in august company.

In many respects, however, Fisher, Ury, and Patton seek a much deeper sense of relationship than Cohen seems to contemplate. Much of the advice that they offer is directed toward the individuals, but they are fundamentally interested in the attitudes and behavior of all participants noting, "A more effective way for the parties to think of themselves is as partners in a hardheaded, side-by-side search for a fair agreement advantageous to each" (p. 37). Collaboration can be facilitated if discourse is shifted from a positional contest of wills to a mutual exploration of underlying interests.

Fisher, Ury, and Patton concede that in one time, single-issue transactions with strangers, "simple haggling over positions may work fine" (p. 152), but they regard those cases as exceptional and less important. In negotiations with valued customers, suppliers, and colleagues, the authors urge looking beyond mere dollars-and-cents issues and giving weight to relational considerations. Indeed, a properly conducted process should yield wise, enduring, and efficient agreements that enhance the parties' relationship.

Even in cases like the VCR purchase where important relationships are not at stake, the authors would see opportunity for mutual gain, just as Cohen himself implicitly did. *Getting to Yes* diverges from *You Can Negotiate Anything*, however, with respect to how that potential is first identified and then distributed. Fisher, Ury, and Patton instruct negotiators to "insist on using objective criteria" and not of risking relationships by issuing ultimatums. Instead, "the more you bring standards of fairness, efficiency, or scientific merit to bear on your particular problem, the more likely you are to produce a final package that

is wise and efficient" (p. 83). Searching for appropriate precedent and norms allows negotiators to learn from others' experience and generates agreements that are more likely to be seen as legitimate by the parties themselves and others. Fairness thus is not something one party uses to dignify his or her demands. Instead, it is an area for mutual inquiry and exploration.

The authors grant that "you will usually find more than one objective criterion available as a basis for agreement" (p. 85). Parties may argue for one principle over another as a way of bootstrapping a favorable result. "Ideally, to assure a wise agreement, objective criteria should be not only independent of will but also legitimate and practical" (p. 85). Thus, a home buyer who is insisting on certain warranties should be open to offering the same assurances for another property he or she happens to be selling. Essentially this captures the Rawlsian notion of identifying the appropriate principle without knowing one's stake or role in a transaction. Fisher, Ury, and Patton note that objective criteria are relevant to both outcomes and process, citing as an example of the latter the age-old solution of having one person cut the cake and the other choose the piece.[6]

In the first edition of the book, the authors maintained that one standard usually will prove more persuasive than others by being "more directly on point, more widely accepted, and more immediately relevant in terms of time, place, and circumstance" (p. 154). In the supplement to the revised edition of *Getting to Yes*, the authors backed off somewhat from that claim:

> In most negotiations there will be no one "right" or "fairest" answer; people will advance different standards by which to judge what is fair. Yet using external standards improves on haggling in three ways: An outcome informed even by conflicting standards of fairness and community practice is likely to be wiser than an arbitrary result. Using standards reduces the costs of "backing down"—it is easier to agree to follow a principle or independent standard than to give in to the other side's positional demand. And finally, unlike arbitrary positions, some standards are more persuasive than others [p. 153].

Fisher, Ury, and Patton further asserted that consensus on a single fairness standard is not essential for success:

> Criteria are just one tool that may help the parties find an agreement better for both than no agreement. Using external standards often helps narrow the range of disagreement and may help extend the area of potential agreement. When standards have been refined to the point that it is difficult to argue persuasively that one standard is more applicable than another, the parties can explore trade-offs or resort to fair procedures to settle remaining differences. They can flip a coin, use an arbitrator, or even split the difference [p. 154].

Their argument for fairness thus oscillates between being idealistic and pragmatic. At points, they make a practical case for objective criteria generally and for fairness in particular, contending that debates over principle are likely to be less explosive than contests of will. In other places, there seems to be an underlying notion that there really are objective truths to which all decent people must subscribe. Objectivity is a hard sell in this postmodern era, when such claims are taken as privileging certain positions at the expense of others and, still worse, doing so in a way that brooks no argument.

