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Section 1

NEGOTIATION AND SETTLEMENT ADVOCACY

A BOOK OF READINGS

Second Edition

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Section I

NEGOTIATION AS A STRUCTURED PROCESS OF INTERPERSONAL COMMUNICATION

Some negotiators are more successful than others. Many people think that negotiating success is a skill related to an excellent physician's bedside manner or to a major league baseball player's ability to hit the curve ball. Some have natural ability, and some do not. Perhaps it has to do with how each person was raised, or to genetics, or just to chance.

In fact, however, when people negotiate, their behavior frequently follows predictable patterns. Some successful negotiators follow the patterns unconsciously, while others work to bring them to consciousness and use this information to their advantage. For most of us, unless we are conscious about what is occurring, it is difficult to see these recurring themes.

This section elucidates the predictable patterns of negotiation. The materials in Chapter One orient us to the topic of negotiation. They place bargaining in its social and behavioral context, and introduce us to both descriptive and prescriptive approaches to negotiation analysis. We are then ready to move to understand the recurring patterns of negotiation structure.

In Chapter Two we will learn about a technique, derived from social and behavioral experimentation, that is the foundation of all sound bargaining techniques. If we are self-conscious of this technique, we can assure that—at worst—we will never be exploited in our bargaining. It is comforting to know that no matter what else happens in a negotiation, we will not do far worse than we should.

This baseline of avoiding exploitation is just the starting point for becoming self conscious about effective negotiation behavior. In the next two chapters we will learn techniques that will allow us to do much better than merely survive. In Chapter Three we will discover that people frequently bargain to distribute a single unit of value, like money, where gain for one party comes primarily at another's expense. In these competitive contexts, people follow a predictable process of making opening offers, responding with counteroffers, bargaining for concessions, making commitments, and using tactics. By understanding the predictability of bargaining in this context, and by being self conscious about how to use this predictability strategically, we can materially enhance our negotiation outcomes.

In Chapter Four we will see that these predictable patterns of competitive negotiation provide a useful but an incomplete picture of bargaining dynamics. There are times in most negotiations when opportunities arise to create additional value or to expand the range of available options for settlement. By recognizing when these opportunities arise, and by taking advantage of them to craft a creative and elegant solution, we can again enhance our negotiation outcomes.

Finally, in Chapter Five, the last Chapter in this Section, we will discuss how parties can work with their bargaining opposites to move between the available strategies and achieve the best possible outcome. We will also learn how to develop external reference points to the present negotiation that will enable us to gauge our possibilities for success in this interaction. By using all these tools of negotiation structure, by being self conscious, we can dramatically increase the likelihood of reaching optimal negotiated outcomes.

Chapter 1

THE NEGOTIATION PROCESS— GENERAL OBSERVATIONS

Negotiation can be defined as a communication process that people use to plan transactions and resolve conflict. If this definition is satisfactory, then much of human behavior involves negotiating. Indeed, almost all of our interactions with others involve some kind of negotiation. The readings in this first chapter introduce several preliminary themes that will be amplified in great detail throughout the volume.

In the first selection, Phillip Gulliver, the noted anthropologist, describes two patterns of communication in negotiation that appear to be universal across cultures. Gulliver describes how bargainers employ cyclical and sequential communication patterns as they interact with others.

Frank Sander and the late Jeffrey Rubin next characterize more concretely the two primary contexts in which people negotiate. Bargainers sometimes enter into deal-making transactions, looking forward to build future relationships; and sometimes enter into dispute settlement transactions, looking backward to resolve past conflicts. Strategies effective in one context may be counterproductive in another. They introduce several important concepts, such as the difference between issues and interests, and the power of a good alternative, that we will amplify in later chapters. Effective negotiators recognize the characteristic attributes and opportunities of each bargaining context, and “eventually come to know both faces of the negotiation process.”

Lawyers spend much of their professional lives working in the transaction planning and dispute resolution contexts described by Sander and Rubin. Effective negotiation skills are critical to success in both contexts. The next two readings introduce us to the types of bargaining and the strategic choices available to lawyers as they negotiate. Many other selections in this book amplify the models presented in these two articles. First, Gary Goodpaster describes three basic bargaining strategies, and distinguishes between negotiation strategies and negotiator styles. Then, Russell Korobkin presents his theoretical structure of “zone definition,” a novel way to think about negotiation.

In our next reading, John Murray builds upon this analysis by offering a typology of the strengths and the weaknesses of competitive and problem-solving bargaining behavior. Experts disagree as to the number of types of

bargaining contexts facing the negotiator. For example, Murray sees two, whereas Goodpaster sees three. All experts agree, however, that effective negotiators must understand the distinctive characteristics of the various bargaining contexts. They can then assess how best to proceed in any negotiation, with appreciation for the upsides and the downsides of their strategy selection. Murray's writing introduces this concept, again to be amplified in later chapters.

Finally, we end this introductory chapter with a personal reflection. Drawing upon his extensive international experience, the late Hungarian diplomat Nyerges Janos provides a list of practical tips for effective negotiating. They provide helpful organizing principles to guide the skilled bargainer.

Readings

1. Phillip H. Gulliver, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE* 81-89 (1979).
2. Frank E.A. Sander & Jeffrey Rubin, *The Janus Quality of Negotiation: Dealmaking and Dispute Settlement*, 4 *NEGOT.J.* 109-13 (1988).
3. Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 *J. DISP.RESOL.* 325-30.
4. Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 *GEO. L.J.* 1789 (2000).
5. John Murray, *Understanding Competing Theories of Negotiation*, 2 *NEGOT.J.* 179, 182-85 (1986).
6. Janos Nyerges, *Ten Commandments for a Negotiator*, 3 *NEGOT.J.* 21, 21-6 (1987).

PHILLIP H. GULLIVER, *DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE*

81-88 (1979).

... [W]hen a dispute emerges and negotiations begin, the two parties start at a distance from one another, in disagreement, opposition, and conflict, with disparate ideas and expectations about an acceptable outcome. Through the processes of negotiation the parties gradually may be able to come together into coordination and collusion and, in the end, to some agreement on the issues between them.

* * *

In negotiation there are two distinct though interconnected processes going on simultaneously: a repetitive, cyclical one and a developmental one. A simple analogy is a moving automobile. There is the cyclical turning of the wheels (linked to the cyclical action of valves, pistons, etc., in the motor) that enables the vehicle to move, and there is the actual movement of the vehicle from one place to another. The latter process depends on the former but the *raison d'être* of the automobile is its spatial movement. In negotiation, somewhat similarly, there is a cyclical process comprising the repetitive exchange of information between the parties, its assessment, and the resulting adjustments of expectations and preferences; there is also a developmen-

tal process involved in the movement from the initiation of the dispute to its conclusion—some outcome—and its implementation.

* * *

It is logically appropriate to discuss first the model of the cyclical process since by analogy it is the turning of the wheels that makes movement of the vehicle possible. Because the two processes are intimately interconnected, references to the developmental process are unavoidable in the following exposition, though they are kept to a minimum so as to avoid confusion.

THE CYCLICAL MODEL

Briefly, the pattern of repetitive exchange is that, in turn, each party receives information of various kinds from the other and in response offers information to him. There is, however, more than merely communication. There is cognition and learning. Received information is interpreted and evaluated by a party and added to what he already knows or thinks he knows. Thus a party may be able to learn more about his own expectations and preferences, about those of his opponent, and about their common situation and possible outcomes. Learning may induce changes in the party's preference set and his strategies or it may reinforce his existing position. Learning may raise the need for more information from the opponent and/or the need to give further information to him so that he may be induced to learn and therefore be persuaded to shift his position to something more favorable to the party. Depending on the kind of learning, the party makes a tactical choice concerning the purpose and content of his next message, which is then proffered to his opponent. In turn, the other party goes through the same procedure and then offers his information to the first party ... and so on. Thus, one might say, the wheels turn and the vehicle moves.

* * *

THE EXCHANGE OF INFORMATION

In negotiation there is a continual need both to give and to receive information. There is a need to give it in order to tell the opponent about one's own demands and strengths and to attempt to induce him to shift his demands toward one's own. There is a need to obtain information in order to get a better understanding of the opponent—his expectations and demands, his attitudes, strategies, strengths, and weaknesses, together with any changes in all these matters. In order to obtain needed information, a party has to give information to his opponent. In order to give information, he needs to receive information from his opponent. Receiving information creates the opportunity, but also the necessity perhaps, to learn and to adjust expectations and demands. That in turn induces the party to offer further information and to seek to obtain more.

Thus there is and has to be exchange of information, or more accurately, of messages. Strictly speaking, information is not exchanged but shared since the giver himself retains that which is given, in contrast with economic exchange of goods. A party must respond and wishes to respond to the receipt of messages by giving his own in return. As in other kinds of social reciprocity, a party offers messages in order to obtain a response and to be

able to claim a response, or at least some kind of reaction that carries a message. Refusal to exchange messages may, in the short run, draw further messages from the opponent and may be intended to do so. Continued refusal—or what is effectively the same thing, mere repetition of previous messages—leads to impasse and the possible breakdown of negotiations.

Yet these desires and needs to give and to receive information create a persisting dilemma for each party. How much information should be given and when? What information is required and how can it be obtained? Moreover, as Iklé has pointed out, "It is an essential feature of negotiations that the process of finding out the opponent's terms (and of revealing one's own) is also part of the process of inducing him to soften his terms (and of making one's own more acceptable to him)." While seeking to persuade or coerce his opponent, a party lays himself open to persuasion and coercion. He may, therefore, attempt to defend himself by the offer of further information and his opponent proceeds likewise.

* * *

An inherent problem in these exchanges is that each party tends to edit in his own favor the information he offers. He wishes to show and substantiate his demands and to emphasize his strengths and determination but without disclosing his weaknesses, his truer expectations, or his minimal requirements. Thus he usually stresses and exaggerates the more advantageous features of his case while discounting or ignoring the disadvantageous ones. A party must expect that the messages he receives are similarly edited. The flow of information is therefore distorted in some degree. Moreover, the exchange of messages always carries the possibility that unintended information will be conveyed at the same time. On the one hand, a party may not say what he intended, or he may say more than he intended as information is carried between the lines and, as an affectual penumbra, colors what is said. On the other hand, his opponent may misreceive and misinterpret messages and obtain wrong information.

* * *

The kinds of information exchanged depend a good deal on the current phase of the negotiation: that is, on the mode and focus of interaction and purpose at the time (as explained in the developmental model). Some kinds of subject matter are more likely to be confined to particular phases. For instance, information concerning procedural rules is more pertinent to earlier phases when procedure is being established, although it is never altogether excluded from later phases if the parties consider it important. Factual information similarly is more emphasized in earlier phases, whereas messages carrying threats, promises, and other persuasion are likely to be more common in later ones. Yet the subject matter and even the overt content of messages are often much the same in different phases even though the information transmitted can be quite different. "This is my best offer," or "We cannot agree to your claim," carry and are more or less intended to carry different information in earlier and later phases. During final bargaining a "final offer" may indeed be just that or something very near it, but earlier it is nothing like so definitive and usually it is not intended to be so. Earlier, the information is something like a show of the importance of the particular

issue in dispute and of the strength of resistance intended. It may in fact be little more than putting a toe in the water to test it, an attempt to get reaction and response from the opponent in order to learn more about his expectations and preferences. It relates, in the earlier phases, to attempts by parties to perceive where the main differences lie and what the maximal limits are to the range of reference on the issue in question. That is to say, messages are to be understood, and are so interpreted by the receiver, depending on what is already known and not known by the parties about each other. A message and its information are very largely contextual, as of course is the case in most ordinary conversation.

Assessment of messages is necessary to complete the transference of information and so make it usable. Some or even all of a message may not be received. What is received is subject to appraisal. For instance, what is its content, overtly and covertly? What is the probable degree of validity of fact, opinion, affectual state, and ignorance? What did the opponent intend to convey and with what force? What did he convey unwittingly and why in the fashion he used? What is absent from the message and why? Such assessment can be carried out quite carefully and analytically or, at the other extreme, it may be largely unconsidered gut reaction. Some messages are highly complex, containing information that cannot be immediately assessed or its implications understood. Such information may have to be set aside for the moment until more information is accumulated or until a later phase of the negotiations. Other messages are so simple that, in one sense, their content is clear; yet the alert negotiator is prepared to acknowledge that the simplicity may be deceptive, deliberately or not on the part of the sender. "No" can indicate or be understood to indicate a variety of information: "yes" or "yes but" or "I do not know" among others, or it can indicate a less certain denial than hitherto and so reveal some degree of change in the sender's expectations or determination.

For instance, an observation on the weather or a humorous anecdote may—though it may not—carry an expression of friendliness and willingness to be cooperative or an expression of antagonism and derision. It can show a desire to break tension, to pause awhile, or to change topic and tactics. It can be a sign of a lack of further ideas or of frustration, and many other things, according to the current phase of the negotiations and the relationship between the parties. Though seemingly trivial, it affords a party a possibility of indicating something about his position, attitude, and expectations. It may, at a particular point in the negotiations, be quite crucial to an improvement of understanding that in context is no less significant than the party's forthright declaration on some matter. Yet the message may be unimportant, offering little that is new or helpful to the other.

* * *

In terms of the cyclical model, the supply of more or less assessed information can be seen as flowing in two directions. First, received information may affect a party's behavior as a result of causing changes in knowledge, preferences, attitudes, and strategy—in brief, as a result of changes in his preference set. Second, the information may affect a party's behavior as a result of his assessment of his opponent's future behavior—his expectations of

his opponent. Both are liable to be affected and changed by each new piece of information received.

FRANK E. A. SANDER AND JEFFREY Z. RUBIN, *THE JANUS QUALITY OF NEGOTIATION: DEALMAKING AND DISPUTE SETTLEMENT*

4 Negot. J. 109-13 (1988).

In this brief column, we will explore the simple difference between negotiation over entry into a relationship (what we will refer to as Deal-Making Negotiation, or DMN) and negotiation over remaining in or leaving a relationship (what we will refer to as Dispute Settlement Negotiation, or DSN). We will first look at the critical distinguishing characteristics between DSN and DMN, and then consider briefly some of the practical consequences of this distinction for more effective negotiation.

By definition, DMN arises when parties embark upon a deal. Typically this means the parties *have had no prior dealings*, and the *focus is on their future relationship* (e.g., A negotiates for the purchase of B's house; C Corp. agrees to sell its business to D Corp.). Although the second factor is critical in this definition, the first is not. The deal-making parties *may* have had a prior relationship. Indeed sometimes the deal grows out of, or is based on, a prior relationship (e.g., Union X makes a new contract with Company Y; Father F enters an arrangement with Son S for shoveling the sidewalk or putting out the trash), but the thrust of the dealmaking—and hence of the negotiations that lead to the deal—is forward-looking. The parties typically have come together in order to reach agreement, and anticipate a future relationship under the umbrella of the deal that has been struck.

* * *

By contrast, dispute settlement negotiation (DSN) is a *backward-looking* transaction because dispute settlement, in the sense the term is used here, means a dispute arising under an existing agreement. If a dispute arises in the course of any of the previously described deals (e.g., the house to be sold is damaged in a fire, and the question is who bears the risk of that event), then the resulting negotiation is a DSN. A DSN addresses the rights (both substantive and procedural) established under a previous agreement....

Note, finally, that although the distinction between DMN and DSN is fairly clear, there is often a symbiotic interplay between the two. A DMN creates rights that may later form the norms of DSN. Conversely, some disputes arising under an agreement can best be resolved by creating a new relationship (or formulating a new agreement) between the parties, thereby turning a DSN into a new deal.

What are some of the practical implications of these distinctions?

1. As suggested above, DSN looks more to rights (established under the previously made deal); parties in a DSN pay attention to what they feel *entitled* to. In contrast, DMN looks more to interests (because there often aren't any "rights" governing a deal that has not yet been struck). This distinction is attenuated by the symbiotic relationship point made above. That is, in a typical DSN one can look backward to the rights established

under the agreement or look forward by creating a new deal. This is a particular problem for lawyers, who are all too prone in cases of dispute settlement to look backward to the legal rights of the disputants (i.e., the court outcome) rather than seeing the case as an opportunity for a new agreement that meets the future needs of the parties and downplays their rights vis-à-vis the present agreement.

Theoretically, negotiations over interests (as in DMN) should be easier to move to agreement than negotiations over rights (as in DSN). Interests can be satisfied in multiple ways, by devising creative options for joint gain, and thus tend to be non-zero sum in nature; rights, although they need not be construed as zero sum, are typically so interpreted by protagonists: Either I win or you win—but not both.

2. In most dispute settlement negotiations, the Best Alternative to a Negotiated Agreement (or BATNA) is fairly clear—what would happen, absent a negotiated settlement, under the terms of the previously made deal. . . . In deal-making negotiations, however, the vistas are much wider. If A doesn't enter into the deal with B, A may not sell his house at all. Or A may sell it to P or Q.

On the one hand, the deal-making negotiator has a much harder task than the dispute settlement negotiator (because the alternatives are so wide open); on the other hand, there is a far greater opportunity for inventive solutions that meet the needs and interests of the other party. . . .

Note also that in DSN, both parties' BATNAs are usually the same, though their assessments of it may well diverge. But in DMN, each party's BATNA is likely to be different; hence it becomes much more difficult to ascertain the other's BATNA.

* * *

3. Another consequence is that in DSN there is more likely to be an adversarial flavor to the proceedings. In the words of Lax and Sebenius' *The Manager as Negotiator* (1986), DSN is often about the "claiming" of resources that are in dispute under the terms of an agreement. DMN, in contrast, is often concerned with "creating" opportunities that make negotiated settlement an attractive outcome.

* * *

4. The *mode of discourse* and the *external frames of reference* are also likely to be quite different in the two types of negotiation. In DMN, the parties have wide-ranging opportunities to explore each other's interests and options. The mode of discourse will therefore tend to be informal, reasonably friendly, and focused on a frame of reference that lies in the future: What happens to us if we should go ahead and agree to reach agreement? The focus of activity is devising an agreement that you are ready to "live with" later on.

In contrast, DSN is characterized by a more formal, less friendly mode of discourse—as when one appeals to the formal proceedings of arbitration to bring about the settlement of a dispute under an agreement. And the frame of reference, as we earlier observed, is in the past—usually including a

canvass of all the sins of commission and omission that have led the disputants into their present quandary.

GARY GOODPASTER, *A PRIMER ON COMPETITIVE BARGAINING*

1996 J. Disp. Resol. 325-30.

BASIC NEGOTIATION STRATEGIES

Negotiation strategies are basic ways of managing power relations, information exchanges, and interactions between the negotiating parties. Although often complex and varied, negotiation and bargaining behaviors generally fit into certain recognizable and often predictable patterns and subpatterns—essentially three basic negotiating strategies: competing, compromising, and collaborating or joint problem solving. Not only are there variations on these strategies, but the negotiators' personal styles or ways of playing their strategies can also complicate matters. Nonetheless, understanding the three basic negotiation strategies, their characteristic tactics and techniques, and the ways to package and combine them, will prepare anyone for most negotiations.

Most negotiators adopt one or more of the three strategies in an effort to reach an agreement. As a negotiation strategy, each of these ways of dealing with others has a different substantive aim, rests on different and usually unarticulated premises or assumptions about human behavior, and uses certain characteristic tactics and techniques to move toward agreement or to resolve disputes or conflicts.

A. *Competing*

Competitive bargaining, sometimes called hard, distributive, positional, zero-sum or win-lose bargaining, has the purpose of maximizing the competitive bargainer's gain over the gain of those with whom he negotiates. He is, in effect, trying to "come out ahead of", or "do better than", all other parties in the negotiation. For this reason, we sometimes refer to this competitive bargaining strategy as a *domination* strategy, meaning that the competitive bargainer tends to treat negotiations as a kind of contest to win.

The competitive negotiator tends to define success in negotiation rather narrowly. It is simply getting as much as possible for himself: the cheapest price, the most profit, the least cost, the best terms and so on. In its simplest form, this strategy focuses on immediate gain and is not much concerned with the relationship between the negotiating parties. A more complex version of this strategy focuses on long-term gain. This focus usually requires some effort to maintain or further a relationship and usually moderates the competitive, often aggressive, behavior that jeopardizes relationships and possibilities of long-term gain.

B. *Compromising*

A second negotiation strategy is cooperative-compromise bargaining, sometimes called soft-bargaining, or win-some-lose-some, or give-and-take bargaining. Compromise bargainers believe they must trade off some of what they want in order to get at least something. This means that, in some sense,

they concern themselves not only with their own gain, but with that of the parties with whom they are dealing. They may do this out of genuine concern for others' well-being or because they conclude they must give up something to reach any agreement at all. In this sort of bargaining, the negotiator only receives, for whatever reason, some of what is desired.

For cooperators, success in a negotiation is often a combination of how the negotiation feels and what they receive. They want to be reasonable, which means accommodating the other party to a certain degree. If the negotiation involves roughly equivalent compromises on both sides and the final deal is satisfactory or "fair," then the cooperator thinks the negotiation has been successful. This view of success implies some concern for the relationship between the parties. When the parties compromise equally—or at least appear to each other to have done so—they feel treated equally. As long as the result is in the range of what they deem acceptable, they are satisfied. Such equal and fair treatment can reflect a concern for maintaining good relationships and, in any case, does not damage these relationships.

A person can cooperate or compromise as a matter of principle or as a matter of necessity. In the simplified, type-cast images of basic bargaining strategies presented here as introductory sketches, the cooperative bargainer compromises as a matter of principle. By contrast, a competitive bargainer compromises because she has to—there will be no deal if she does not. Consequently, although both cooperative and competitive bargainers may compromise, there are differences in why they do so, how they go about it, and how much they are willing to compromise.

C. *Collaborating or Problem-Solving*

Another important negotiation strategy is collaborating or working together with others to further all parties' interests and aims. This kind of bargaining is generally referred to as integrative or problem-solving bargaining, but is also called interest bargaining, positive-sum, or win-win bargaining. In integrative or problem-solving bargaining, the parties aim to satisfy their own interests, as well as those of the other negotiating parties. Put another way, they seek to maximize their own gain *and* the gain of the other parties. The parties achieve this aim through a process in which the parties collaborate to discover what mutual action they can take to satisfy their respective interests.

Integrative bargaining is the fullest form of cooperative bargaining: How could one cooperate more than by engaging in joint problem solving with another? The integrative bargainer defines ideal negotiating success as satisfaction of both parties' interests, *without compromise*, if at all possible. The interests the parties seek to satisfy in the negotiation are as many and as broad as they wish to define them. This model, therefore, conceives of negotiation success more broadly than competitive bargaining, which focuses primarily on acquiring the most of anything in contention between the parties. The integrator is not trying to get "the most" or outdo the other side, but is simply trying to further or realize her aims. Unlike compromise bargaining, integrative bargaining treats negotiations as creative opportunities for problem solving that the parties can exploit to serve each of their interests fully so that each benefits as much as possible from the negotiation.

D. Choice Among Bargaining Strategies

Nothing, except perhaps local culture, standard, custom or practice in a particular industry or negotiating arena, requires negotiating parties to negotiate in any particular way. None of these ways of bargaining is *necessarily* "better" than any other way. Most sophisticated practitioners, however, would probably acknowledge that integrative bargaining is the most productive and efficient way to bargain.

The way a party chooses to bargain, assuming a choice is made rather than just jumping in and doing what seems natural or what prior experience suggests, depends very much on the particular aims of a given negotiation. A negotiator's aims will, to a certain degree, depend on the aims of the other party negotiating. Context, circumstances, parties' expectations and personalities, the nature of the parties' interests and the issues between them, and the parties' relative knowledge of bargaining methods deeply shape the choice of bargaining strategy. Nonetheless, negotiators either consciously or unconsciously adopt negotiation aims and methods that conform to one of the foregoing basic forms or some combination of them. Anyone who does much negotiating should be familiar with each strategy, know how to recognize it, how to use it, and how to deal with it.

Some issues and the way the parties define them, as well as some circumstances, appear to dictate particular kinds of bargaining. For example, when each party wants the same indivisible thing, but both cannot have it, or when what one wants apparently conflicts with what the other wants, parties are quite likely to bargain competitively. When, however, the matter in dispute is divisible, the parties anticipate a future relationship, and neither party needs nor desires to dominate, both parties may simply compromise. When the parties have common or complementary interests, such that mutual action will satisfy or enhance their respective interests, they are likely to bargain integratively. These examples, however, do not exhaust the possibilities, and negotiators can transform one kind of bargaining into another.

E. Negotiating Style

Negotiators' personalities and their own characteristic methods of dealing with others also inevitably affect negotiations. Some people are naturally disposed to be competitive, cooperative, or pragmatic and inclined to take a problem-solving approach in dealing with issues. Others acquire one disposition or another through training or experience. Further, individuals often react differently in different contexts or respond differently to different persons. Finally, some persons are self-aware, have some control over their basic dispositions, and can adapt themselves effectively in interactions with different people. Others are pretty much what they are and act much the same way with everyone.

These simple observations imply that a negotiator's basic bargaining strategy can be, but is not necessarily a simple reflection of his or her own personality. A negotiator who is at heart a competitor and is trying to "win" a negotiation by doing better than the other side through extracting more gain than the other side may also have a competitive or aggressive demeanor and, therefore, bargain competitively. Alternatively, the same negotiator could bargain competitively on substance yet affect a cooperative, "reasonable," or

non-aggressive bargaining manner if he is aware of and in conscious control of his own behavior. Similarly, one who has a competitive nature can decide that it is in his best interests to be cooperative or collaborative, either in a particular situation or in general. Conversely, there will also be occasions when people who view themselves as compromisers or problem solvers will take a hard line and bargain competitively.

Consequently, while there are three basic ways of negotiating substance, a negotiator's behavioral style can mask or otherwise affect the strategy in actual use. Thus, a competitive negotiator who is reasonable in disposition and demeanor, acts agreeably, and gives the appearance of cooperation may be mistaken as one who is negotiating cooperatively even though he is a hard bargainer on matters of substance. Obviously, one should not mistake style for substance. Although style could reflect strategy, a person's attitude and demeanor in a negotiation is not a sure guide to her basic bargaining strategy.

During the course of a negotiation, any given negotiator may both change demeanor, mix or combine different methods of negotiating, or also use tactics and techniques that appropriately respond to the opposing party's method of negotiating. Negotiations also become more complex as the number of issues and parties involved increase. Adding issues and parties increases the interaction and tradeoff possibilities and affects the psychological dynamics of the negotiating process.

While there are three basic models of negotiating strategies that can be used to organize our analysis—think, plan and negotiate—there are many permutations and combinations of these three models. The issues, the parties' personal interactions and the dynamics between them, their sophistication, as well as contextual and cultural factors form and shade every negotiation.

RUSSELL KOROBKIN, *A POSITIVE THEORY OF LEGAL NEGOTIATION*

88 Geo. L.J. 1789 (2000).

This article presents a new dichotomy that creates a clear theoretical structure for viewing the legal negotiation process. This "zone definition/surplus allocation" dichotomy provides a complete description of the negotiating process: *every* action taken by negotiators in preparation for negotiations or at the bargaining table fits into one of these categories.

First, negotiators attempt to define the bargaining zone—the distance between the reservation points (or "walkaway" points) of the two parties—in the manner most advantageous to their respective clients. I call this activity "zone definition." Exploring alternatives to agreement, questioning, persuading, misleading, committing to positions, and redefining the negotiation's subject matter are all tactical tools used in zone definition. Because transactions are economically rational—in the sense that reaching agreement is better than not reaching agreement for both parties—only at points within the bargaining zone, zone definition can be understood as an inherently economic activity.

Second, negotiators attempt to convince their opponent to agree to a single "deal point" within the bargaining zone. I call this activity "surplus allocation." Surplus allocation effectively divides the cooperative surplus that

the parties create by reaching an agreement. For both parties, transacting at any point within the bargaining zone is more desirable than not reaching agreement, but each knows that the same is true for the other. Once the bargaining zone is established, there is no economically obvious way for the parties to select a deal point. As a result, surplus allocation usually requires that negotiators appeal to community norms of either procedural or substantive fairness. Consequently, surplus allocation can be understood as an inherently social activity.

Negotiating tactics that can be classified as "competitive" or "cooperative," or as "distributive" or "integrative," also fit into the zone definition/surplus allocation dichotomy, but they are organized differently under the new dichotomy than they are under the existing frameworks. Both zone definition and surplus allocation can be achieved by competitive or cooperative tactics. While surplus allocation is a distributive exercise, zone definition can be achieved with both integrative and distributive tactics. This article, therefore, presents not a new way to *negotiate*, but a new way to *think about negotiation*.

ZONE DEFINITION

In any negotiation, the maximum amount that a buyer will pay for a good, service, or other legal entitlement is called his "reservation point" or, if the deal being negotiated is a monetary transaction, his "reservation price" (RP). The minimum amount that a seller would accept for that item is her RP. If the buyer's RP is higher than the seller's, the distance between the two points is called the "bargaining zone." Reaching agreement for any amount that lies within the bargaining zone is superior to not reaching an agreement for both parties, at least if they are concerned only with the transaction in question.

For example, suppose Esau, looking to get into business for himself, is willing to pay up to \$200,000 for Jacob's catering business, while Jacob, interested in retiring, is willing to sell the business for any amount over \$150,000. This difference between Esau's and Jacob's RPs creates a \$50,000 bargaining zone. At any price between \$150,000 and \$200,000, both parties are better off agreeing to the sale of the business than they are reaching no agreement and going their separate ways.

The same structure used to describe a transactional negotiation can be used to describe a dispute resolution negotiation. Suppose that Goliath has filed suit against David for battery. David is willing to pay up to \$90,000 to settle the case out of court—essentially, to buy Goliath's legal right to bring suit—while Goliath will "sell" his right for any amount over \$60,000. These RPs create a \$30,000 bargaining zone between \$60,000 and \$90,000. Any settlement in this range would leave both parties better off than they would be without a settlement.

In contrast, if the seller's RP is higher than the buyer's RP, there is no bargaining zone. In this circumstance, there is no sale price that would make both parties better off than they would be by not reaching a negotiated agreement. Put another way, the parties would be better off not reaching a negotiated agreement. If Jacob will not part with his business for less than \$150,000 and Esau will not pay more than \$100,000 for it, there is no

bargaining zone. If David will pay up to \$50,000 to settle Goliath's claim, but Goliath will not accept any amount less than \$60,000, again there is no bargaining zone. An agreement in either case would leave at least one party, and possibly both parties, worse off than if they were to decide not to make a deal.

Knowledge of the parameters of the bargaining zone, which is created by the two parties' reservation points, is the most critical information for the negotiator to possess. Those parameters tell the negotiator both whether any agreement is possible and, if so, identify the range of possible deal points. At the same time, the negotiator has an interest in adjusting the parameters of the bargaining zone to his advantage. A buyer not only wants to know his and the seller's RPs, he wishes to make both lower, or at least make both *appear* lower to the seller. This shifts the zone of possible deal points lower, increasing the chances that the seller will ultimately agree to a relatively low price. Experimental evidence in fact confirms that negotiators with more favorable RPs (that is, lower for buyers, higher for sellers) reach more profitable agreements than negotiators with less favorable RPs.

Esau wants to know his and Jacob's RPs, but he also would like to shift both numbers, and therefore the bargaining range, lower. Assuming Esau knows his RP is \$200,000 and learns Jacob's is \$150,000, Esau knows that an agreement is possible for some amount greater than the latter figure and less than the former. If he could reduce Jacob's RP to \$120,000 and his own to \$170,000, however, the bargaining zone would remain the same size, but its changed parameters would suggest that Esau would be likely to buy the business for a lower price. Esau could achieve the same advantage if Jacob *believes* the parties' RPs are \$120,000 and \$170,000 respectively, even if the RPs objectively are \$150,000 and \$200,000.

The existence of a bargaining zone is necessary for a negotiated agreement, and the parameters of the bargaining zone—defined by both parties' RPs—define the set of possible “deal points.” Consequently, parties spend a substantial portion of most negotiations defining the bargaining zone—the activity I call “zone definition.” The remainder of this part explains how a disparate collection of negotiating activities and tactics is best understood as being geared toward accomplishing this critical strategic goal.

A. Preparation

All observers of the negotiation process agree that painstaking preparation is critical to success at the bargaining table. The main reason this is true is that thorough preparation is a prerequisite for the negotiator to accomplish zone definition as advantageously as possible. Two types of preparation serve this purpose. “Internal” preparation refers to research that the negotiator does to set and adjust his own RP. “External” preparation refers to research that the negotiator does to estimate and manipulate the other party's RP.

1. Internal Preparation: Alternatives and BATNAs

A negotiator cannot determine his RP without first understanding his substitutes for and the opportunity costs of reaching a negotiated agreement. This, of course, requires research. Esau cannot determine how much he is willing to pay for Jacob's business without investigating his other options. Most obviously, Esau will want to investigate what other catering companies

are for sale in his area, their asking prices, and how they compare in quality and earning potential to Jacob's. He also might consider other types of businesses that are for sale. And he will likely consider the possibility of investing his money passively and working for someone else, rather than investing in a business.

Alternatives to reaching an agreement can be nearly limitless in transactional negotiations, and creativity in generating the list of alternatives is a critical skill to the negotiator. The panoply of alternatives is generally more circumscribed in dispute resolution negotiations. If Goliath fails to reach a settlement of some sort with David, he has the alternative of seeking an adjudicated outcome of the dispute and the alternative of dropping the suit. Most likely, he does not have the choice of suing someone else instead of David, in the same way that Esau has the choice of buying a business other than Jacob's.

After identifying the various alternatives to reaching a negotiated agreement, the negotiator needs to determine which alternative is most desirable. Fisher and his coauthors coined the appropriate term "BATNA"—"best alternative to a negotiated agreement"—to identify this choice. The identity and quality of a negotiator's BATNA is the primary input into his RP.

* * *

Internal preparation serves two related purposes. By considering the value of obvious alternatives to reaching a negotiated agreement, the negotiator can accurately estimate his RP. This is of critical importance because without a precise and accurate estimation of his RP the negotiator cannot be sure to avoid the most basic negotiating mistake—agreeing to a deal when he would have been better off walking away from the table with no agreement.

By investigating an even wider range of alternatives to reaching agreement, and by more thoroughly investigating the value of obvious alternatives, the negotiator can alter his RP in a way that will shift the bargaining zone to his advantage. Rather than just considering the asking price of other catering companies listed for sale in his town, Esau might contact catering companies that are not for sale to find out if their owners might consider selling under the right conditions. This could lead to the identification of a company similar to Jacob's that could be purchased for \$175,000, which would have the effect of reducing Esau's RP to \$175,000 and therefore shifting the bargaining zone lower. Goliath's attorney might conduct additional legal research, perhaps exploring other, more novel, theories of liability. If he determines that one or more alternative legal theories has a reasonable chance of success in court, Goliath might adjust upward his estimate of prevailing at trial—and therefore the value of his BATNA of trial—allowing him to adjust upward his RP.

2. *External Preparation: The Opponent's Alternatives and BATNA*

Internal preparation enables the negotiator to estimate his RP accurately and favorably. Of course, the bargaining zone is fixed by *both* parties' RPs. External preparation allows the negotiator to estimate his opponent's RP. If Esau is savvy, he will attempt to research Jacob's alternatives to a negotiated agreement as well as his own alternatives. For example, other caterers might know whether Jacob has had other offers for his business, how much the business might bring on the open market, or how anxious Jacob is to sell—all

factors that will help Esau to accurately predict Jacob's RP and therefore pinpoint the low end of the bargaining zone. This information will also prepare Esau to attempt to persuade Jacob during the course of negotiations to lower his RP, a point discussed in detail below.

It is worth noting that in the litigation context both parties often have the same alternatives and the same BATNA. If plaintiff Goliath determines that his BATNA is going to trial, then defendant David's only alternative—and therefore his BATNA by default—is going to trial as well. In this circumstance, internal preparation and external preparation merge. For example, when Goliath's lawyer conducts legal research, he is attempting to simultaneously estimate the value of both parties' BATNAs. Of course, just because the parties have the same BATNA, they will not necessarily estimate the market value of it identically, much less arrive at identical RPs...

B. Persuasion

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Efforts at persuasion in negotiation are best understood as attempts to satisfy one or both of two goals: (1) to shift the bargaining zone to the advantage of the negotiator, either by convincing the opponent that his RP is worse than he believed before beginning negotiations or that the negotiator's RP is better than previously believed; and (2) to establish an objective—and therefore “fair”—method of agreeing on a sale price that falls within the bargaining zone. The first point is considered here; the second is discussed in [the reading in Chapter 4]. In either case, the importance of persuasion demonstrates that both zone definition and surplus allocation are dynamic activities, dependent not only on negotiators' individual prebargaining analysis but also on their interaction.

* * *

C. Information Seeking

Good negotiators do as much or more “asking” as they do “telling.” Significant negotiating time is spent with one party asking the other questions, seeking information. Negotiators do this primarily to generate more accurate estimates of their own and the opponent's RP—and therefore of the bargaining zone—than they can generate from prenegotiation preparation alone.

Questioning the opponent directly can help to better estimate the opponent's RP for two reasons. First, the negotiator's opponent is likely to have private information relevant to his RP, which cannot be discovered through prenegotiation external preparation. Second, as discussed above, the opponent's RP depends on his subjective evaluation of even public information. When the opponent has private information relevant to the negotiation's subject matter or his quality as a trading partner, information-seeking at the bargaining table can also help negotiators to redefine their own RPs. When being questioned, negotiators respond with varying degrees of candor, depending, of course, on whether they perceive that the benefits to themselves or their clients of doing so outweigh the risks entailed.

JOHN S. MURRAY, *UNDERSTANDING COMPETING
THEORIES OF NEGOTIATION*

2 Negot.J. 179, 182-85 (1986).

EXPLANATION OF NEGOTIATING BEHAVIOR

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The competitive negotiator appears to have a narrow perspective on the negotiation as a whole, but broad and flexible standards for selecting strategies and manipulating the process. Competitive theory is reflected in behavior when the negotiator:

1. Maximizes own return in present transaction.
2. Considers needs/interests/attitudes of opponent as not legitimate, and only relevant when usable to achieve # 1 above.
3. Views all disputing processes and strategies as equally valuable and useful if helpful in achieving # 1 above.
4. Behaves cooperatively only if it helps achieve # 1 above.
5. Chooses processes and strategies similar to military maneuvers. The focus is on the process of winning, not on the resolution of disputes.
6. Presents a strong defense against opponent's tactics.
7. Must control the negotiating process for proper manipulation.

The problem-solving negotiator, on the other hand, holds a broad perspective on the negotiation as a whole, combined with more rigid limits on acceptable strategies and conduct. Some of the key behavioral elements for the problem-solver are:

1. Maximizes own return within the larger time and community context.
2. Considers needs/interests/attitudes of other side as both relevant and legitimate to resolving the dispute.
3. Is competitive but not antagonistic.
4. Tries to discover and share any joint gains available.
5. Concentrates on the substance of the dispute or decision.
6. Considers negotiation and other voluntary processes as superior to nonvoluntary methods (adjudication).

These separate behavioral characteristics contain significant strengths within the bargaining situation. The competitive negotiator can be focused and single-minded, with no details being materially relevant other than the present dispute and the party/client. This concentration allows the competitive negotiator to prepare fully for a specific settlement conference. He or she can come armed with a solid offer and fixed negotiation strategies. The opponent's perspective and tactics will not affect the opening position or strategies; they are important only for the manner and rate of concessions, should the negotiator decide to make any at all. Such knowledge gives the

negotiator a reassuring sense of control that translates into confidence that is impressive in the negotiation setting.