Seen in either light, this concern about objective criteria and fairness would likely lead a faithful *Getting to Yes* practitioner to conduct the VCR negotiation somewhat differently. For one thing, a mutual discussion of fairness standards would be required. The conversation might consider whether an owner of a small store is obliged to match the price of a wholesale discounter or can legitimately ask for somewhat more in return for personal service and attention. A buyer who had initially built the relationship by professing sympathy for the hard times being expressed by Main Street businesses might have trouble resisting that principle; hence, the price that Cohen paid for the equipment and all the add-ons might seem unfair.

In some cases, then, the *Getting to Yes* negotiator might end up paying more than would a classic hard bargainer. To this possibility, the authors respond:

> If you want more than you can justify as fair and find that you are regularly able to persuade others to give it to you, you may not find some of the suggestions in this book all that useful. But the negotiators we meet more often fear getting *less* than they should in a negotiation, or damaging a relationship if they press firmly for what they do deserve. The ideas in this book are meant to show you how to get what you are entitled to while still getting along with the other side [p. 155].

How people negotiate thus affects the substance of the deal and the ongoing relationship of the people who reach it. Trade-offs often have to be made between dollars in hand today and long-term payoffs, monetary and otherwise. Fisher, Ury, and Patton appealed to enlightened self-interest, warning negotiators that whatever short-term gains might be won through deception and dirty tricks are often small compared to strained relationships and a tarnished reputation. Being fair and principled thus pays off personally in the long run.

If you have the chance to get more than your fair share, they ask, Should you take it? Not without careful thought, they warn. "More is at stake than just a choice about your moral self-definition. (That too probably deserves careful thought, but advising in that realm is not our purpose here)" (p. 155). Before seizing a windfall, they counsel a full reckoning of costs and benefits: how unfair the outcome is, whether the deal really will stand up, its impact on your reputation, and how it will sit on your conscience.[7]

FAIRNESS AND SELF-INTEREST

It is understandable why its authors tried to cast *Getting to Yes* in these pragmatic terms. It is hard enough to sell good manners today, let alone ask people to sacrifice for the greater good. If we take Fisher, Ury, and Patton at their word, however, they really are making a utilitarian argument, not a moral one. Rather than declaring certain things right or wrong, they simply warn that what goes around often comes around.

They thus give self-interest primacy, just as Cohen does, although they emphasize a broader sweep of interests, especially in regard to relational issues and long-run impacts. They grant that positional bargaining sometimes may work in one time single transactions with strangers but essentially relegate haggling to unimportant cases. In negotiations with valued customers, suppliers, and colleagues, the authors would give priority to relational considerations, but the utilitarian formula is the same. The weights given to specific factors simply vary according to the situation. Cohen would not disagree.

The language also can be read, however, as invoking social welfare more broadly. The authors' disavowals about moralizing notwithstanding, their own values seem to peek through at times. In a footnote, for example, they allow that "we do think that, in addition to providing a good all-around method for getting what you want in a negotiation, principled negotiation can help make the world a better place. It promotes understanding among people, whether they be parent and child, worker and manager, or Arab and Israeli" (Fisher, Ury, and Patton, 1991, pp. 154–155).

Focusing on interests fosters creativity, which in turn promotes economic efficiency and mutual gain. "Relying on standards of fairness and seeking to meet the interest of *both* sides helps produce agreements that are durable, set good precedents, and build lasting relationships" (Fisher, Ury, and Patton, 1991, p. 155). In addition to reducing the cost of conflict, negotiators "may find that using this approach serves values of caring and justice in a way that is personally satisfying" (p. 155).

The last assertion is provocative. The fairness standards the authors invoke—legal precedents, business norms, and the like—may not themselves be just. Workers whose pension funds have been raided may not have a viable legal claim for their losses. Divorce laws may have gender bias when it comes to division of property and child custody. Inventors who do not secure the right kind of patent protection may not reap the fruits of their genius.

Getting to Yes does not purport to change the larger game. Success at the bargaining table is measured by how well the outcome compares to the practical nonagreement alternatives. It is nonetheless meant to help people better play the hands that they are dealt. In this respect, it is an optimistic book, one that earnestly aspires to reduce the individual and social costs of conflict and to increase the value of exchange.

By contrast, the underlying assumptions of *You Can Negotiate Anything* seem pessimistic. Cohen (1982) sets up his VCR story, for example, by noting that "after spending an entire week in an exasperating negotiation overseas, I didn't relish the thought of facing off with a department store clerk or a local shop owner" (p. 172). It is a revealing comment. Even the self-proclaimed "world's best negotiator" apparently dreaded a routine encounter, imagining it as "facing off," a metaphor that recalls gunslingers in the old West.