Another strength follows directly from this disregard for the opponent's position and tactics. The competitive negotiator has analyzed the facts, determined the position, and made the case. The opponent cannot dislodge or defeat this preparation by any means of persuasion based on the merits. Having such an unbreachable defensive position permits the competitive negotiator to stress an aggressive offense aimed at persuading, coercing, deceiving or otherwise manipulating the opponent to an acceptable agreement.

There is also strength in the competitive negotiator's flexibility in selecting strategies. Everything is acceptable, including the alternative of not negotiating, with the only limit being the express violation of ethical obligations. The ultimate selection is based directly on which strategy yields the maximum expected gain for the party/client. A significant element of bargaining power is the attractiveness of a good alternative to negotiating with the opponent. The competitive negotiator does not hesitate to choose that alternative when it is perceived as yielding a bigger gain, even if that choice places the party/client in a psychologically costly court trial. The relevant standards are quantitative: the size of gain expected from the alternative, discounted to reflect any time delay, compared to what appears possible in settlement. The competitive negotiator thereby avoids the confusion and indecision fostered by the impact of intangible or psychological factors and the normative arguments of fairness, wisdom, durability, and efficiency.

Finally, there is psychological strength in the excitement of doing battle. Like a military general, the competitive negotiator concentrates full attention on manipulating the tools and processes available within the negotiation setting. The goal is victory over the opponent on the field of battle. Resolving the underlying disagreements between parties/clients is left to others. With no responsibility for resolving these underlying problems, the negotiator can savor the excitement and challenge of the negotiation chase as if it were only a game, like baseball, chess or poker.

On the other side, the problem-solving negotiator also brings strengths to the bargaining table. Concentration on the merits of the dispute gives the problem-solver a sense of legitimacy, centrality and purpose. The problem-solver is responsible not only for tactical decisions within the negotiation setting but also for helping resolve the underlying problems of the party/client. Such a central role to the life of the party/client makes the negotiator's efforts less like a game and more like a serious human responsibility. In addition, using the merits as the central negotiating focus establishes a more objective and predictable control mechanism than can be achieved by relying on manipulation of the personal strategy and style decisions of the negotiators.

The problem-solving negotiator also generates strength by recognizing the importance of common interests and joint gains. Such objectives can be shared among negotiators and parties/clients in a mutually positive and reinforcing way, quite different than the competitive effect that the goal of victory has.

Finally, successful problem-solving is a satisfying experience on a human level. Since the intended outcome of the negotiation is a win-win result, the accomplishment of creating an innovative solution that maximizes joint as well as individual gains can be shared with the other side. The process of reaching this goal is psychologically unifying, rather than divisive. Negotiating is thus an enjoyable and challenging personal experience, rather than a highly stressful battle of wits and words.

DOWNSIDE RISKS

Each behavioral pattern exhibits weaknesses as well as strengths.... The significance of recognizing these risks lies in understanding negotiator vulnerabilities, identifying possible threats to consistently good outcomes, and developing appropriate responses or changes to improve the result.

* * *

It is especially enlightening to analyze the downside risks with the objective of devising actions that might decrease or eliminate them. For the competitive negotiator, adopting actions intended to lessen the risks appears to change negotiating behavior from a competitive to a problem-solving mode.

For example, actions aimed at reducing the harmful effects of frustration, anger, mistrust, misinformation and misjudgment must of necessity include building a better working relationship between the negotiators. The objective would be to identify and eliminate possible breakdowns that are based on emotional and communication problems and not due to the inability to find an outcome that maximizes the party/client gain. The result of adopting such actions would be to improve the amount and credibility of information exchanged, increase the grounds for trust, and lessen the use of manipulation based on process rather than substance.

The success of misrepresentation and deceit as a strategy to elicit information leading to joint gains depends largely on an inequality in the relative level of negotiator competence, which is not a solid base for generating consistently good outcomes. Therefore, actions intended by the competitive negotiator to uncover joint gains would need to include improvement in active listening and acceptance of the opponent's legitimacy.

Reducing brinkmanship would help eliminate impasses where settlement at the party/client's maximum is possible but is frustrated by the psychological impact of the frequent use of threats. Pulling back from the brink requires fewer threats of impasse, less psychological tension, and more recognition of substantive fairness.

The competitive negotiator who tries to counter these downside risks becomes more problem-solving than competitive in orientation, thereby exhibiting more of the characteristics and strengths associated with problem-solving theory.

On the other side, analysis of the downside risks of problem-solving theory suggests that corrective actions will lead to a strengthening of problem-solving skills, not to a change in basic negotiating behavior. The theories are in this way asymmetrical.

For example, the tendency toward unwarranted compromise and accommodation is countered not by confrontation and stubbornness but by more thorough preparation on the merits and a stronger commitment to an identifiable substantive standard. Indefinite aspiration levels and bottom lines pose serious problems for the problem-solving negotiator at all stages of negotiation, from the initial planning to post-agreement evaluation. Corrective steps include the development and use of more accurate analysis of the subject matter, not a shift to process manipulation and positional bargaining.

Viewing impasse not as failure but as a better alternative than agreeing to an unfair settlement does not force a negotiator to be confrontational in a competitive sense. Rather, it causes the problem-solver to be even more committed to a recognized standard of fairness and more flexible in strategy selection.

One of the most feared downside risks for the problem-solver is vulnerability to deception and manipulation by a competitive opponent. The result can be not only an inequitable outcome but also a residual sense of personal and professional embarrassment. Reciprocating with equally deceptive and competitive behavior may be the easiest response, but such reciprocity is defensive in nature, not corrective. Actions to detect and counter deception and manipulation must focus on ways to build confidence in the truthfulness of information exchanged and in the identification of various negotiating tactics.

Personal confidence in the negotiator's own ability and judgment is a prerequisite for effective problem-solving. The negotiator builds such confidence by acquiring up-to-date knowledge of both substance and process, preparing rigorously for each case, and seeking practical negotiating experiences.

Negotiation for the problem-solver who tries to correct for downside risks does not shift to a more competitive and confrontational mode but rather retains and enhances problem-solving characteristics.

JANOS NYERGES, *TEN COMMANDMENTS FOR A NEGOTIATOR*

3 Negot.J. 21, 21-26 (1987).

Toward the end of my professional career—I was Special Representative of the Hungarian Government to International Economic Organizations—I was asked by my younger colleagues about the “secret” of my negotiation ability. This question, though flattering, took me by surprise because, as a matter of fact, I never gave much thought to how I did what I did.

* * *

The question of what makes a good negotiator continues to intrigue me. Based on my experience, observation, and study I've developed my own “Ten Commandments for a Negotiator.” Here they are:

* * *

1. YOU SHALL LOVE AND CHERISH YOUR TRADE

* * *

It is obvious that involvement and dedication to a cause are not enough; in fact, without a strong sense of professionalism, this type of adherence can

be a liability. Professionalism, to my mind, is not simply the fact that a good negotiator has a high professional standing. I view professionalism as an intellectual and emotional involvement and commitment to the profession itself. True negotiators are enthusiastic about negotiation, just as good lawyers, doctors, engineers, and teachers are in love with their trade.

* * *

2. BE COURAGEOUS

A good negotiator must command respect. Respect cannot be conferred by rank or functions; it is due to character. Nothing confers respect more than courage, which is the readiness to accept responsibilities and to make decisions.

In German terms, there are two different qualifications: *Entschlussfähig* (i.e., capable to make decisions) and *Entschlussfreudig* (i.e., enjoys making decisions). Being capable of making decisions seems obvious. In reality, however, many negotiators are not born to negotiate, nor even trained to do so....

One of my former ministers was once negotiating with his colleague in a foreign country. As he made a proposal that was a bit unusual, his partner picked up the phone on his desk and, after a quick exchange with the person at the other end of the line, turned to my minister and said: "I am sorry, I cannot accept." Throughout the long discussions, this little scene was repeated several times, with different answers. Finally, my minister had had enough. He turned to his colleague and said, "Couldn't you give me, dear colleague, that phone number?" Enjoying decision making is a quality that's rarely found. It is a sign of a sovereign will, of self-confidence.

* * *

3. THE EAGLE'S EYE MUST BE YOURS

Needless to say, courage and acceptance of the challenges are not enough. Good judgment, quick assessment of the situation—"the eagle's eye" of my third commandment—is also necessary. Without it, courage remains blind. For a negotiator, quick assessment of the situation is what a targeting device is to a guided missile.

I would like to emphasize that good judgment, the correct assessment being a precondition for making an appropriate decision, has a specific importance in the context of the negotiation. More often than not in negotiation, the real situation is far from being clear. Among the factors that obscure the truth are inconsistent behavior on the other side, the irresistible impact of one's own patterns of thinking, the smokescreen of purposely created impressions by the other side, and lack of information. There frequently are few "redcoats" on this battlefield that reveal the positions of the other party.

Speed of assessment is vital because time is the eternal enemy of the negotiator. Sometimes one can buy time, but such a purchase often involves

a price that may later turn out to be too high. Instead of buying time, speed in recognizing the real situation *gains* time.

* * *

One word of warning: Quick assessment does not always mean a quick answer. The answer of the good negotiator, once the assessment is quickly made, must be subordinated to tactical considerations.

4. THERE ARE NO PROBLEMS, ONLY OPPORTUNITIES

This very wise advice was quoted to me as having originally been said by a former president of Trans World Airlines. Problems often hypnotize the negotiator, just as the cold eyes of the snake immobilize the little rabbit. However, I believe there are no situations, no problems that do not offer opportunities—if you look for them. By viewing a problem as an opportunity, you often discover new, sometimes surprising proposals. Last but not least, this kind of opportunity can help you convert a seemingly zero sum situation into a non-zero sum situation. The only thing that a good negotiator must do is *look* for these opportunities. If this is how you view “problems,” you will find opportunities.

5. BE HONEST UNDER ALL CIRCUMSTANCES

The “commandments” described thus far apply not only to negotiators, but also to the military and boxing champion. These are rules for fighting persons.

Negotiation is a fight—I have no doubt about this—but not a fight alone. It is a fight with a specific character. The good negotiator is not simply a fighter for victory, but a fighter who seeks to win the mind, the sympathy, and the cooperation of his or her opposite number.

Therefore, the most needed quality—without which a negotiator is doomed to fail—is honesty, both intellectual and moral. Honesty has many manifestations and it’s a quality that a good negotiator displays on each and every occasion. Negotiators should never have to say “Look how honest I am!” Such a protestation, in fact, places in question the honesty of the person speaking. Instead, honesty should be manifested by faithful observance of the rules of the game, loyalty shown in the way arguments are put forward, and giving the benefit of the doubt to the other party. Honesty is unconditional.

* * *

Interaction cannot be regarded only as the development of mutual sympathy based on personal understanding and esteem. It is an intellectual process as well. In addition, the presentation of facts in negotiation should be handled in a way that strengthens the feeling that the negotiators are *partners* rather than *opponents*.

6. LOVE YOUR OPPONENT EVEN IF YOU RECEIVE SOMETHING LESS IN RETURN

Negotiators are in a contradictory situation: Each wants the problem resolved in a self-interested way. This separates them. On the other hand, each of them has to resolve the same problem, and this unites them.

Negotiators are like two workers carrying the same burden: Whether they like it or not, they are part of the same "chain-gang." The negotiator who dislikes or is rude to the other side adds to the mutual burden instead of alleviating it. The better negotiator, on the other hand, respects the other side.

7. PUT YOURSELF IN THE SHOES OF YOUR OPPONENT,
BUT DO NOT REMAIN THERE TOO LONG

The good negotiator feels the necessity to put himself or herself into the situation of the other side. This feeling is a natural byproduct of the negotiating process itself. Negotiation involves personal contact, communication, and interaction. . . .

Knowing it is one thing. Reacting to it is another. An inexperienced negotiator is sometimes tempted to use the internal difficulty of the negotiating partner as a welcome occasion to exert pressure. A good negotiator knows that this attitude is more often than not counter-productive. Instead, the good negotiator will try to understand and to alleviate this embarrassing situation. This attitude is sometimes mingled with a kind of sympathy and compassion.

Here lies the danger: Having put oneself in the shoes of the other fellow can lead to the road on which those shoes were marching—that is, seeking solutions which risk being beneficial to the other party alone. The right attitude in such a situation is to find answers that alleviate the burden of the other party while also providing satisfaction for yourself. Therefore, the more willing a negotiator is to assimilate, to feel the problems of the other side, the more that negotiator has to bear in mind the self-interested goals.

8. CONVERT YOUR OPPONENT INTO YOUR PARTNER

Every negotiator needs help, and the person who is in the best position to give this help is the opponent. Hence, the importance of the conversion of the opponent into a negotiating *partner*. This comes almost automatically, if the previous three commandments were successfully observed. Combined, these precepts yield the indispensable element in any negotiation: trust. Even in extreme cases where the partners are known to each other as criminals or outlaws, they must trust each other, to a minimal extent at least, if the negotiations are to succeed.

9. DO NOT ACT BEFORE YOU FIND OUT WHAT YOUR PARTNER'S AIMS ARE

In my mind, bargaining in negotiation begins when substantial discussion occurs, offers are made, positions are taken. But—and this mistake occurs very often—what happens if your partner's position is not what you believed it was? You made overtures, your promises, and your threats are all in vain. The harm is greater in such cases than to lose time and opportunity. By revealing your ignorance, you cease to be a competent negotiator.

Therefore, the first stage of the negotiations has to be to find out, to the greatest extent possible, what the partner really wants to achieve. Once you know it, start the bargaining.

10. YOUR PARTNER IS AT LEAST AS INTELLIGENT AS
YOU ARE; BUT YOU MUST HAVE MORE WILL

The good negotiator never underestimates the intellectual capacity of any opponent. Rather, a good negotiator closely observes every move of the partner, giving very serious attention to each action. Soon a good negotiator will realize that negotiation is not a contest of intelligence but a contest of will.

* * *

The good negotiator sees such crises coming, and is prepared to meet them. The better negotiator prepares for such crises, taking good care that the stakes and risks on the other side are greater than his or her own.

For Further Reading

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Chapter 2

THE PRISONER'S DILEMMA— AVOIDING EXPLOITATION IN THE MIXED-MOTIVE EXCHANGE

Chapter One gave us a general overview of the ubiquitous communication process people use to plan transactions or resolve conflict. In this chapter, we begin to identify more specifically the key ingredients of effective bargaining. Our starting point is the thesis that we would all appreciate a simple prescription that would permit us to avoid being exploited when we negotiate. In the chapters following this one, we will detail how to move upward from this baseline of avoiding exploitation and attain more satisfying outcomes.

Negotiators typically begin their dealings with a number of potentially conflicting motives about how best to proceed. On the one hand, they want to do well, to win as much as they can, for themselves or their client, firm or cause. Aggressive bargaining strategies may help them accomplish these goals successfully. On the other hand, bargainers also recognize that they must interact, however minimally, in order to reach agreement. Typically, enlightened self-interest, not altruism, pulls in this more cooperative direction. Even when people are in bitter dispute, they know that better outcomes might be possible if only their bargaining relationship could be fostered. This cooperative interaction could bring a double benefit. It might lead to a better result in the present negotiation. It might also encourage more successful outcomes in any future dealings.

These mixed motives create a predicament for participants as they develop a preferred negotiating strategy. Many competitive bargaining tactics are hard on the alliance of the parties, and may chill collaborative opportunities. Unfortunately, however, collaborative strategies can leave one open to exploitation by negotiators who do not place a similar premium on a good working relationship. In the face of this inevitable uncertainty, how should an effective negotiator proceed?

For over fifty years a broad range of scholars and practitioners have been intrigued by this strategic puzzle. It has a name: "The Prisoner's Dilemma." Game theorists, mathematicians, political scientists, psychologists and practitioners of negotiation have analyzed the puzzle in detail. In the Prisoner's Dilemma, two people, suspected of participating in a crime, are arrested and placed in separate jail cells. They cannot talk with one another. The prosecu-

tor gives each one the same deal. If one of them provides the information necessary to convict their partner (defect) while their partner says nothing (sit tight), they can go free while their partner serves a very long sentence. If both defect, both serve a somewhat long sentence. If both sit tight, both serve a somewhat shorter sentence. This situation places each partner in a dilemma whether to defect or sit tight.

Recently, these researchers have advanced some intriguing hypotheses about managing the mixed motives inherent in the prisoner's dilemma. The following materials describe the Prisoner's Dilemma, discuss possible strategies for dealing with it successfully, and raise provocative questions about its general applicability. The readings provide effective bargainers with a theoretical foundation upon which to commence any negotiation with the assurance that they can at least avoid being exploited.

Douglas Hofstadter, a longtime contributor to *Scientific American*, describes the ways in which people confront the puzzle of the Prisoner's Dilemma. His writing highlights research from two linked computer tournaments conducted by Michigan's Robert Axelrod to test how best to manage the Prisoner's Dilemma. In the next reading, Axelrod introduces us to the winner of the computer tournaments; the simple program called "Tit-for-Tat." He develops the implications of this winning program and makes prescriptive suggestions for how to manage the Prisoner's Dilemma most effectively. His four suggestions are thus grounded in the analytical results of game theoretic model testing. They can help every bargainer avoid exploitation when making strategic decisions under typical conditions of uncertainty.

In a passage from a book that should be read by everyone curious about the bargaining process, David Lax and James Sebenius build upon Axelrod's theoretical work to analyze the "Negotiator's Dilemma" with characteristic clarity. Tit-for-Tat's moves either to defect or cooperate in rounds of the iterated prisoner's dilemma are analogous to negotiator's decisions to employ competitive or cooperative strategies during any bargaining process. Negotiators are pulled between the impulse to claim value and to create value. Lax and Sebenius advise us to think of the two strategies not as mutually inconsistent but as Siamese twins, equally valid, symbiotic in the process of negotiating effectively.

Three summaries of recent research continue our theoretical look at the Prisoner's Dilemma. In the first, new game theoretic research on the impact of Axelrod's computer tournament amplifies Tit-for-Tat. The weakness of that program is clear when both players are locked in a competitive embrace. There is no way for either party to test the waters of cooperation by inviting a different response. This new research augments Axelrod's data. The results suggest that occasional efforts to induce the negotiating opposite to cooperate, called "Generous" Tit-for-Tat, are analytically preferable to lockstep and unyielding competition.

In the next two selections, researchers designed instruments to assess the negotiating preferences of people with shared academic expertise. The implications of these studies should receive close scrutiny by legal educators and lawyers. They suggest the critical role of professional socialization in deter-

mining bargaining behavior, and the complexity added by lawyer participation in negotiations.

These two selections challenge the assumption of rational choice theory that it is always better to defect in a one-shot prisoner's dilemma game. Baton and Ahmad discover that if one player knows something about the other that creates an empathetic connection, the results of the one-shot game are less predictable. Russell Korobkin and Thomas Ulen also find results inconsistent with rational choice theory when several players decide how much they are willing to contribute to provide for a public good.

In our final reading in this chapter, two negotiation theorists combine to demonstrate how the Prisoner's Dilemma can have practical implications. We know lawyers routinely negotiate as agents for their clients. We know little about how this agency relationship affects bargaining outcomes. Ronald Gilson and Robert Mnookin use the Prisoner's Dilemma to help explain the "increase in contentiousness" observable in contemporary commercial litigation practice.

Readings

1. Douglas Hofstadter, *Metamagical Themas: Computer Tournaments of the Prisoner's Dilemma Suggest How Cooperation Evolves*, SCIENTIFIC AMERICAN 16-19 (May 1983).
2. Robert Axelrod, THE EVOLUTION OF COOPERATION 109-23 (1984).
3. David Lax & James Sebenius, THE MANAGER AS NEGOTIATOR 29-35 (1986).
4. Thomas Bass, *Forgiveness Math*, DISCOVER MAGAZINE 62-67 (May 1993).
5. Robert H. Frank, Thomas Gilovich & Dennis Regan, *Does Studying Economics Inhibit Cooperation?*, 7 J. OF ECON.PERSP. 159-71 (1993).
6. Peter Passell, *The Law as the Free Market's Rogue: Hostage to the Prisoner's Dilemma*, THE NEW YORK TIMES, March 25, 1994, at B-18.
7. C. Daniel Baton & Nadia Ahmad, *Empathy-Induced Altruism in a Prisoner's Dilemma II: What if the Target of Empathy has Defected?* 31 EUR.J.SOC. PSYCHOL. 25-36 (2001).
8. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF.L.REV. 1051, 1138-41 (2000).
9. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM.L.REV. 509, 534-40 (1994).