In an earlier personal anecdote, Cohen described how he knocked down the price of a refrigerator that listed for $489.95. He made three separate trips to the store, first alone, next with his wife, and finally with his mother-in-law, each time displaying enough interest to command the salesman's attention while never being quite ready to make a deal. Finally, after getting the salesman to "waste" (Cohen's word) six hours of time with this hemming and hawing, he finally emptied his pockets and offered $450—all he supposedly had with him—to make the deal. He said he would walk out of the store if it was not good enough. "Will the salesman follow you? Yes. He has an investment in the situation, and he wants some return on the effort he has expended" (p. 36).

Short-circuiting this arduous process by just offering $450 up front would have failed, Cohen says. His success depended on creating what behavioral economists call a sunk cost trap for the salesman. That required a lot of work on Cohen's own part and a high tolerance for tedium. It also seems to require an attitude of "do unto others before they do unto you." The world often is a hostile place, but bringing that attitude to every encounter can only make it more so. The preemptive steps that we take to defend ourselves can easily be read as aggressive by others. Unless they practice forbearance more than we do ourselves, escalation can easily ensue.

Even when things do not blow up, something may be lost, and we may not even know it. Toward the end of his book, Cohen notes, "By now you must realize that I do not share the cynical view that people are inescapably greedy or evil" (p. 163). Then a few pages later, he goes on to tell a story about pulling up in a cab in front of a New York hotel. A crowd was pressed around a police barricade and was gaping upward. According to the doorman, someone on the eleventh floor was threatening to jump. "Gee, that's too bad," Cohen said. As he entered, he was "upset at the thought of a fellow human being tumbling to the sidewalk" (p. 227).

The story then takes an unexpected twist. This is not a tale of how a gifted negotiator raced to the elevator and talked a desperate man off the ledge or about how he deftly enlisted volunteers to hold a rescue net. Instead, Cohen strode directly to the front desk, where his mood quickly changed. The clerk acknowledged that Cohen did have a guaranteed reservation, but unfortunately no rooms were available. The clerk offered to call other hotels. Cohen describes what happened next:

"'Hold it!' I snapped. 'You *do* have a room! You know that guy on the eleventh floor? The one who's causing all that commotion outside. *He's checking out!*'

The windup? The guy didn't jump. The police corralled him but checked him into a different facility for psychiatric examination. I got his vacant room" (p. 227).

It is true that Cohen had no role in pushing the stranger into despair, nor was he rooting for the man to jump. His dogged self-centeredness simply led him to construe another person's disaster as his own good luck. Somebody would eventually get that empty room. Why not him?

What is missing in Cohen's account is self-awareness. It is not the outcome so much that is unseemly but the haste with which it was reached. It required a marked attitude on his part: within a minute, the "fellow human being" perched on the ledge became the "one who's causing all the commotion." That less sympathetic characterization suited Cohen's need for a room. Apparently he slept well that night, though the clerk who had to deal with his insistence had one more experience of hard-boiled life in the city. And, who knows, maybe the family of the poor soul on the ledge was distressed to learn that someone had commandeered their father or husband's room even before he left it. All this in the name of self-interest.

Notes

1. The original Fisher-Ury edition was published in 1981. Commentary in this essay is based on the later revision, which Bruce Patton joined as a coauthor, as it includes an epilogue with several pages on fairness in negotiation.
2. They also say, "We do not suggest that you should be good for the sake of being good (nor do we discourage it)" (Fisher, Ury, and Patton, 1991, p. 154).
3. One wonders how the store owner might feel about that relationship after reading Cohen's description in the book.
4. By this reasoning, using an illegal radar detector to evade police is unethical.
5. All three authors of the second edition went on to write their own books on negotiating better relationships (Ury, 1991; Fisher and Brown, 1989; Stone, Heen, and Patton, 2000).
6. As it happens, Cohen cites this example too.
7. Cohen, incidentally, makes this same point, warning readers against making sharp choices that they will come to regret.

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PART ONE

OVERVIEW

"Reading about ethics," Mason Cooley (1988) says, "is about as likely to improve one's behavior as reading about sports is to make one into an athlete." The only germ of truth in Cooley's wisecrack is that good intentions alone do not get us very far. Beyond that, analogizing ethics to sports misses the point.