DOUGLAS R. HOFSTADTER, METAMAGICAL THEMAS:
COMPUTER TOURNAMENTS OF THE PRISONER'S
DILEMMA SUGGEST HOW COOPERATION EVOLVES

Scientific American 16-19 (May 1983).

Life is filled with paradoxes and dilemmas. Sometimes it even feels as if the essence of living is the sensing—indeed the savoring—of paradox. Al-

though all paradoxes seem somehow related, some seem abstract and philosophical whereas others touch on life directly. A very lifelike paradox is the Prisoner's Dilemma, discovered in about 1950 by Merrill M. Flood and Melvin Dresher, and later formalized by Albert W. Tucker. I shall present it first as a metaphor and then as a formal problem.

The original formulation in terms of prisoners is a little less clear to the uninitiated, in my experience, than the following one. Assume you possess large quantities of some item (money, for example) and want to obtain some amount of another item (stamps, groceries, diamonds). You arrange a mutually agreeable trade with the only dealer of that item known to you. You are both satisfied with the amounts you will be giving and getting. For some reason, though, the exchange must take place in secret. Each of you agrees to leave a bag at a designated place in the woods and to pick up the other's bag at the other's designated place. Suppose it is clear to both of you that you will never meet or have further dealings with each other again.

Clearly there is something for each of you to fear, namely that the other one will leave an empty bag. Obviously if you both leave full bags, you will both be satisfied, but equally obviously it is even more satisfying to get something for nothing. You are therefore tempted to leave an empty bag. In fact, you can even reason it through with seeming rigor this way: "If the dealer brings a full bag, I'll be better off having left an empty bag, because I'll have got all I wanted and given away nothing. If the dealer brings an empty bag, I'll be better off having left an empty bag, because I'll not have been cheated. I'll have gained nothing but lost nothing either. Thus it seems that *no matter what the dealer chooses to do* I'm better off leaving an empty bag. And so I'll leave an empty bag."

The dealer, meanwhile, being in more or less the same boat (although at the other end of it), thinks analogous thoughts and comes to the parallel conclusion that it is best to leave an empty bag. And so both of you, with your impeccable (or seemingly impeccable) logic, leave empty bags and go away empty-handed. How sad, because if you had both just cooperated, you could each have gained something you wanted to have. Does logic prevent cooperation? That is the issue presented by the Prisoner's Dilemma.

* * *

Let us now go back to the original metaphor and slightly alter its conditions. Suppose both you and the dealer very much want to have a regular supply of what the other has to offer, and so before conducting your first exchange you agree to carry on a lifelong exchange once a month. You still expect never to meet face to face. In fact, neither of you has any idea how old the other is, so that you cannot be sure how long this lifelong agreement will last, but it seems safe to assume it will last for a few months anyway, and quite likely for years.

Now, what do you do on your first exchange? Bringing an empty bag seems fairly nasty as the opening of a relationship; hardly an effective way to build up trust. Suppose you bring a full bag and the dealer brings one too. All is bliss—for a month. Then you both must go back. Will your next bag be empty or full? Each month you have to decide whether to "defect" (bring an empty bag) or to "cooperate" (bring a full one). Suppose one month,

unexpectedly, your dealer defects. Now what do you do? Will you decide that the dealer can never be trusted again and that from now on you will always bring an empty bag, in effect totally giving up on the entire project? Or will you pretend you didn't notice and continue being friendly? Or will you try to punish the dealer by some number of defections of your own? One? Two? A random number? An increasing number, depending on how many defections you have experienced? Just how mad will you get?

This is the Iterated Prisoner's Dilemma. It is a very difficult problem. It can be, and it has been, rendered more quantitative and in that form studied with the methods of game theory and computer simulation.

ROBERT AXELROD, *THE EVOLUTION OF COOPERATION*

109-23 (1984).

This chapter offers advice to someone who is in a Prisoner's Dilemma. From an individual's point of view, the object is to score as well as possible over a series of interactions with another player who is also trying to score well. Since the game is a Prisoner's Dilemma, the player has a short-run incentive to defect, but can do better in the long run by developing a pattern of mutual cooperation with the other. The analysis of the Computer Tournament and the results of the theoretical investigations provide some useful information about what strategies are likely to work under different conditions, and why. The purpose of this chapter is to translate these findings into advice for a player.

The advice takes the form of four simple suggestions for how to do well in a durable iterated Prisoner's Dilemma:

1. Don't be envious.
2. Don't be the first to defect.
3. Reciprocate both cooperation and defection.
4. Don't be too clever.

1. DON'T BE ENVIOUS

People are used to thinking about zero-sum interactions. In these settings, whatever one person wins, another loses. A good example is a chess tournament. In order to do well, the contestant must do better than the other player in the game most of the time. A win for White is necessarily a loss for Black.

But most of life is *not* zero-sum. Generally, both sides can do well, or both can do poorly. Mutual cooperation is often possible, but not always achieved. That is why the Prisoner's Dilemma is such a useful model for a wide variety of everyday situations.

* * *

Asking how well you are doing compared to how well the other player is doing is not a good standard unless your goal is to destroy the other player. In most situations, such a goal is impossible to achieve, or likely to lead to such costly conflict as to be very dangerous to pursue. When you are not trying to destroy the other player, comparing your score to the other's score

simply risks the development of self-destructive envy. A better standard of comparison is how well you are doing relative to how well someone else could be doing in your shoes. Given the strategy of the other player, are you doing as well as possible? Could someone else in your situation have done better with this other player? This is the proper test of successful performance.

TIT FOR TAT won the tournament because it did well in its interactions with a wide variety of other strategies. . . . TIT FOR TAT won the tournament, not by beating the other player, but by eliciting behavior from the other player which allowed both to do well. TIT FOR TAT was so consistent at eliciting mutually rewarding outcomes that it attained a higher overall score than any other strategy.

So in a non-zero-sum world you do not have to do better than the other player to do well for yourself. This is especially true when you are interacting with many different players. Letting each of them do the same or a little better than you is fine, as long as you tend to do well yourself. There is no point in being envious of the success of the other player, since in an iterated Prisoner's Dilemma of long duration the other's success is virtually a prerequisite of your doing well for yourself.

Congress provides a good example. Members of Congress can cooperate with each other without providing threats to each other's standing at home. The main threat to a legislator is not the relative success of another legislator from another part of the country, but from someone who might mount a challenge in the home district. Thus there is not much point in begrudging a fellow legislator the success that comes from mutual cooperation.

Likewise in business. A firm that buys from a supplier can expect that a successful relationship will earn profit for the supplier as well as the buyer. There is no point in being envious of the supplier's profit. Any attempt to reduce it through an uncooperative practice, such as by not paying your bills on time, will only encourage the supplier to take retaliatory action. Retaliatory action could take many forms, often without being explicitly labeled as punishment. It could be less prompt deliveries, lower quality control, less forthcoming attitudes on volume discounts, or less timely news of anticipated changes in market conditions. The retaliation could make the envy quite expensive. Instead of worrying about the relative profits of the seller, the buyer should consider whether another buying strategy would be better.

2. DON'T BE THE FIRST TO DEFECT

Both the tournament and the theoretical results show that it pays to cooperate as long as the other player is cooperating.

The tournament results . . . are very striking. The single best predictor of how well a rule performed was whether or not it was nice, which is to say, whether or not it would ever be the first to defect. In the first round, each of the top eight rules were nice, and not one of the bottom seven were nice. In the second round, all but one of the top fifteen rules were nice (and that one ranked eighth). Of the bottom fifteen rules, all but one were not nice.

* * *

The theoretical results provide an important qualification to the advantages of using a nice strategy. When the future of the interaction is not

important enough relative to immediate gains from defection, then simply waiting for the other to defect is not such a good idea. . . . Therefore, if the other player is not likely to be seen again, defecting right away is better than being nice.

This fact has unfortunate implications for groups who are known to move from one place to another. An anthropologist finds that a Gypsy approaches a non-Gypsy expecting trouble, and a non-Gypsy approaches a Gypsy suspiciously, expecting double-dealing.

For example, a physician was called in to attend a very sick Gypsy baby; he was not the first doctor called, but he was the first willing to come. We escorted him toward the back bedroom, but he stopped short of the threshold of the patient's room. "This visit will be fifteen dollars, and you owe me five dollars from the last time. Pay me the twenty dollars before I see the patient," he demanded. "Okay, okay, you'll get it—just look at the baby now," the Gypsies pleaded. Several more go-arounds occurred before I intervened. Ten dollars changed hands and the doctor examined the patient. After the visit, I discovered the Gypsies, in revenge, did not intend to pay the other ten dollars.

* * *

Short interactions are not the only condition which would make it pay to be the first to defect. The other possibility is that cooperation will simply not be reciprocated. If everyone else is using a strategy of always defecting, then a single individual can do no better than to use this same strategy. But . . . if even a small proportion of one's interactions are going to be with others who are using a responsive strategy like TIT FOR TAT, then it can pay to use TIT FOR TAT rather than to simply defect all the time like most of those in the population.

* * *

Of course, one could try to "play it safe" by defecting until the other player cooperates, and only then starting to cooperate. The tournament results show, however, that this is actually a very risky strategy. The reason is that your own initial defection is likely to set off a retaliation by the other player. This will put the two of you in the difficult position of trying to extricate yourselves from an initial pattern of exploitation or mutual defection. If you punish the other's retaliation, the problem can echo into the future. And if you forgive the other, you risk appearing to be exploitable. Even if you can avoid these long-term problems, a prompt retaliation against your initial defection can make you wish that you had been nice from the start.

* * *

3. RECIPROCATE BOTH COOPERATION AND DEFECTION

The extraordinary success of TIT FOR TAT leads to some simple, but powerful advice: practice reciprocity. After cooperating on the first move, TIT FOR TAT simply reciprocates whatever the other player did on the previous move. This simple rule is amazingly robust. It won the first round of the Computer Tournament for the Prisoner's Dilemma by attaining a

higher average score than any other entry submitted by professional game theorists. And when this result was publicized for the contestants in the second round, TIT FOR TAT won again. The victory was obviously a surprise, since anyone could have submitted it to the second round after seeing its success in the first round. But obviously people hoped they could do better—and they were wrong.

* * *

In responding to a defection from the other player, TIT FOR TAT represents a balance between punishing and being forgiving. TIT FOR TAT always defects exactly once after each defection by the other, and TIT FOR TAT was very successful in the tournament. This suggests the question of whether always doing exactly one-for-one is the most effective balance. It is hard to say because rules with slightly different balances were not submitted. What is clear is that extracting more than one defection for each defection of the other risks escalation. On the other hand, extracting less than one-for-one risks exploitation.

* * *

The moral of the story is that the precise level of forgiveness that is optimal depends upon the environment. In particular, if the main danger is unending mutual recriminations, then a generous level of forgiveness is appropriate. But, if the main danger is from strategies that are good at exploiting easygoing rules, then an excess of forgiveness is costly. While the exact balance will be hard to determine in a given environment, the evidence of the tournament suggests that something approaching a one-for-one response to defection is likely to be quite effective in a wide range of settings. Therefore it is good advice to a player to reciprocate defection as well as cooperation.

4. DON'T BE TOO CLEVER

The tournament results show that in a Prisoner's Dilemma situation it is easy to be *too* clever. The very sophisticated rules did not do better than the simple ones. In fact, the so-called maximizing rules often did poorly because they got into a rut of mutual defection. A common problem with these rules is that they used complex methods of making inferences about the other player—and these inferences were wrong. Part of the problem was that a trial defection by the other player was often taken to imply that the other player could not be enticed into cooperation. But the heart of the problem was that these maximizing rules did not take into account that their *own* behavior would lead the other player to change.

In deciding whether to carry an umbrella, we do not have to worry that the clouds will take our behavior into account. We can do a calculation about the chance of rain based on past experience. Likewise in a zero-sum game, such as chess, we can safely use the assumption that the other player will pick the most dangerous move that can be found, and we can act accordingly. Therefore it pays for us to be as sophisticated and as complex in our analysis as we can.

Non-zero-sum games, such as the Prisoner's Dilemma, are not like this. Unlike the clouds, the other player can respond to your own choices. And

unlike the chess opponent, the other player in a Prisoner's Dilemma should not be regarded as someone who is out to defeat you. The other player will be watching your behavior for signs of whether you will reciprocate cooperation or not, and therefore your own behavior is likely to be echoed back to you.

* * *

One way to account for TIT FOR TAT's great success in the tournament is that it has great clarity: it is eminently comprehensible to the other player. When you are using TIT FOR TAT, the other player has an excellent chance of understanding what you are doing. Your one-for-one response to any defection is an easy pattern to appreciate. Your future behavior can then be predicted. Once this happens, the other player can easily see that the best way to deal with TIT FOR TAT is to cooperate with it. Assuming that the game is sufficiently likely to continue for at least one more interaction, there is no better plan when meeting a TIT FOR TAT strategy than to cooperate now so that you will be the recipient of a cooperation on the very next move.

DAVID LAX & JAMES SEBENIUS, *THE MANAGER AS
NEGOTIATOR: BARGAINING FOR COOPERATION
AND MUTUAL GAIN*

29-35 (1986).

That negotiation includes cooperation and competition, common and conflicting interests, is nothing new. In fact, it is typically understood that these elements are both present and can be disentangled. Deep down, however, some people believe that the elements of conflict are illusory, that meaningful communication will erase any such unfortunate misperceptions. Others see mainly competition and take the cooperative pieces to be minimal. Some overtly acknowledge the reality of each aspect but direct all their attention to one of them and wish, pretend, or act as if the other does not exist. Still others hold to a more balanced view that accepts both elements as significant but seeks to treat them separately. In this chapter, we argue that *all* these approaches are flawed.

A deeper analysis shows that the competitive and cooperative elements are inextricably entwined. In practice, they cannot be separated. This bonding is fundamentally important to the analysis, structuring, and conduct of negotiation. There is a central, inescapable tension between cooperative moves to create value jointly and competitive moves to gain individual advantage. This tension affects virtually all tactical and strategic choice. Analysts must come to grips with it; negotiators must manage it. Neither denial nor discomfort will make it disappear.

* * *

Negotiators and analysts tend to fall into two groups that are guided by warring conceptions of the bargaining process. In the left-hand corner are the "value creators" and in the right-hand corner are the "value claimers."

Value creators tend to believe that, above all, successful negotiators must be inventive and cooperative enough to devise an agreement that yields considerable gain to each party, relative to no-agreement possibilities. Some

speak about the need for replacing the "win-lose" image of negotiation with "win-win" negotiation, from which all parties presumably derive great value. . . .

Roger Fisher and Bill Ury give an example that concerns the difficult Egyptian-Israeli negotiations over where to draw a boundary in the Sinai. This appeared to be an absolutely classic example of zero-sum bargaining, in which each square mile lost to one party was the other side's gain. For years the negotiations proceeded inconclusively with proposed boundary lines drawn and redrawn on innumerable maps. On probing the real interests of the two sides, however, Egypt was found to care a great deal about sovereignty over the Sinai while Israel was heavily concerned with its security. As such, a creative solution could be devised to "unbundle" these different interests and give to each what it valued most. In the Sinai, this involved creating a demilitarized zone under the Egyptian flag. This had the effect of giving Egypt "sovereignty" and Israel "security." This situation exemplifies extremely common tendencies to assume that negotiators' interests are in direct opposition, a conviction that can sometimes be corrected by communicating, sharing information, and inventing solutions.

* * *

Value claimers, on the other hand, tend to see this drive for joint gain as naive and weak-minded. For them, negotiation is hard, tough bargaining. The object of negotiation is to convince the other guy that he wants what you have to offer much more than you want what he has; moreover, you have all the time in the world while he is up against pressing deadlines. To "win" at negotiating—and thus make the other fellow "lose"—one must start high, concede slowly, exaggerate the value of concessions, minimize the benefits of the other's concessions, conceal information, argue forcefully on behalf of principles that imply favorable settlements, make commitments to accept only highly favorable agreements, and be willing to outwait the other fellow.

The hardest of bargainers will threaten to walk away or to retaliate harshly if their one-sided demands are not met; they may ridicule, attack, and intimidate their *adversaries*. For example, Lewis Glucksman, once the volatile head of trading activities at Lehman Brothers, the large investment banking firm, employed the hardest sort of bargaining tactics in his bid to wrest control of Lehman from then-Chairman Peter G. Peterson after being elevated to co-CEO status with Peterson. As co-CEO, Glucksman abruptly demanded full control of the firm, making a thinly veiled threat that unless his demands were met, he would provoke civil war at Lehman and take the entire profitable trading department elsewhere. When Peterson and others desperately sought less damaging accommodation, Glucksman conveyed the impression that "his feet were set in cement," even if that meant the destruction of the firm. (Ultimately, Peterson left with a substantial money settlement and Glucksman presided briefly over a shaken Lehman that was soon sold at a bargain price to American Express.)

At the heart of this adversarial approach is an image of a negotiation with a winner and a loser: "We are dividing a pie of fixed size and every slice I give

to you is a slice I do not get; thus, I need to *claim* as much of the value as possible by giving you as little as possible.”

* * *

Both of these images of negotiation are incomplete and inadequate. Value creating and value claiming are linked parts of negotiation. Both processes are present. No matter how much creative problem solving enlarges the pie, it must still be divided; value that has been created must be claimed. And, if the pie is not enlarged, there will be less to divide; there is more value to be claimed if one has helped create it first. An essential tension in negotiation exists between cooperative moves to create value and competitive moves to claim it.

* * *

The tension between cooperative moves to create value and competitive moves to claim it is greatly exacerbated by the interaction of the tactics used either to create or claim value.

First, tactics for claiming value (which we will call “claiming tactics”) can impede its creation. Exaggerating the value of concessions and minimizing the benefit of others’ concessions presents a distorted picture of one’s relative preferences; thus, mutually beneficial trades may not be discovered. Making threats or commitments to highly favorable outcomes surely impedes hearing and understanding others’ interests. Concealing information may also cause one to leave joint gains on the table. In fact, excessive use of tactics for claiming value may well sour the parties’ relationship and reduce the trust between them. Such tactics may also evoke a variety of unhelpful interests. Conflict may escalate and make joint prospects less appealing and settlement less likely.

Second, approaches to creating value are vulnerable to tactics for claiming value. Revealing information about one’s relative preferences is risky. . . . The information that a negotiator would accept position A in return for a favorable resolution on a second issue can be exploited: “So, you’ll accept A. Good, Now, let’s move on to discuss the merits of the second issue.” The willingness to make a new, creative offer can often be taken as a sign that its proposer is able and willing to make further concessions. Thus, such offers sometimes remain undisclosed. Even purely shared interests can be held hostage in exchange for concessions on other issues. Though a divorcing husband and wife may both prefer giving the wife custody of the child, the husband may “suddenly” develop strong parental instincts to extract concessions on alimony in return for giving the wife custody.

In tactical choices, each negotiator thus has reasons not to be open and cooperative. Each also has apparent incentives to try to claim value. Moves to claim value thus tend to drive out moves to create it. Yet, if both choose to claim value, by being dishonest or less than forthcoming about preferences, beliefs, or minimum requirements, they may miss mutually beneficial terms for agreement.

Indeed, the structure of many bargaining situations suggests that negotiators will tend to leave joint gains on the table or even reach impasses when mutually acceptable agreements are available.

THOMAS A. BASS, *FORGIVENESS MATH: MATHEMATICAL GAMES EXPLAIN THE EVOLUTIONARY EXISTENCE OF COOPERATIVE BEHAVIOR*

14(5) Discover 62, 62-67 (1993).

Nice guys do not always finish last. In fact, they sometimes finish first. And now we have scientific evidence to prove it, thanks to the work of two Austrian mathematicians who have discovered the value of forgiveness. Or at least they've discovered how forgiveness might have come into being in our dog-eat-dog world.