Our ethical fitness cannot be built by pumping iron or running wind sprints. It depends instead on our intellectual and emotional capacity, starting with our ability to recognize difficult questions of right and wrong. These are not always easy to spot, particularly when they surface in the heat of negotiation and are entangled with high-stakes substantive issues. Moreover, we have to make ethical judgments while we are also trying to advocate our own interests, understand those of counterparts, manage feelings, and, oh yes, conjure up some sort of practical solution. Small wonder that people sometimes slip up.

Doing the right thing is more likely if we can anticipate potential issues before they arise and thus have well-reasoned principles to guide our response. Reading about the experiences of others sharpens our ethical vision. Comparing different frameworks and practices allows us to deepen our own values. You are therefore invited to read on, Cooley's jibe notwithstanding.

Most chapters later in this book explore specific ethical problems in negotiation, such as the issue of deception or possible conflicts of interest between principals and agents, to name just two examples. By contrast, the chapters in Part One represent broader perspectives on ethical decision making and introduce themes that are developed throughout the book.

In Chapter One, David Lax and James Sebenius succinctly identify three areas of ethical concern—tactical moves to influence others' perceptions, distributional fairness, and impacts on unrepresented stakeholders—and then offer practical tests for drawing the bounds of responsible behavior. They also distinguish between ethical concerns that are instrumental and those that are intrinsic: the former involve awareness of long-term payoffs of our actions, while the latter raise fundamental questions of right and wrong.

Next are two chapters by Howard Raiffa, one from his classic *Art and Science of Negotiation* written twenty years ago and the other from his just published sequel, *Negotiation Analysis*. As might be expected from a pioneer in the formal modeling of decisions, his analysis is constructed around a so-called social dilemma, a situation in which each individual must decide whether to do something good for the group as a whole, albeit at some cost personally. Many economists conclude that only self-centered behavior is rational, even though it leaves everyone worse off. Raiffa, however, instead argues for a moral frame of reference, with virtue being its own reward. Better still, he says, when selfless acts are made visible, others are inspired to follow suit. His straightforward view recalls Mark Twain's injunction (1901), "Always do right. This will gratify some people, and astonish the rest."

Raiffa's chapters illustrate how disciplinary frames themselves are value laden. Roger Fisher, another negotiation luminary, describes in Chapter Four how professional roles can bias our approach to problem solving, challenging in particular the canard that lawyers can only act as hired guns. He urges attorneys instead to explicitly negotiate their relationships with clients, clarifying what they will and will not do in the name of effective representation. Fisher does not eschew all advocacy, but he stresses that lawyers are also counselors and quasimediators. Above all else, they must be models of responsible conduct (walk the talk, if you will). Fisher's chapter foreshadows other material in this book, specifically the parts on relationships and agents (Parts Four and Five).

Gerald Wetlaufer presents a different point of view in Chapter Five, one that is largely skeptical of the claims that Raiffa, Fisher, and others have made on behalf of the promise of integrative or mutual gains bargaining. Wetlaufer acknowledges that mutually beneficial trades are possible in some instances but believes that those are the exception, not the rule. Readers can judge for themselves whether he makes that case. The important question for our purposes is how our views of negotiation ethics are premised on assumptions about whether the world is primarily zero sum. If it is, then doing the right thing would always seem to come at personal cost.

Richard Shell reminds us in Chapter Six that some ethical standards are embodied in legal standards, notably the prohibition against fraud. When other parties reasonably rely on material misrepresentations we have made in the

course of negotiation, they can sue us, nullify the agreement, and recover damages. In one sense, the law of fraud protects victims of unscrupulous behavior. In another sense, it promotes beneficial exchanges by lending credibility that whatever we promise will in fact be delivered.

Shell contends that compliance with legal standards is a minimum threshold. Honoring more rigorous unwritten norms may be necessary, though their specific definition may vary depending on whether one is an idealist, pragmatist, or someone who sees negotiation as a game. Reading through this book, you can consider which of those categories best suit you. You may find some ideas you encounter congenial and others challenging. If none of the models fits perfectly, the process of reflection still should help you identify your own coherent values and rules of thumb for doing the right thing at the bargaining table.

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