"Generosity pays off under conditions of uncertainty. You should not be too tolerant, but not too intolerant, either," says Karl Sigmund, a 47-year-old mathematician at the University of Vienna. "Never forget a good turn, but try occasionally to forgive a bad one. We benefit from cultivating a keen sense of gratitude dosed with a small amount of generosity."

[After summarizing Robert Axelrod's classic computer tournament, the author continues:] In 1980 Axelrod came up with a different kind of competition. He wanted to use computers to simulate natural selection by modeling ecological encounters in nature. Participants in this ecological tournament formed a population that altered with each repetition of the game. The strategies that got the most points during Round One, for instance, would be rewarded with offspring: two or three other versions of themselves, all of which would participate in the next round. In this way one can build up entire populations of strategic cooperators or defectors. During successive rounds, winning strategies multiplied while less successful rivals died out.

This is the tournament that first got Karl Sigmund interested in the prisoner's dilemma. Sigmund had been working on theoretical chemistry at the University of Vienna, studying the hypercycle, a system of self-reproducing molecules that might hold clues to how life evolved on Earth. "I got very excited when I found the prisoner's dilemma had meaning in evolutionary biology," says Sigmund. He got so excited, in fact, that he switched from studying self-replicating molecules to studying models of animal behavior.

"For a mathematician," says Sigmund, "whether you study molecules or the behavior of animals doesn't matter. It all reduces to the same differential equations. Mathematically this is really one field: the population dynamics of self-replicating entities. They can be RNA molecules or reproductive strategies or animals preying on each other or parasites or whatever. Success determines the composition of the field, and the composition determines success. It is not easy to predict where this may lead."

Sigmund watched with interest as Axelrod played his ecological tournament out to the thousandth round. Again, Tit for Tat was the winner. "At first glance this may appear to be paradoxical, but of course it isn't," says Sigmund. When thrown into a hornet's nest of inveterate defectors, a single Tit for Tat will do less well than the meanies, because it loses out on the first round before switching into tough-guy mode. But when playing itself or other nice strategies, Tit for Tat will do significantly better than such hard-liners as Always Defect, which can't get more than one point per interaction

with itself. "The moral is that Tit for Tatters do best when they start interacting in clusters or families," Sigmund says. "Kinship facilitates cooperation." In a mixture of Always Defect and Tit for Tat, even if only a small percentage of the population is using the nice policy, that policy will start reproducing itself and quickly take over the game.

Even as Tit for Tat was racking up one success after another, it was clear to Axelrod and Sigmund that the strategy had a fatal flaw. "It has no tolerance for errors," says Sigmund. "While computer programs interact flawlessly, humans and other animals certainly do not. In biological or human interactions, it is clear that sometimes the wires get crossed and you make a mistake about the identity of someone. You meet a friend and, not recognizing him, you defect. This is the Achilles' heel of Tit for Tat, which is particularly vulnerable against itself."

A realistic version of Tit for Tat against Tit for Tat can fall into endless cycles of retaliation. Since all it knows how to do is strike back at defectors, one scrambled signal will send Tit for Tat spiraling into vendettas that make the Hatfields and the McCoys look tame by comparison. The average payoff for Tit for Tat drops by 25 percent if you introduce only a few such mistakes into the tournament. "This is a terrible performance," Sigmund says, noting that a random strategy (unthinkingly defecting or cooperating in each round with equal probability) will do just as well.

"The obvious way to break up this vicious cycle of grim retaliation consists in being ready, on occasion, to let bygones be bygones. We can even compute the optimal measure of forgiveness," says Sigmund. The Viennese Golden Mean—the extra dose of generosity that makes for the best of all strategies in a less-than-perfect world—is contained in the following rule: Always meet cooperation with cooperation, and when facing defection, cooperate on average one out of every three times. The strategy that embodies this rule is called Generous Tit for Tat.

The merits of Generous Tit for Tat were already known in the early 1980s, when a Swedish scientist named Per Molander computed the benefits of generosity in a world where pure Tit for Tat could sometimes make a mistake—like Oedipus meeting his father. Molander arrived at the figure of one-third through repeated rounds of trial and error. Molander's finding does not mean that you should turn the other cheek to every third blow. Obviously it would be a big mistake to let your opponent know exactly when you were going to be nice. The number is just an average.

* * *

Realizing how important mistakes can be to the prisoner's dilemma, Sigmund and Nowak started playing the game with what are called stochastic strategies. Stochastic means "random," and strategies such as these—Generous Tit for Tat being one of them—allow for reacting to one's opponent with a degree of flexibility.

"We had been experimenting with games where everyone was playing the same strategy and watching what would happen when a small minority came in and started playing something else," says Sigmund. "Would they spread or be wiped out? Later we got the idea, why not try out our model with 100 different strategies, chosen at random to be more or less tolerant, more or less

forgiving? Some would forgive one out of two times, some one out of five, and so on. And some, of course, would never forgive."

* * *

After two black weeks of watching meanies invade their tournament, Nowak and Sigmund accidentally stumbled on the key to evolving cooperation. They noticed the game took a radically different turn with one small alteration. If a dose of Tit for Tat—just enough to establish a tiny enclave, a dose as small as one percent of the population—was added to the game at the start, then it flipped directions. "Generous Tit for Tat is not strong enough to organize this emergence of cooperation," says Sigmund. "What one needs is a kind of police force, a minority that helps by its very strictness to effect this move but that does not ultimately prove the best.

"If you don't have Tit for Tat but some other strategy, it cannot do it. It must be a very strict retaliator. But then after you have the switch toward cooperation, it is not Tit for Tat that profits. Its frequency goes up, but then it yields to Generous Tit for Tat. Tit for Tat is not the aim of evolution, but it makes it possible. It is a kind of pivot.

"For 100 generations the Always Defect strategy dominates the population with what looks like inescapable ferocity; it looks so bad you almost give up hope. A beleaguered minority of Tit for Tat survives on the edge of extinction. But when the suckers are nearly wiped out and the exploiters have no one left to exploit, the game reverses direction. The retaliators spring back to life. The exploiters suffer crippling reverses." There was great pleasure, Sigmund recalls, in watching the Always Defectors weaken and then die out.

ROBERT H. FRANK, THOMAS GILOVICH, AND DENNIS
T. REGAN, *DOES STUDYING ECONOMICS
INHIBIT COOPERATION?*

7 J.Econ.Perspectives 159-71 (1993).

From the perspective of many economists, motives other than self-interest are peripheral to the main thrust of human endeavor, and we indulge them at our peril. In Gordon Tullock's (1976) words (as quoted by Mansbridge, 1990, p. 12), "the average human being is about 95 percent selfish in the narrow sense of the term."

In this paper we investigate whether exposure to the self-interest model commonly used in economics alters the extent to which people behave in self-interested ways.

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ECONOMISTS AND THE PRISONER'S DILEMMA

* * *

We conducted a prisoner's dilemma experiment involving both economics majors and nonmajors. All groups were given an extensive briefing on the prisoner's dilemma at the start of the experiment and each subject was required to complete a questionnaire at the end to verify that he or she had

indeed understood the consequences of different combinations of choices; in addition, many of our subjects were students recruited from courses in which the prisoner's dilemma is an item on the syllabus. Our subjects met in groups of three and each was told that he or she would play the game once only with each of the other two subjects. The payoff matrix . . . was the same for each play of the game. Subjects were told that the games would be played for real money, and that confidentiality would be maintained so that none of the players would learn how their partners had responded in any play of the game.

Following a period in which subjects were given an opportunity to get to know one another, each subject was taken to a separate room and asked to fill out a form indicating a response (cooperate or defect) to each of the other two players in the group. After the subjects had filled out their forms, the results were tallied and the payments disbursed. Each subject received a single payment that was the sum of three separate amounts: the payoff from the game with the first partner; the payoff from the game with the second partner; and a term that was drawn at random from a large list of positive and negative values. None of these three elements could be observed separately, only their sum. The purpose of this procedure was to prevent subjects from inferring both individual and group patterns of choice. Thus, unlike earlier prisoner's dilemma experiments, ours did not enable the subject to infer what happened even when each (or neither) of the other players defected.

* * *

For the sample as a whole there were a total of 267 games, which means a total of 534 choices between cooperation and defection. For these choices, the defection rate for economics majors was 60.4 percent, as compared to only 38.8 percent for nonmajors. This pattern of differences strongly supports the hypothesis that economics majors are more likely than nonmajors to behave self-interestedly ($p < .005$).

One possible explanation for the observed differences between economics students and others is that economics students are more likely to be male, and males have lower cooperation rates. To control for possible influences of sex, age, and experimental condition, we performed the ordinary least squares regression

Consistent with a variety of other findings on sex differences in cooperation, we estimate that, other factors the same, the probability of a male defecting is almost 0.24 higher than the corresponding probability for a female. But even after controlling for the influence of gender, we see that the probability of an economics major defecting is almost 0.17 higher than the corresponding probability for a nonmajor.

* * *

As part of the exit questionnaire that tested understanding of the payoffs associated with different combinations of choices, we also asked subjects to state reasons for their choices. We hypothesized that economists would be more inclined to construe the objective of the game in self-interested terms, and therefore more likely to refer exclusively to features of the game itself, while noneconomists would be more open to alternative ways of interpreting

the game, and would refer more often to their feelings about their partners, aspects of human nature, and so on. Indeed, among the sample of economics students, 31 percent referred only to features of the game itself in explaining their chosen strategies, compared with only 17 percent of the noneconomists. The probability of obtaining such divergent responses by chance is less than .05.

... Recalling our earlier finding that defection rates for the sample as a whole fall steadily between the freshman and senior years, the question is thus whether defection rates fall to the same degree over time for economists as for noneconomists. We found that the pattern of falling defection rates holds more strongly for noneconomics majors than for economics majors in the no-promises subsample. For noneconomics underclassmen in this group (freshmen and sophomores), the defection rate is 53.7 percent, compared to only 40.2 percent for upperclassmen. By contrast, the trend toward lower defection rates is virtually absent from economics majors in the no-promises subsample (73.7 percent for underclassmen, 70.0 percent for upperclassmen). In other words, students generally show a pronounced tendency toward more cooperative behavior with movement toward graduation, but this trend is conspicuously absent for economics majors.

Naturally, we are in no position to say whether the trend for noneconomists reflects something about the content of noneconomics courses. But the fact that this trend is not present for economists is at least consistent with the hypothesis that training in economics plays some causal role in the lower observed cooperation rates of economists.

* * *

Should we be concerned that economics training may inhibit cooperation? Some might respond that while society would benefit if more people cooperated in social dilemmas, economists cannot be faulted for pointing out the unpleasant truth that self-interest dictates defection. One difficulty with this response is that it may be wrong. Several researchers have recently suggested that the ultimate victims of noncooperative behavior may be the very people who practice it. . . .

In an ever more interdependent world, social cooperation has become increasingly important—and yet increasingly fragile. With an eye toward both the social good and the well-being of their own students, economists may wish to stress a broader view of human motivation in their teaching.

PETER PASSELL, *THE LAW AS THE FREE
MARKET'S ROGUE: HOSTAGE TO
THE PRISONER'S DILEMMA*

The New York Times, March 25, 1994, at B-18.

KATE: For someone who has nothing nice to say about lawyers, you certainly have enough of them around.

GARFINKLE: You have to. They're like nuclear warheads. They have theirs, so you need yours, but ... they're only good in their silos.

—"Other People's Money,"
Jerry Sterner

Looking for a new reason to blame lawyers for it all? Economists are at your service.

One recent study documented a strong negative link between the proportion of law graduates in a country's work force and its rate of economic growth. Another estimates that litigation between companies reduces their combined stock value, on average, by 1 percent—real money in a world of multibillion-dollar corporations.

But as many a learned counsel would be happy to point out, there is a seeming contradiction in economists' distaste for lawyers. Modern economics is built on the rock of competition and free choice. If lawyers, who are certainly competitive, can find willing customers for their services, where do economists get off second-guessing the market?

Not to worry, lawyer-bashers. Two seasoned practitioners of the dismal science, Profs. Orley Ashenfelter of Princeton and David Bloom of Columbia, have at least come up with an explanation. Competitive markets do sometimes fail to produce efficient outcomes, they note. And they believe that the market for legal services fails in a particularly perverse and fascinating way, known in the jargon of the mathematical theory of games as "the prisoner's dilemma."

* * *

Take Smith and Jones, who disagree about the ownership of \$100,000 worth of property. They can settle the dispute very cheaply by splitting the difference or by asking a neutral party to arbitrate. Alternatively, either can hire a lawyer for \$10,000 to represent him in a formal proceeding.

Jones believes that by hiring counsel while Smith does not, he can improve his chances of winning by at least enough to make his \$10,000 expenditure worthwhile. Likewise for Smith. On the other hand, if both hire lawyers the value of legal representation is neutralized, and the total size of the pie to be split between the two parties is reduced to \$80,000.

So one might expect that Smith and Jones would cooperate—that is, that the incentives offered each of them by the free market would lead them to minimize the collective cost of settling their dispute. What makes the prisoner's dilemma so compelling and so frustrating is that noncooperative behavior dominates cooperative behavior in spite of the certain knowledge that the process will burn \$20,000 in legal fees.

* * *

And it is here that Professors Ashenfelter and Bloom strike their blow against the bar, offering evidence that noncooperation pays—that the likely payoff in hiring a lawyer does exceed the cost.

In a yet-to-be-published paper entitled "Lawyers as Agents of the Devil," the two economists looked first at public-employee wage disputes from 1981 to 1984 in New Jersey, where arbitrators, rather than splitting the difference, were required to choose one of the disputants' final offers. By the estimates of Professors Ashenfelter and Bloom, expert representation sufficiently increased the probability of winning to make it worthwhile to hire a lawyer.

They also examined the outcomes of 755 union grievance proceedings in Pennsylvania in which arbitrators decided whether employers had the right to discharge workers. Here, they assumed that the loss of a coveted union job cut an average worker's future earning power by 10 percent, and calculated that the improved chances of keeping that job by retaining a lawyer was worth at the very least \$5,000—far more than the cost of representation. Similar results were found in a study by the Rand Corporation Institute for Civil Justice involving debt-collection, personal-injury and breach-of-contract cases resolved through arbitration in Pittsburgh.

* * *

In any event, economists may not have the last word on the games that lawyers and their clients are compelled to play. Douglas Baird, director of the law-and-economics program at the University of Chicago Law School, contends that the "traditional prisoner's dilemma ends badly only because the prisoners aren't able to communicate or to hold the other to an agreement." And, he asserts, those conditions do not typically apply to legal disputes.

Profs. Ronald Gilson of Stanford Law School and Robert Mnookin of Harvard Law School press the point further in an article soon to be published in the *Columbia Law Review*. They argue that if parties to a dispute believed that they stood to gain collectively from cooperation, and if each was in a position to neutralize the advantage of trickery by the other, would not cooperation become the dominant strategy?

By the same token, they believe that lawyers themselves often have strong incentive to signal a willingness to cooperate. Since many clients prefer to hire lawyers who are disinclined to no-holds-barred warfare (providing the other side does the same), it would pay many lawyers to establish reputations as peacemakers. And indeed they note that the divorce bar is clearly divided between "gladiators" out for blood and "peacemakers" who seek amicable resolution.

But if the free market is inclined to reward lawyers who use low-cost strategies, why has there been an escalation in civil litigation in recent decades? One reason, Professor Mnookin argues, is that as the legal profession has grown, it has become harder for lawyers to establish a clear reputation as peacemakers among other lawyers and potential clients.

Another is that commercial law has become more complex, offering more ways for an advocate to hide his intentions and fail to honor the spirit of an interim agreement. This "noise" in the legal system is often so loud, Professor Mnookin suggests, that it is easy to misinterpret the other side's strategy. And a very noisy case may lead to the classic prisoner's dilemma, in which neither party can risk a cooperative stance lest he be tagged as the sucker.

While the two economists see lawyers as the problem, Professor Mnookin views them as the potential solution. He wants to make it easier for lawyers to establish and sustain professional reputations as reliable peacemakers—for example, by letting them more simply withdraw from cases in which clients pressure them to act uncooperatively. And he imagines the establishment of "cooperative boutiques," law firms that would handle only cases in which all parties signaled their interest in cooperation.

The big question here is whether lawyers as a whole have the will or the way to reduce the demand for their services. And Professor Tullock is plainly skeptical. How, he wonders, could the bar cotton to reforms that would cause "many lawyers to become vacuum cleaner salesmen?"

C. DANIEL BATON & NADIA AHMAD, *EMPATHY-INDUCED ALTRUISM IN A PRISONER'S DILEMMA II: WHAT IF THE TARGET OF EMPATHY HAS DEFECTED?*

31 Eur. J. Soc. Psychol. 25-36 (2001).

Imagine that you are in a one-trial prisoner's dilemma, and before making your decision, you learn that the other person has already defected. The payoffs in the dilemma are as follows. If both you and the other person cooperate, you each receive a payoff of +15; if both defect, you each receive a payoff of +5. If one cooperates and the other defects, the former receives nothing and the latter receives payoff of +25. Once you know the other person has already defected, there is no possibility of your receiving a payoff of +15 or +25. Now there are only two possible outcomes. If you defect too, then you and the other person will each receive the same moderately undesirable payoff (+5). If you do not defect, then you will receive the least desirable payoff (nothing), whereas the other participant will receive the most desirable (+25). What do you do?

From the perspectives of classic game theory and the theory of rational choice, the answer to this question is an absolute no-brainer. There is no ambiguity about how best to serve your own interests, so you defect. Perhaps because the answer seems so obvious, in the over 2000 prisoner's dilemma studies to date this question has almost never been asked. When it has been asked, the answer has been very clear and not very surprising. Shafer and Tversky (1992) tested 80 Princeton undergraduates and found that when these undergraduates knew the other person in a prisoner's dilemma had already defected, they cooperated only 3% of the time. Van Lange (1999) found that even individuals with a prosocial value orientation cooperated more than the other person in a modified prisoner's dilemma only 5% of the time.

We wish to suggest that the answer to the question of what to do when you know the other person in a prisoner's dilemma has already defected is not always so obvious. What if you care not only about your own welfare but also about the welfare of other person? The choice that is best for the other person in a prisoner's dilemma is clear, and it is always the opposite of the choice that is best for you. Therefore, if you care about the welfare of the person who has defected, you are still faced with a dilemma. The dilemma is not how best to serve your own interests; the dilemma is whose interests to serve.

EMPATHY-INDUCED ALTRUISM IN A SIMULTANEOUS-DECISION PRISONER'S DILEMMA

Baton and Moran (1999) recently examined the effect of caring for the other in a less extreme situation than the one just described. They placed undergraduate women in a standard, simultaneous-decision one-trial prisoner's dilemma, and they found far more cooperative responses among those who were induced to feel empathy for the other woman in the dilemma (0.75) than among those not induced to feel empathy (0.33). Baton and Moran had

predicted this result based on the extensive evidence that empathic emotion evokes altruistic motivation—motivation with the ultimate goal of increasing the welfare of the person for whom empathy is felt. They reasoned that in a one-trial prisoner's dilemma a person who feels empathy for the other will experience altruistic motivation to increase the other's welfare. This empathy-induced altruistic motivation should shift the decisional balance in the direction of cooperation.

We wished to provide a further—and even more stringent—test of the claim that empathy-induced altruism can shift the decisional balance in a one-trial prisoner's dilemma. To this end, we placed 60 undergraduate women in the same one-trial dilemma used by Baton and Moran (1999); the payoffs, which were in the form of raffle tickets for a \$30.00 gift certificate, matched the payoffs described at the beginning of this paper. We also manipulated empathy as did Baton and Moran, but we changed the dilemma to one in which decisions were made sequentially rather than simultaneously. Before deciding what to do, participants always knew that the other person—for whom they either had or had not been induced to feel empathy—had defected.

None of the research participants ever met the other woman participating in the dilemma (who was actually fictitious), although 49 read a note from her that revealed a need for cheering up. Research on empathy and on the empathy-altruism hypothesis has suggested that two conditions are necessary and sufficient for the creation of empathy: (a) perception of another person as in need and (b) adoption of that other's perspective. Accordingly, participants in one experimental condition were instructed to read the note from the other woman while imagining how she felt (high-empathy condition). To ensure that any increased cooperation was a function of empathy and not simply of (a) receipt of communication from the other woman or (b) awareness that she was in need, participants in a second experimental condition were provided with the same note, including the same information about need, but they read the note from an objective perspective (low-empathy condition). Participants in a third experimental condition received no note at all (no-communication condition). As has been found in prior research using this empathy manipulation we expected that empathy would be low in both the no-communication and low-empathy conditions, but high in the high-empathy condition.

PREDICTIONS BASED ON THE EMPATHY-ALTRUISM HYPOTHESIS

Baton and Moran (1999) claimed that feeling empathy for the other participant in a prisoner's dilemma evokes altruistic motivation. If they are correct, then even when the women in our dilemma know that the other woman has defected, those induced to feel empathy for her should experience motivational conflict. In addition to the desire to maximize raffle tickets for themselves, they should also want to maximize raffle tickets for her. Once they know that she has defected, these two motives are in direct conflict. The former encourages defecting, the latter not. We expected at least some participants in the high-empathy condition to resolve this conflict in favor of the other, leading them not to defect even though this meant they would receive nothing. In contrast, in both the no-communication and low-empathy conditions, where empathy-induced altruistic motivation should be low, we expected the same result found by Shafer and Tversky (1992): virtually everyone should defect.

CONTROLLING FOR TWO ALTERNATIVE EXPLANATIONS
FOR THE BATON AND MORAN (1999) RESULTS

Using a sequential one-trial prisoner's dilemma in which the other is known to have defected permitted us to disentangle predictions based on the empathy-altruism hypothesis from predictions based on the two most plausible alternative explanations for the empathy effect reported by Baton and Moran (1999). Both of these alternatives derived from uncertainty regarding the other's choice. The first was that the empathy induction, which involved taking the other person's perspective and imagining her feelings, led to an increased expectation that she would cooperate, and this expectation, in turn, increased participants' willingness to cooperate. Baton and Moran found that even after covarying ratings of the other's perceived cooperativeness, the effect of empathy on participants' cooperation was highly significant, which cast doubt on this first alternative. Still, to know that the other had already defected would even more effectively control expectations about cooperation. Expectations would no longer be an issue because participants would know that she had not cooperated.

The second alternative was that participants induced to feel empathy for the other cooperated more because they anticipated that they would feel especially guilty if they defected and then learned that the other for whom they felt empathy had cooperated. Although Baton and Moran (1999) collected no data that directly addressed this alternative, prior research tested and found no support for the hypothesis that the motivation to help evoked by empathy is directed toward the egoistic goal of avoiding guilt. Instead, the prior research consistently supported the hypothesis that the motivation evoked by empathy is directed toward the altruistic goal of increasing the welfare of the person for whom empathy is felt. Once again, to know that the other had already defected would render this alternative irrelevant. There would be no reason to fear feeling guilty on learning the other person had cooperated because participants would know that she had not cooperated.

In sum, were either of these alternative explanations the reason for Baton and Moran's (1999) results, then there should be no effect of the empathy manipulation in the present study. The empathy-altruism hypothesis, in contrast, predicted less defection among participants induced to feel empathy than among participants not induced to feel empathy even when, as in the present study, they knew the other had already defected.

METHOD

Participants

To test this prediction, 60 undergraduate women participated in an experiment, receiving credit toward a research requirement in their introductory psychology course. Using a randomized block procedure, 20 women were assigned to each of the three experimental conditions (no communication, low-empathy, and high-empathy). Three additional women were dropped from the sample and replaced because in a post-experimental interview they expressed doubts about the existence of the fictitious other participant. Only women were used as participants for two reasons. First, we wished to compare our results to those of Batson and Moran (1999) in their simultaneous-choice

dilemma, and they had used only women. Second, the experimenter was a woman and we wished to minimize cross-gender self-presentation concerns.

* * *

RESULTS

Effectiveness of the Empathy Manipulation

Although they read identical notes, we expected that participants in the high-empathy condition would experience more empathy for the other participant than would participants in the low-empathy condition. We checked this expectation with the self-reports of emotional response that participants in the low-empathy and high-empathy conditions made after reading the other participant's note (those in the no-communication condition neither read the note nor reported emotional responses). As in previous research, responses to the six empathy adjectives (*sympathetic, warm, compassionate, softhearted, tender, and moved*) were averaged to form an index of self-reported empathy. Scores on this empathy index were significantly higher in the high-empathy condition than in the low-empathy condition. We concluded that the empathy manipulation was successful.

Effects of Empathy on Response to Defection

Results patterned very much as predicted by the empathy-altruism hypothesis. In the no-communication condition, none of the 20 participants gave a +5 card. For them, there seemed to be very little inclination to benefit the other participant after she defected and gave them the -5 card. By also giving a -5 card, both they and she received the same outcome: 5 raffle tickets. Nor was communication alone enough to noticeably change the situation. In the low-empathy condition, only 2 of 20 participants (0.10) gave a +5 card. Knowing that the other participant had recently suffered a broken relationship was not, in itself, sufficient to increase the inclination to benefit the defector. In the high-empathy condition, however, 9 of 20 participants (0.45) chose to give the other participant a +5 card. As a result of this decision, they provided her with 25 raffle tickets while they received none.

* * *

IMPLICATIONS

The idea that empathy-induced altruism can affect responses in a prisoner's dilemma has wide-ranging implications. Responses in such dilemmas have been used to argue for various forms of enlightened self-interest as the dominant—if not exclusive—motivation in social exchange situations. Our results suggest that this conclusion, even though based on the results of hundred of studies, is based on an unduly narrow set of observations. In the vast majority of one-trial prisoner's dilemma studies, people know absolutely nothing about the other player. As a result, they have no particular reason to care what happens to him or her. Even social encounters with strangers are often more complex and textured than that.

Our research participants never saw the other participant. They did not anticipate meeting her. They did not even know her name. Yet imagining her feelings about the break-up of a romantic relationship was enough to lead

many to have sufficient concern for her welfare that they gave up all chance at winning a \$30 gift certificate themselves in order to improve her chances of winning.

From the perspective of classic game theory and the theory of rational choice, the behavior of our empathically aroused participants makes absolutely no sense. From the perspective of the empathy-altruism hypothesis, it is to be expected. Clearly, the range of motives considered relevant to social exchange situations needs to be expanded.

RUSSELL B. KOROBKIN & THOMAS S. ULEN, *LAW AND
BEHAVIORAL SCIENCE: REMOVING THE RATIONAL-
ITY ASSUMPTION FROM LAW AND ECONOMICS*

88 Calif.L.Rev. 1051, 1138-41 (2000).

COLLECTIVE ACTION

In the familiar "prisoner's dilemma game," two prisoners who are isolated from each other are given the choice between keeping silent (known as "cooperating," for shorthand) or implicating their coconspirator in a crime (known as "defecting"). If both prisoners cooperate, each receives a short prison sentence. If both defect, each receives a long prison sentence. If one defects and the other cooperates, the defector is released from custody and the cooperator receives an extremely long sentence. The interesting feature of the game is that each prisoner is individually better off defecting (because each player is better off defecting if his coconspirator defects and is also better off defecting if his coconspirator cooperates), yet they are collectively better off cooperating (because both cooperating is superior to both defecting). The result is that self-interested prisoners will always defect, ensuring that each receives a long sentence, rather than the shorter sentence they could have received if both had cooperated.

The prisoner's dilemma, expanded to include more than two players, emerges in public policy debates as the "collective action" problem. Most frequently, the problem concerns the collective provision of a service or good known as a "public good." A "public good" is one that exhibits non-rivalrous consumption and for which the costs to suppliers of excluding nonpaying beneficiaries are prohibitively high. Clean air and national defense are prototypical examples: many people can "consume" them simultaneously, and it is not feasible to exclude from enjoying their benefits those who refuse to contribute to their upkeep. Self-interested actors, if left to their own devices, would refuse to contribute to the provision of a public good, for the same reason that each prisoner in the prisoner's dilemma will defect. If everyone else (or most others) contributes to the public good, the self-interested actor can "free-ride"—that is, enjoy equal benefits without shouldering any of the costs. If no one else (or few others) contributes to the public good, the self-interested actor is still better off not contributing, because the public good presumably does not have enough value to the actor to make it worth paying the cost himself of providing it to all other citizens. If everyone is self-interested, all will refuse to contribute, leaving everyone worse off than if each had contributed his or her share.

The self-interested version of rational choice theory leads to the prediction that no public goods will be produced as a result of voluntary behavior. It follows that an important role of government is to use its coercive powers to guarantee the production of public goods that make society better off than it would be without their production.

There is a good deal of experimental evidence, however, that people do willingly and voluntarily contribute to the production of public goods. Consider an experiment sometimes referred to as the "group exchange." A group of people, usually college students, are brought together, and each is given the same sum of money. They are told that they can invest some, none, or all of that money in something called a "group exchange." The decision to invest in the group exchange will be secret. That is, one does not know whether or not the other players have contributed. The group is also told that the game operator will multiply the total sum invested by the members of the group by a number that is larger than one but smaller than the number of people in the group and will then divide the resulting sum equally among all of the group members, whether they have invested in the group exchange or not. These rules make the group exchange into a public good. Because self-interested players can maximize their profits by receiving an equal share of the sum generated by whatever contributions others make, the prediction of rational choice theory is that no one will contribute.

To see the logic of the experiment, suppose that there are five people in the group and that each of them is given \$5. If no one contributes anything to the group exchange, then there is nothing for the game operator to multiply and nothing, therefore, for the group to divide. But suppose that only one person contributes nothing and the other four people in our example contribute their entire \$5 to the group exchange. Further, suppose that the group operator doubles the resulting \$20 to \$40 and then distributes that sum equally among all five players. Each, therefore, receives \$8. The incremental return to the four players who contributed \$5 is \$3, but that of the player who contributed nothing is \$8. This logic should be clear to all the subjects. As a result, no self-interested player should invest in the group exchange.

Although not everyone contributes to the group exchange in these experiments, a substantial number do. On average, subjects in the experiments contributed between 40% and 60% of their initial sum to the public good. Manipulating certain aspects of the exercise can affect the percentage of their money that subjects will invest in the public good. Increasing the return on contributions to the group exchange increases contributions, as does permitting subjects to communicate with one another prior to making their contribution decisions. The evidence is equivocal as to whether increasing the number of subjects involved in a single group exchange game increases or decreases average contribution levels. Regardless of how the features of the game are altered, the fundamental finding persists: contributions to the public good are well above what rational choice theory predicts. In one study, even economics students (who ought to know better) contributed to the group exchange, although their average contribution rate (20%) was significantly lower than the rate observed for other players.

RONALD J. GILSON & ROBERT H. MNOOKIN, *DISPUTING
THROUGH AGENTS: COOPERATION AND CONFLICT
BETWEEN LAWYERS IN LITIGATION*

94 Colum.L.Rev. 509, 534-40 (1994).

Viewing the perceived deterioration in the conduct of commercial litigation through the lens of the prisoner's dilemma suggests two explanations for the increase in contentiousness: a change in the character of the litigation itself; and the impact of growth in the size of the legal community upon the formation and maintenance of reputations for cooperation.

1. THE CHANGING PAYOFF STRUCTURE IN LITIGATION

Two conclusions about the character of large commercial litigation have emerged in recent years, one empirical and relating to its frequency, the second subjective and relating to its conduct. Recent studies have documented a dramatic increase in the amount of commercial litigation after 1970. A nationwide study of federal court contract cases found that the annual number of filings, after remaining at a relatively constant level of about 14,000 during the 1960s, began rising in the 1970s and reached an annual rate of over 47,000 by 1986. Similarly, a study of breach of contract filings in the Southern District of New York (Manhattan)—the federal trial court with what is likely the largest commercial caseload in the country and certainly the court with the largest commercial bar—found that contracts cases increased from an average of some 391 cases per year during the 1960s to an average of 1272 cases per year during the period 1973 through 1979, with some years exceeding 1400 cases. At the same time, the involvement of large New York law firms in these cases increased substantially.

Over the same period, commercial litigators attested to the increasingly uncivil conduct of civil litigation. The phenomenon of discovery abuse was the most obvious manifestation. Over-reaching requests for production were met with dogged resistance to any but perfunctory compliance, and the liberal discovery contemplated by the Federal Rules of Civil Procedure—which aimed to eliminate surprise and facilitate a resolution of the merits based on full information—led instead to trench warfare. Motion and counter-motion, each accompanied by requests for sanctions, created multiple satellite litigation that pushed the merits into the background.

The prisoner's dilemma heuristic suggests a possible link between the empirical fact of increased commercial litigation and the subjective fact that litigation behavior has become significantly more contentious. Recall that in order for lawyers to allow clients credibly to precommit to a cooperative solution the payoffs in the lawsuit must take the form of a prisoner's dilemma: mutual cooperation must have a bigger payoff for each player than mutual defection. If some commercial litigation has payoffs in which one party does not gain from mutual cooperation, such litigation would suffer from defections and be more conflictual. One or both parties would choose gladiators in the pre-litigation game even if that party knew the result would be that the other party would respond in kind.

At least some of the increase in commercial litigation stems from lawsuits in which there were no gains from cooperation. In his study of New York

commercial litigation, William Nelson notes that during the 1970s the statutory prejudgment interest rate—the amount a defendant would have to pay a plaintiff on a damage award from the date the damage was suffered to the date of judgment—was no higher than 6%. In contrast, the market rate of interest over the 1974–1980 period ranged from 10.5% at the end of 1974 to 21.5% at the end of 1980, a spread over the statutory rate ranging from 4.5% to 15.5%. Now consider the payoff to a litigation game in which one player owes the other money. As the interest rate spread increases, it becomes more likely that the defendant's dominant strategy will be noncooperation because the gains from the spread outweigh the transaction costs of conflict: the more conflictual the litigation, the longer the process takes, and the longer the defendant earns the interest rate spread. Indeed, in this game the debtor's best outcome is not the "sucker's payoff" in which the debtor acts noncooperatively and the creditor cooperatively, but "thermonuclear war" in which both sides play noncooperatively—the more conflict, the longer the delay.

This example suggests that the payoff structure of commercial litigation is hardly immutable, and change may well affect the frequency of cooperation. Changes in economic conditions or the rules concerning prejudgment interest can affect the payoff structure of commercial litigation. Some jurisdictions now have rules imposing market-level prejudgment interest in some disputes, and it is plain that, as legal fees have increased and interest rates have fallen, there may be fewer disputes in which delay so clearly serves one party's interest. Thus, it may be no coincidence that large corporations became much more interested in Alternative Dispute Resolution (ADR) in the 1980s when interest rates were falling and legal costs were increasing.

* * *

2. THE SIZE OF THE LEGAL COMMUNITY AND REPUTATIONS FOR COOPERATION

Central to the potential for lawyers to facilitate a cooperative solution to a prisoner's dilemma litigation game is an effective reputation market for lawyers. Lawyers must be able to earn and maintain observable reputations for cooperation, and lawyers must be able to observe breaches of reputation by opposing counsel and have an interest in reporting these breaches. There is reason to believe that the enormous growth in size of the large law firms that provide legal representation in most substantial commercial litigation has undermined the effectiveness of the reputation market.

The first step in the analysis is to recognize the extraordinary growth of large law firms. In the late 1950s, only 38 law firms had more than 50 lawyers. By 1985, 508 firms had reached that size. Fewer than a dozen firms exceeded 100 lawyers in 1960; by 1986, there were 251 such firms. In 1968, the largest law firm had 169 lawyers; in 1993 the largest firm had 1662 lawyers and 184 firms were larger than the 1968 leader.

Now consider how lawyers might develop a reputation for cooperation. Suppose that the primary vehicle of reputation formation is a lawyer's relations with other lawyers, who then communicate that reputation to the client community. As discussed earlier, this is a plausible assumption given that cooperation in litigation is not a bright-line concept; because litigation is inherently competitive, a reputation for cooperation will be based on the more

ephemeral concept of not being *too* conflictual. This type of standard requires that a lawyer apply it in the first instance.

In this setting, repeated experience with the same lawyers facilitates the formation of a cooperative reputation because competing lawyers are able to factor out the noise associated with the lawyer's conduct in any particular matter. The number of times that one lawyer has the experience of litigating against another lawyer in the community is a function of the size of the community—the smaller the community, the easier it is for lawyers to learn about the predilections of their adversaries toward cooperation.

These circumstances are sufficient to predict a secular trend of decreased reputations for cooperation among law firm lawyers in a rapidly growing legal community. Lawyers will perceive members of the older generation of lawyers as having a reputation for cooperation, their reputations having been developed in a less populated environment. In this environment, leading litigators in a community dealt with each other every day. In contrast, the succeeding generations of lawyers would have found it much more difficult to develop reputations for cooperation because the continued growth of the legal community decreased their opportunity to have had sufficient dealings with a large enough segment of the bar to have developed one. In these circumstances, if a lawyer cannot develop a reputation for cooperation, then the dominant career strategy is noncooperation—to be a gladiator. Thus, with the passage of time, as the older lawyers retire and are replaced by younger lawyers, the legal community becomes dominated by lawyers with a noncooperative style and conflict in litigation increases over time.

To be sure, most lawyers do not identify themselves as bombers or gladiators. Rather, they describe their personal strategy as flexible, either cooperator or gladiator, depending on how the other side plays. In effect, the picture is of a population of tit-for-tat lawyers: each cooperates until the other side defects and then retaliates. Wrapping oneself in the cloak of tit-for-tat does have a powerful rhetorical effect. Not only is blame for observed conflict placed on the other lawyer—retaliation comes only after the other side defects—but it also carries a strong claim of effectiveness. In Robert Axelrod's now classic tournament, tit-for-tat proved the most successful strategy for playing a repeated prisoner's dilemma game.

The puzzle, then, is to explain what generates all the litigation conflict. If litigators generally claim that they always cooperate unless the other side defects, who is left to defect first? The problem is that the effectiveness of the tit-for-tat strategy depends on a particular characteristic of the environment in which the game is played. As typically stated (and as was the case in Axelrod's tournament), the tit-for-tat strategy assumes that each player has perfect information about the other player's actions. That is, each player knows with certainty whether the other player has cooperated or defected. In contrast, when one player may mistake the character of the other player's actions, tit-for-tat leads not to cooperation, but to continuing gladiatorial defection. Suppose one player misinterprets her opponent's action as defection when her opponent actually meant to cooperate. Tit-for-tat dictates following the opponent's move on all moves after the first. Thus, cooperation ends after the misinterpretation. One player defects, mistakenly thinking her

opponent had done so, and her opponent then follows suit, the mistake “echoing” back and forth as the players simply repeat the initial mistake.

Thus, the information structure of the litigation game can explain the presence of significant conflict in litigation even though most lawyers claim to play tit-for-tat. Litigation is quite “noisy.” Clearly identifying whether the other side has cooperated or defected in a competitive environment where cooperation is defined as being not *too* conflictual, is often quite difficult.

For Further Reading

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Chapter 3

DISTRIBUTIVE BARGAINING— COMPETITIVE MOVES TO CLAIM VALUE

The last chapter explored the contours of the mixed motive exchange symbolized by the Prisoner's Dilemma. The readings suggested that competitive and collaborative bargaining strategies are each legitimate and are interconnected: They do not exist in isolation from one another. The effective negotiator must be sufficiently flexible to know how to select the appropriate strategy at each opportunity during the negotiation process. Remembering the lessons of tit-for-tat ensures against exploitation in each bargaining context.

It is difficult to understand how to employ the intertwined strategies of collaboration and competition, however, without artificially separating them for a time and studying them independently. The present chapter begins this process by identifying the characteristics of a negotiation strategy designed to **claim** value by obtaining the largest possible share of whatever resources are available for distribution. The next chapter explores how to use strategies designed to **create** value by expanding the range of available options for agreement. The skilled negotiator knows how to use the **predictability** of the distributive strategies and how to capture the **creativity** of the more collaborative ones.

We have all experienced the rich benefits, and the painful downsides, of using competitive strategies to gain a bargaining advantage. On many occasions people attempt to obtain as much value as possible from their negotiating opposite, and perceive that they can obtain this value only if the opposite foregoes it. This strategy is called **distributive bargaining** because the negotiators distribute a single medium of exchange or "pool of value," frequently money. Habitues of garage sales and swap meets, visitors to Third World souks, and attorneys settling casualty litigation all must be experts in competitive negotiating techniques. This is particularly true for those of us whose natural instincts lie away from the push and pull of aggressive tactics. While some people may prefer a more collaborative negotiating environment, effective negotiators forswear using distributive bargaining only at their peril. In fact, whenever we decide to advance our own

interests though the opposite may lose, we dance to the rhythms of competitive bargaining.

Elmtree House, developed by Howard Raiffa, illustrates how we commonly use distributive bargaining strategies to help put deals together. The story highlights many of the assumptions made and the tactics used to gain a bargaining advantage when there is only one resource to distribute, in this case the money necessary to complete a real estate transaction. Raiffa's more detailed explanation of the process in later chapters of *The Art and Science of Negotiation* is well worth extensive study.

Next, Gary Goodpaster's excerpt offers us a compact primer to the theoretical framework of the competitive negotiation strategy. Goodpaster shows that many of the moves made in the Elmtree House negotiation were grounded on a sound theoretical foundation. Like the other strategies we will discuss, competitive efforts to claim value by distributive bargaining have a predictable structure and rhythm. By understanding this predictable "dance" of the distributive strategy, and the tactics frequently used to obtain a bargaining advantage, we can negotiate more effectively when the context calls for it.

Much of the predictability of the distributive strategy stems from the negotiator's use of tactics to obtain a bargaining advantage. Tactics are psychological maneuvers designed to influence negotiating opposites to view their own position as less powerful or our position as more powerful than would otherwise be the case. Competitive negotiators use tactics for one reason: Unless effectively countered, they work! The numbers of available tactics are legion; they include silence; anger; misrepresentation; lack of authority; the "good cop, bad cop" scenario; time pressure; ultimatums; insults; refusal to make concessions; flattery. The list is all but endless. We explore the use of tactics in this chapter.

Howard Raiffa amplifies the lessons of Elmtree House to show the predictability of the distributive strategy. Once the parties hear the music, and the "dance" of reciprocal concessions begins, we can make a number of empirical observations about the use of these concessions as a strategy for reaching an advantageous agreement. Next, Goodpaster returns to suggest that practical negotiators commonly employ variations of some tried-and-true tactics to attain their objectives. Distributive bargaining tactics have also been analyzed using game theoretic modeling and other social sciences research methods. One of the most powerful competitive techniques is to make a commitment to a particular position. David Lax and James Sebenius demonstrate that commitments to certain results can influence negotiations dramatically; and if they are not deployed effectively, their influence may be disadvantageous. Gary Lowenthal provides us a case study of how then-Vice President Spiro Agnew used a commitment to a position to gain a decided advantage in his negotiation of a *nolo contendere* plea.

We next look at a sampling of the recent empirical literature that adds such richness to our study of negotiation. As parties begin the process of distributive bargaining, there comes a time when one of them must put an offer on the table, and in making that offer must calculate what figure to recommend as the starting point for what will follow. John Oesch, together with Adam Galinsky, an impressively prolific empiricist in this field, catalogue

the issues involved in this process of making opening offers. Who should make the first offer? How extreme should it be? These two critical decisions will affect the substantive outcome reached, and the parties' satisfaction with the outcome.

Building on this foundation, Russell Korobkin takes a more litigation-oriented look at this concept of how to think tactically about opening offers and deal points. In training settings, we often use the phrase: "Higher aspirations tend to boost results." Is this merely a folk aphorism, sensible but unproven, or is there an empirical basis for this approach? Korobkin uses the new generation of empirical research to determine the validity and limitations of this advice for effective negotiators. He also discusses the connection between aspirations and outcomes, and parties' levels of satisfaction.

Two final readings complete our examination of the process of distributive bargaining. Don Moore's contribution explores the effect of revealing a time deadline in a competitive setting. We might think that such a revelation would weaken our bargaining leverage: His analysis suggests otherwise. Finally, three researchers take a close look at our behavior in a competitive setting. If we know our opposite has a reputation as a competitive negotiator, do we become more competitive ourselves? Or, at least, do we think we would? Their finding of a gulf between our perception and our behavior is both surprising and useful.

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HOWARD RAIFFA, *THE ART & SCIENCE
OF NEGOTIATION*

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The following case study is mostly make-believe; one might speak of it as an "armchair" case. It involves a colleague of mine—I'll call him Steve—who, as a professor of business, was quite knowledgeable about finance but not a practitioner of the art and science of negotiation.

Steve was on the governing board of Elmtree House, a halfway house for young men and women ages eighteen to twenty-five who needed the support of a sympathetic group and professional guidance to ease their transition from mental institutions back to society. Many of the residents had had nervous breakdowns, or were borderline schizophrenics, or were recovering from unfortunate experiences with drugs. Located on the outskirts of Boston in the industrial city of Somerville, Elmtree House accommodated about twenty residents. The neighborhood was in a transition stage; some said that it would deteriorate further, others that it was on the way up. In any case, it did not provide an ideal recuperative setting because of its agitated atmosphere. Although the house was small and quite run down, the lot itself was extensive, consisting of a full acre of ground. Its once-magnificent stand of elm trees had succumbed to disease.

The governing board, through a subcommittee, had once investigated the possibility of moving Elmtree from Somerville to a quieter, semiresidential community. Other suitable houses were located in the nearby cities of Brookline, Medford, and Allston, but the financial aspects were prohibitive and the idea of moving was reluctantly dropped.

Some months later, a Mr. Wilson approached Elmtree's director, Mrs. Peters, who lived in the house with her husband and child. Wilson indicated that his firm, a combined architectural and developmental contractor, might be interested in buying the Elmtree property. This was out of the blue. No public announcement had ever been made that Elmtree House was interested in a move. Mrs. Peters responded that the thought had never occurred to her, but that if the price were right, the governing board might just consider it. Wilson gave Mrs. Peters his card and said that he would like to pursue the topic further if there were a chance for a deal.

The governing board asked Steve to follow up on this promising lead.

* * *

During the next twelve days, Steve did a number of things. First, he tried to ascertain Elmtree's *reservation price* or walkaway price—that is, the minimum price that Elmtree House, the seller, could accept. The reservation price was difficult to determine, since it depended on the availability of alternative sites to relocate. Steve learned that of the other sites that had previously been located, the one in Brookline was no longer available but the other two, in Medford and in Allston, were still possibilities—for the right price. Steve talked with the owners of those sites and found out that the Medford property could be had for about \$175,000 and the Allston property for about \$235,000.

Steve decided that Elmtree House would need at least \$220,000 before a move to Medford could be undertaken and that it would need \$275,000 to justify a move to Allston. These figures took into account the cost of moving, minor repairs, insurance, and a small sum for risk aversion. The Allston site (needing \$275,000) was much better than the Medford site (needing \$220,000), which in turn was better than the site at Elmtree. So Steve decided that his reservation price would be \$220,000. He would take nothing less, and hope to get more—possibly enough more to justify the Allston alternative. This bit of research took about six hours, or a couple of evenings' work.

Meanwhile Steve's wife, Mary, contacted several realtors looking for alternate properties. There were a few nibbles, but nothing definite turned up.

What next?

Steve next investigated what Elmtree House would bring if sold on the open market. By examining the sale prices of houses in the vicinity and by talking to local realtors and real estate experts, he learned that the Elmtree property was probably worth only about \$125,000. He felt that if sold without Wilson in the picture, the house would go for between \$110,000 and \$145,000 (with probability one-half), and it was just as likely to go below \$110,000 as above \$145,000. How disappointing! This took another four hours of research time.

* * *

As of two days before the start of real negotiations, Steve would have bet even money that Wilson's *RP* lay in the interval from \$250,000 (the lower quartile) to \$475,000 (the upper quartile).

* * *

What should be Steve's opening gambit? Who should start the bidding first? If Wilson insisted that Steve make the first offer, what should that be? If Wilson opened with x thousand dollars, what should Steve's counteroffer be? How far could this be planned in advance? Were there any obvious traps to be avoided?

Steve and I felt that our probabilistic assessment of Wilson's *RP* was so broad that it would be easy to make a mistake by having our first offer fall below his true reservation price. But if we started with a wildly high request like \$900,000—way over what we would settle for—it might sour the atmosphere.

Steve decided to try to get Wilson to move first; if that did not work and if he were forced to make the first offer, he would use the round figure of \$750,000, but he would try to make that offer appear very flexible and soft. Steve thought about opening with an offer of \$400,000 and holding firm for a while, but we felt there was a 40 percent chance that this amount would be below Wilson's *RP*. If Wilson moved first, Steve would not allow him to dwell on his offer but would quickly try to get away from that psychologically low anchor point by promptly retorting with a counteroffer of, say, \$750,000.

I told Steve that once two offers are on the table—one for each party—the final point of agreement could reasonably be predicted to fall midway between

those two extremes. So if Wilson offered \$200,000 and if Steve came back with \$400,000, a reasonable bet would be a settlement of \$300,000—provided, of course, that that midway figure fell within the potential zone of agreement, the range between Steve's (the seller's) true *RP* and Wilson's (the buyer's) true *RP*. For starters, Steve thought that it would be nice if he could get \$350,000 from Wilson, but, of course, Steve realized that his own *RP* was still \$220,000.

* * *

As it turned out, the first round of negotiations was, in Steve's eyes, a disaster, and afterward he wasn't even sure that there would be a second round. Mrs. Peters performed admirably, but to no avail; it seemed unlikely that Wilson would raise his offer to Elmtree's reservation price. After preliminary pleasantries and some posturing, Wilson said, "Tell me the bare minimum you would accept from us, and I'll see if I can throw in something extra." Steve expected that gambit, and instead of outright misrepresentation he responded, "Why don't you tell us the very maximum that you are willing to pay, and we'll see if we can shave off a bit." Luckily, Wilson was amused at that response. He finally made his opening offer at \$125,000, but first bolstered it with a lot of facts about what other property was selling for in that section of Somerville. Steve immediately responded that Elmtree House could always sell their property for more money than Wilson was offering, and that they did not have the faintest intention of moving. They would consider moving only if they could relocate in a much more tranquil environment where real estate values were high. Steve claimed that the trouble of moving could be justified only by a sale price of about \$600,000, and Mrs. Peters concurred. Steve chose that \$600,000 figure keeping in mind that the mid-point between \$150,000 and \$600,000 was above his aspiration level of \$350,000. Wilson retorted that prices like that were out of the question. The two sides jockeyed around a bit and decided to break off, with hints that they might each do a bit more homework.

* * *

Two days later, however, Steve received a call from Wilson, who said that his conscience was bothering him. He had had a dream about Mrs. Peters and the social good she was bringing to this world, and this had persuaded him that, even though it did not make business sense, he should increase his offer to \$250,000. Steve could not contain himself and blurted out his first mistake: "Now that's more like it!" But then he regained his composure and said that he thought that he could get Elmtree's board to come down to \$475,000. They agreed to meet again in a couple of days for what would hopefully be a final round of bargaining.

Following this phone conversation with Wilson, Steve told me that he had inadvertently led Wilson to believe that his \$250,000 offer would suffice; but Steve also felt that his offer of \$475,000 was coming close to Wilson's *RP*, because this seemed to be the only reason for Wilson's reference to a "final round of bargaining." We talked further about strategy and we revised some probabilistic assessments.

Over the next two days there was more jockeying between the two sides, and Wilson successively yielded from \$250,000 to \$275,000 to \$290,000 and

finally to a *firm last offer* of \$300,000, whereas Steve went from \$475,000 to \$425,000 to \$400,000, and then—painfully—when Wilson sat fixedly at \$300,000, inched down to \$350,000. Steve finally broke off by saying that he would have to contact key members of the governing board to see if he could possibly break the \$350,000 barrier.

* * *

The next day Steve called Wilson and explained to him that the members of Elmtree's board were divided about accepting \$300,000 (that was actually true). "Would it be possible for your company to yield a bit and do, for free, the equivalent of \$30,000 or \$40,000 worth of repair work on Elmtree's new property if our deal with you goes through? In that case, we could go with the \$300,000 offer." Wilson responded that he was delighted that the board was smart enough to accept his magnanimous offer of \$300,000. Steve was speechless. Wilson then explained that his company had a firm policy not to entangle itself with side deals involving free contract work. He didn't blame Steve for trying, but his suggestion was out of the question.

"Well then," Steve responded, "it would surely help us if your company could make a tax-free gift to Elmtree House of, say, \$40,000, for Elmtree's Financial Aid Fund for needy residents."

"Now that's an idea! Forty grand is too high, but I'll ask our lawyers if we can contribute twenty grand."

"Twenty-five?"

"Okay—twenty-five."

It turned out that for legal reasons Wilson's company paid a straight \$325,000 to Elmtree House, but Wilson had succeeded in finding a good face-saving reason for breaking his "firm last offer" of \$300,000.

GARY GOODPASTER, *A PRIMER ON COMPETITIVE BARGAINING*

1996 J. Disp. Resol. 325, 346–9; 375–7.

A COMPETITIVE NEGOTIATOR'S OPERATING ASSUMPTIONS

Generally, the competitive negotiator seeks to persuade the other party that she will not agree to or settle above or below a certain point. In devising a negotiating strategy, the competitor uses some general approaches and rules of thumb. These are:

Negotiation is an information game. The competitor treats negotiation as a game in which the party with the most accurate information wins. Thus, the competitor either seeks to gather as much information as possible while giving away as little as possible or gives and manipulates information in such a way that the other party is led indirectly to draw conclusions the competitor wishes it to draw. Realizing that the other party will decide what to do on the basis of what he or she thinks and believes, the competitor seeks to shape, manage, and manipulate the other party's perceptions of the situation and that party's available choices.

Take an opening position at the margin (high or low openers). The negotiator who opens with a high or low offer and makes few and small

concessions generally has the most success in negotiation. As used here, "opens high" or "opens low" means at the extreme or far end of the potential bargaining range but sufficiently within the range to retain credibility. The competitive negotiator prepares an opening position by first estimating her best possible deal and then staking out an initial position considerably beyond that estimate while developing justifications for the latter position.

Treat concessions as a way to gain and disclose information. Concessions convey information about what a party wants and values, about the party's preferences and intentions, and about the party's perception of the other party. The skillful, competitive negotiator "reads" concessions to infer this information and plans her own concessions to give the other party only those impressions she wants it to have. Concessions are not only, and perhaps are not even principally, a way to give something to the other party to narrow differences, but are also a way to gain advantage. A skillful competitor crafts concessions to shape the perceptions and expectations of the other party.

Hang tough on concessions; do not make concessions one-for-one nor trade concessions equally. Concessions seem to beget concessions. In general, an expectation exists in bargaining that when one party makes a concession, then the other party will also make a concession in return. Indeed, a party usually makes concessions *in order to* gain a concession. Notwithstanding this expectation, it is not *always* necessary to give a concession in exchange for receiving one. Indeed, failing to note a concession or to make a return concession may cause the other party to make one or more additional concessions.

Furthermore, when making a concession in exchange for a concession, it is not necessary to give something of equivalent value to that received. For example, take the typical case of someone negotiating a purchase of a relatively expensive new car. The dealer says he wants \$30,000, and the buyer says he wants to pay only \$24,000. After negotiating for a while, the buyer relents and offers \$26,000. The dealer, rather than making an equivalent \$2000 concession, counters with \$29,000, in effect exchanging \$1000 for \$2000.

Although this kind of exchange is common, what many do not realize is that the need or desire to get something back in exchange for a concession is often satisfied by *any* concession from the other party. In addition, when weighing a concession, the receiving party may accord the concession a lower value than the conceder *apparently* gives it. For example, in a negotiation if A concedes something having a value of \$100 and B makes a return concession having a value of \$50 to A, then A may conclude that B values \$50 as much as A values \$100. While this could be true if B has fewer resources, is more needy, etc., B may simply wish for A to believe that this is so. In short, a negotiator need not respond to a concession by making a concession of equal value. In fact, competitive negotiators often respond in this fashion. In using an apparent value scale different from that of the other party, the competitive negotiator may mislead the other party into misvaluing the concession.

Make small, infrequent, and declining concessions. As a corollary to the foregoing, the competitive negotiator makes it a practice to make small concessions and force the other party to work hard to gain any concessions. The aim is to send the message that there is not much to give: if there is to be a bargain, the other party will have to move much further than the competi-

tor. The competitive negotiator also makes concessions in declining increments in order to suggest a convergence on his apparent bottom line; that is, his maximal expectation point.

One effect of “hanging tough” and making small concessions is to shape or alter the other party’s expectations or aspirations about what it can get out of the negotiation. Treating a negotiator’s concessions as information about what can be achieved, the other party may alter its expectations in a way favorable to the negotiator.

Select an opening position by reference to the mid-point rule. Once two settlement offers are on the table, the natural settling point is the mid-point. This rule of thumb, while not always true, is true often enough that competitive negotiators can use it to good effect. Typically, the competitive negotiator will allow, or more likely, *get* the other party to make the first offer. This allows the competitor to set his or her offer at the most advantageous point, given the likelihood that once both offers are out, the negotiators will settle in the middle. Alternatively, a competitive negotiator simply starts with an extreme offer, hoping that the other party is either innocent or will overvalue the item being negotiated and will open with an offer more favorable to the competitor. In effect, the competitor’s high opener draws the other party’s opener in its direction. If the parties continue bargaining and eventually settle in the middle, then the competitive negotiator will have extracted additional gain.

Link positions and concessions to convincing justifications or rationales. Experienced competitive negotiators know that they may not be able to persuade the other party to agree to settle at any particular point in the perceived bargaining range simply by hanging tough. Though simple firmness is sometimes enough, it will not work with everyone. In bargaining situations, people want justifications for positions taken. Understanding this, in preparing for a negotiation, the competitor picks positions on the bargaining continuum that he can defend with some plausible justification. For example, the woman selling her house might say her house is priced at \$450,000 because that is the price she paid for it adjusted for inflation over the years she has owned it. Alternatively, she might say she has compared prices for comparable houses and that, although their prices were somewhat lower, her house has special features that justify the price differential. A negotiator should note that though these justifications have some persuasive value, they certainly have flaws or counters and may not, in fact, be the reason she chose the figure. She may have chosen the figure because that is what she needs to buy a new condominium and still qualify for the \$125,000 one-time, over age-55, tax exclusion on profit from a home sale. The latter reason, however, will not carry as much weight with the buyer as the former, and she would find it easier to maintain the former in the face of argued counterproposals. In short, giving reasons or justifications for positions taken is persuasive, even when they are not the real reasons.

The same reasoning applies to concessions. A concession made by moving from one position to another needs a good justification in order to convince the other party that the new position is a real bottom line. For example, after bargaining for a while, the house seller might say, “Well, o.k., you’ve convinced me the price is too high for you. The house may need a new roof in a

few years, and I think that \$10,000 would be a reasonable amount to reduce the asking price to reflect that." Again, a negotiator should note that whether or not the reason given is the seller's true reason is not important, but only that it sounds reasonable.

Tying positions taken to reasons and justifications not only hides the potential grab involved in competitive bargaining, but also permits planning a strategy for moving from position to position, if necessary, in response to moves and demands of the other party. Actually moving from one position to another or to several different, but understandable, positions may cause the other party to believe it has gained from bargaining and, therefore, to feel satisfied with the deal struck. Of course, had the party known more by investigating further, it might have discovered there was, in fact, more to gain.

Good, competitive negotiators prepare for negotiations by developing plausible rationales for the positions they are going to take and the concessions they may make. They also attempt to anticipate what positions the other party may take and what rationales it may provide and then develop counterpositions and arguments. While developing a position and concession strategy and developing rationales are important, a competitive negotiator, nonetheless, does not limit himself to only these kinds of negotiation moves. Instead, he may orchestrate negotiation strategy with a variety of informational and psychological tactics to manage, manipulate, pressure, cajole or persuade the other party in ways aimed at extracting as much gain as possible.

* * *

Because people bargain competitively for various reasons, negotiators and mediators need to understand competition in negotiation in order to respond appropriately. Some people bargain competitively without giving much conscious attention to the matter. Others compete in response to the other party's competitive behavior. In this response, they follow the common pattern that a particular kind of behavior elicits a similar behavior in response. In other words, one party frames the negotiation as a contest, and the other party picks up the competitive cues and behaves accordingly. Further, people naturally incline to competitive bargaining when they are non-trusting. In such situations, in order to avoid putting themselves at risk, non-trusting people act guardedly and adopt elements of the competitive strategy, for example, withholding information or misrepresenting a position. Finally, one can readily imagine ambiguous bargaining situations, in which at least one party is non-trusting, quickly devolving into a competitive negotiation between both parties. The non-trusting party acts defensively, and the other party senses this as competitive behavior and, therefore, acts in a similar fashion.

Negotiators, however, can also consciously adopt a competitive strategy. Negotiators are most likely to compete purposefully when:

- the parties have an adversarial relationship;
- a negotiator has a bargaining power advantage and can dominate the situation;

- a negotiator perceives an opportunity for gain at the expense of the other party;
- the other party appears susceptible to competitive tactics;
- the negotiator is defending against competitive moves; or
- there is no concern for the future relationship between the parties.

This list suggests that competitive bargaining most likely occurs in situations such as labor and lawsuit negotiations, insurance and similar claims type settlements, and in one-time transactions between a relatively experienced party and a relatively inexperienced party. One would, for example, expect to see it in sales transactions where the parties will probably not see each other again.

Representative bargaining or bargaining for a constituency may also prompt competitive bargaining even when there will be future negotiations between equally sophisticated parties. The negotiator's accountability may override relationship concerns and reasons for cooperation. The concerned audience, consisting of a client, constituency, coalition partner, or other phantom party at the table, is, in effect, looking over the negotiator's shoulder. The negotiator, therefore, takes positions and makes moves she believes her client either expects or would approve. International negotiations between countries, union-management, lawsuit negotiations, and negotiations between different parties in interest-group coalition negotiations sometimes evidence this pattern.

Aside from circumstantial or situational pressures, there are some parties who bargain competitively because they believe that is the way to conduct business. There are also parties who are simply predisposed to bargain competitively and will incline to do so opportunistically in any bargaining situation if possible.

Finally, it is important to note that one can bargain competitively in a negotiation on some issues and cooperatively on others. In other words, a negotiator can selectively use competitive strategy or tactics on particular issues, while using a cooperative or problem-solving strategy on other issues. In such a case, extracting gain competitively may not greatly endanger future relationships. At least, there is a judgment call concerning this. The negotiator attempts to calculate the net effect of the overall results and skews the benefits, insofar as possible, to his side. In this kind of calculation, it is clear that there is some kind of assessment or balancing of short-term versus long-term gain. Again, there is no formula to calculate these gains, and the parties probably follow rules of thumb prevalent in the industry and developed from prior experience, or they calculate these gains based on hopes or individualized assessments.

Similarly, it is possible for negotiators to use an integrative or problem-solving bargaining strategy in order to increase the amount of gain possible to the parties. At some point, however, notwithstanding cooperation to produce greater gain, the parties will have to distribute or divide the gain. Therefore, they may also engage in competitive bargaining.

Obviously, competitive bargaining covers a continuum of behaviors from the simplest, unreflective adversarial actions to highly conscious and virtually scripted contests. As such, competitive bargaining moves are natural respons-

es in some negotiation situations and advantageous or profitable actions in others. This being so, what are the downsides to competitive negotiation?

At least in its full-blown form, competitive negotiation is risky bargaining. The competitor takes risks in order to secure gains. Among these is the risk that there will be no gains at all. The competitive strategy of staking out a position and holding firm, particularly when joined with various devious tactics, runs the risk of alienating, frustrating, or angering the other party and, thus, precluding a possible agreement.

Even if there is an agreement, it may not be a sustainable one. On reflection, the other party may conclude that it does not really like the deal or feels that it was "taken" in some way. Furthermore, even if there is a deal and it survives, the bargaining that occurred may adversely affect future relations between the parties. This is certain to happen if one party discovers that the other party actively misled or manipulated it. It may also happen just because of residual hard feelings or mistrust arising from the tactics used.

Beyond these concerns, competitive bargaining is neither efficient nor productive bargaining. It is inefficient and nonproductive because parties who withhold and manipulate information miss possibilities of cooperating to find or create additional value to divide between them. As a result, they can be said "to leave gains on the table."

Along this line, genuine cooperation and positive relationships are two real gains that competitive negotiators are unlikely to ever realize and bring to bear in immediate or prospective negotiations between themselves and others. Put another way, although a competitive negotiator may realize a gain in a particular negotiation, he may forgo far greater possible gains in doing so. The greater foregone gains are those that may arise from enlisting the willing cooperation of others to assist him in maximizing the satisfaction of his interests, while at the same time advancing their own. That is an entirely different view of the negotiation situation, however, and one that competitors usually do not attempt.

HOWARD RAIFFA, *THE ART & SCIENCE OF NEGOTIATION*

47-50 (1982).

A simple laboratory bargaining problem can be introduced with less than one page of confidential instructions to the seller and buyer. The context is the sale of a used car, the Streaker, and the setting is dated to justify a seller's reservation price of \$300 and a buyer's reservation price of \$550. The instructions to each give only the vaguest of hints about the other person's *RP*. The challenge for a buyer is to get a good deal for herself, and she will be judged in terms of how well she has done in comparison to other buyers in an identical situation; the seller is judged similarly, in comparison to other sellers. This is like a duplicate bridge scoring system.

Players who put themselves in the role of one or the other of these negotiators will naturally ask a number of questions. What analyses should be done? What bargaining ploys seem to work? Should I open first with an offer? If I open first, how extreme should I be? Am I better off giving a

reasonable value that would yield me a respectable surplus and remaining firm, or should I start with a more extreme value and pace my concessions with those of the other party? What is a reasonable pattern of concessions? Our data indicate that in this situation most pairs of negotiators come to an agreement.

A typical pattern of concessions is depicted in Figure 3, where s_1, b_1, s_2, b_2 , and so on represent the prices successively proposed by the seller and buyer. I call this pattern “the negotiation dance.” The seller might open with a value of \$700 (s_1 in the figure); the buyer retorts with $b_1 = \$250$; then in succession comes $s_2 = \$500$ (breaking the buyer’s RP), $b_2 = \$300$ (breaking the seller’s RP), $s_3 = \$450$, $b_3 = \$400$, and a final-contract price of $x^* = \$425$. Would x^* be higher if s_1 were \$900 instead of \$700? If so, why not make $s_1 = \$2,000$?

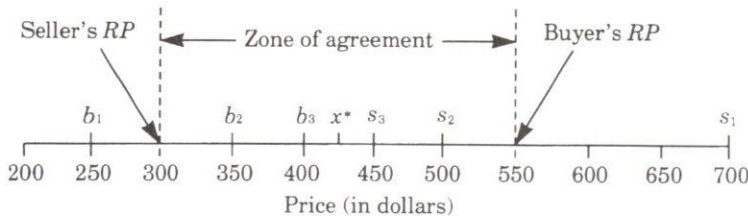


Figure 3. The negotiation dance ($x^* =$ final-contract price).

Our data yielded a number of interesting findings. First, the final contracts ranged over the entire zone of agreement, from \$300 to \$550. A sprinkling (less than 1 percent) of cases were settled out of the zone of agreement for a value less than \$300 or more than \$550; the subjects in these cases misinterpreted the directions. In some cases, but surprisingly few (around 3 percent), agreement was never achieved.

Second, the average of the final contracts was \$415 with a standard deviation of 52, indicating a surprising spread of outcomes. The average opening offer of the sellers was \$525 (standard deviation of 116); the average opening offer of the buyers was \$261 (standard deviation 112).

Third, the Boulware strategy of making a reasonable opening and remaining firm works sometimes, but more often than not it antagonizes the other party, and many of the no-agreements resulted from this strategy. Advice: don’t embarrass your bargaining partner by forcing him or her to make all the concessions.

Fourth, once two offers are on the table (s_1 and b_1), the best prediction of the final contract is the midpoint, $(s_1 + b_1)/2$ —provided that the midpoint falls within the zone of agreement. If the midpoint falls outside this zone, then it’s hard to predict where the final contract will fall. It is not true that x^* will be near the reservation price that is closer to the midpoint. The reason is that the concessions will have to be lopsided, and it’s hard to predict the consequences. Thus, if $b_1 = \$250$ and $s_1 = \$2,000$, with the midpoint being \$1,125, the seller is going to be forced to make huge concessions and x^* might end up closer to \$300 than to \$550.

Fifth, from a linear regression analysis it appears that if the buyer's opening bid is held constant, then on the average adding \$100 to the opening bid of the seller nets an increase of about \$28 to the final contract. If the seller's opening bid is held constant, then on the average subtracting \$100 from the opening bid of the buyer nets a decrease of about \$15 from the final contract.

With one group of 70 subjects I ran a variation of the Streaker experiments with some fascinating but inconclusive results. In the variation, the instructions to the buyers were the same: as in the original experiments, they still had a reservation price of \$550. But the instructions to the sellers were altered: they still had to get at least \$300, but they were told not to try to get as much as possible because of the desirability of later amicable relationships with the buyers. The sellers were told that they would receive a maximum score if they could sell the car for \$500 and that every dollar above \$500 would detract from their score; a sale of x dollars above \$500 would yield them the same satisfaction as x dollars below \$500. Thus, for example, a score of \$525 would be equivalent to a score of \$475. Of course, the buyers were not aware of these confidential instructions to the sellers.

Surprisingly, the sellers did better playing this variation with benevolent intentions toward the buyer than they did with aggressive intentions to squeeze out as much as possible. In the variation, the average price for the car was \$457 instead of \$415. One reason for this might have been that in the original version, the sellers were told only to get more than \$300 and they did not have any target figure. In the variation, they were told that the best achievable value was \$500 and this became a target value. Indeed, the sellers' opening offers averaged higher in the variation than in the original exercise (\$592 versus \$525). In the variation, the sellers came down faster from high values (above \$500) but they became more reluctant to reduce their prices as they pierced their \$500 aspiration level, thus making it seem to the buyers that they were approaching their reservation values.

Some sellers said that they felt some qualms when they let themselves be bargained back from \$600 to \$500, knowing that this was the direction in which they wanted to move. Some sellers told the buyers that they thought \$500 was the fair price and that they did not want to get a higher value; but the buyers they were bargaining with tended not to believe them, and these sellers on the average hurt themselves.

GARY GOODPASTER, A PRIMER ON COMPETITIVE BARGAINING

1996 J. Disp. Resol. 325, 349-63.

COMMONLY USED PLOYS AND TACTICS

In addition to using basic hard bargaining strategy, a competitive negotiator may also use a variety of ploys and tactics to persuade or induce the other party to settle at a point as favorable as possible to the competitor. Not all competitors use these devices. Some manage quite well with just the basic *high demand, small concession, firmness* strategy. Even those who use such devices do not use them all, nor any standard set of them all the time. Nonetheless, some are commonly used, and some are a part of standard practice in some negotiating arenas.

Knowing these ploys and tactics gives a negotiator a clearer and deeper understanding of how hard bargainers can operate throughout a negotiation on some issues or, in a positive sum negotiation, when it comes time to allocate shares in whatever value the negotiators may have created. More importantly, a large part of negotiating well involves understanding how the other party is negotiating, then responding appropriately. That can entail negotiating defensively, so as not to be taken, or it may involve taking the initiative and trying to change the very character of the negotiation as a process, for example, transforming a competitive negotiation into a problem-solving negotiation. . . .

Furthermore, although you might not wish to use some of the competitive ploys and tactics, you should nonetheless have other ploys and tactics at your command. Although typically used by competitive bargainers, some of these devices are useful to cooperative bargainers as well.

* * *

Some of these tactics are ethically dubious, and some are downright immoral or illegal, depending on the duplicity involved.

“Precondition” demands. Sometimes a party will refuse to negotiate unless some condition or demand is satisfied prior to beginning the negotiation. Actually, setting a precondition is a way of obtaining a concession without giving any in return and, in effect, is the price paid to get the other party to bargain. . . .

Simply understanding that precondition demands actually are, and should be, a part of the principal negotiation dictates the appropriate response. Essentially that response is simply to make clear that you consider the precondition issues to be a part of the negotiation. Then, you should either demand reciprocal concessions in return for any concessions you make or delay consideration of the demands until the full negotiation begins.

Your move, or you first. If competitive negotiation is an information game, the party that has the most and best information regarding the underlying issues and the real desires of the other party positions itself to maximize its gains. A competitor thus seeks to gain as much information as possible while disclosing as little as possible. One way to do this, often disguised as simple politeness, is to convince the other party to make the first offer. Whatever information is received allows the negotiator to set her own first offer advantageously by adjusting the offer for maximum, ultimate gain.

First offer—large demand. For a first offer, which was ideally made only after the other party made its offer, the competitive negotiator states an extreme demand, which is beyond or at the far margin of the range of credible or reasonable offers. This has the effect of setting the perceived or apparent bargaining range. When combined with the tactic of splitting the difference, it allows the user to manipulate the other party for maximum gain.

* * *

If the other party's initial demand is extreme or high in this fashion, it is a good indicator it is hard-bargaining. In dealing with such an opening, you can either ignore it by tactfully stating that it is extreme, and you will not use it as a basis of bargaining; or counter with an equally extreme demand in the

other direction. Both of these moves have the effect of nullifying the initial claim.

Anchoring. Anchoring is fixing or establishing the focus of discussion around a certain point, whether it be a figure, a range, an issue, and the like, simply by asserting it. As a technique, anchoring plays on human suggestibility, that is, on the human tendency to fix attention on, and be influenced by, what someone says.

* * *

False demand, false concession. In using the false issue or false demand-false concession tactic, a negotiator attempts to convince the other party that an issue, which she actually cares little about, is very important. The negotiator makes it appear that she will concede the issue only if the other party makes either a great concession or a particular concession which, perhaps unknown to the other party, has great value to the negotiator. When the concession is finally made, the negotiator reluctantly gives up or concedes the false demand. In effect, the negotiator obtains an important concession with an *asserted*, but not *real*, exchange of value.

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The false demand-false concession tactic is difficult to deal with because our ideas of what is important to the other party usually come from information the other party provides. This makes it difficult to discount the party's claims that some issue has great importance to it. Obtaining outside information, assessing probabilities, and probing questions aimed at establishing convincing justifications for the other party's claims are the major defenses.

Escalation. Escalation involves raising demands, in some way, either before or during a negotiation. Escalation before a negotiation can take the form of adding conditions to be met before the negotiation occurs. During a negotiation, escalating demands is another way of finding the limits of what the other party is willing to give to effect an agreement. It is particularly effective when used against conciliatory or naively cooperative negotiators.

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A party counters escalations during a negotiation by calling attention to them, by indicating that counterescalations are possible and by refusing to agree to any escalated terms.

Nibble or late hit. The nibble or late hit is a form of escalation which comes at the end of a negotiation after the parties have invested time and energy and the major matters have been resolved. The nibbler then raises a relatively small, but yet undiscussed, item and indicates that it "must have" the item or the negotiation may otherwise fail; in other words, it may be a "deal-breaker." Usually, the other party will concede because of the large psychological investment in the potential agreement and the apparent risk of loss. Importantly, this type of escalation can also involve significant matters.

The nibble is really a test of firmness or resolve that plays on possible impatience and frustration, on "sunk costs" and on deal momentum concerns. In dealing with a nibble, it helps to recognize that both parties can play the game of threatening a final agreement. Expressing a willingness to accept the

fact that the deal may fail and refusing to succumb to these demands may cause the nibbler to retreat from these demands.

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Linkage. Negotiators sometimes attempt to expand the scope of a negotiation by bringing in issues which, while not clearly related, a party can make a plausible case for. Successful linkage may change bargaining power and leverage, the focus and character of the dispute, or the set of gains and opportunities the parties are attempting to divide.

A famous recent attempt to transform a dispute and gain bargaining power through linkage was Saddam Hussein's attempt to tie the issue of Iraq's withdrawal from Kuwait to the Palestinian issue. Note that Hussein's effort was not only to introduce another issue, but to shift the alignments of the parties by introducing new parties and concerned "audiences." Had Hussein been successful, he would have expanded the focus of the dispute from an allegedly justified invasion of a sovereign state and possession and control of world oil supplies to include the Arab-Israeli conflict. The added issue would have been a "wedge" issue because it offered Arab states a reason to break their alliance with the West.

Linkage of issues or parties can have a positive or negative effect in a negotiation. Adding issues creates possibilities of tradeoffs that may not have existed previously. Adding parties may create tradeoffs and also change the dynamic of the negotiation. On the other hand, adding issues or parties can sometimes complicate matters, particularly where the added issues or parties increase the potential for conflict. A party should either agree or resist linkage, depending on whether the linkage enhances or inhibits the possibility of agreement. Of course, if a party is not prepared to deal with added issues and the consequences that handling them may entail, as was true of the United States regarding the Palestinian issue, then it should certainly resist efforts to add issues.

Salami. Eventually, as one slices thin rounds from a salami, it disappears. The salami tactic involves making a series of small demands, which, if all are conceded, add up to something considerable. Psychologically and practically speaking, small demands may be easier to tolerate and concede than large demands. Salami plays on this tolerance in order to make significant gains from small, consecutive, and perhaps seemingly inconsequential requests. Note, too, that a negotiator could use salami as a concession tactic as well as a demand tactic. Using it as a concession tactic might result in the negotiator giving up less overall.

Boulewarism. Boulewarism is, in effect, a single offer approach to reaching an agreement. It is the antithesis of genuine bargaining aimed at resolving issues. It is named after Lemuel Bouleware, a General Electric Vice-President and negotiator, who used this technique. It involves making a single, firm offer, usually based on a unilateral idea of what is fair or right under the circumstances, and, in effect, tells the other party to "take it or leave it." The offeror may act quite sincerely and believe that he is making the most reasonable offer possible. There is a certain arrogance in this as the posture does not permit the other party's input and, therefore, does not treat the

other party as a bargaining equal. Aside from any question of the substantive position taken, this tactic will likely create resistance and anger.

If genuine, the Boulewarism posture tells the other party that there is nothing to bargain. This posture is a way to assert an upper hand or make clear where a party firmly stands. Of course, this approach could be used as a tactic to mislead the other party into thinking there is no give when in fact there can be. While Boulewarism may be inimical to developing good relationships, it wears a cloak of righteousness and could be effective with weak or dependent parties. In this sense, it is a kind of authoritarian paternalism as much concerned with maintaining authority and future freedom of action for the offeror as it is with maintaining the substantive merits of a proposal.

Split the difference. Splitting the difference is a common phenomenon in negotiations. The parties reach a point where they are close to an agreement but remain some distance apart. Each party lacks compelling reasons to convince the other party to accept its position, and each is unwilling to give up its position. In these circumstances, the parties often agree to settle by splitting the difference. This approach seems fair, appears to involve equal concessions, and saves face for the parties. Aware that parties close to agreement are likely to split the difference, a party who may already have everything it wants in a negotiation can consciously use it as a tactic to exact a further gain. The tactic is often effectively used in conjunction with the first offer-large demand tactic.

Splitting the difference is not a bad method to employ, unless, of course, the other party has so manipulated the game that it gets an unwarranted gain when the difference is split. It is important to remember, however, that although splitting the difference seems fair, it is not necessarily so. Fairness depends on where the parties start. Splitting the difference is not the only "fair" formula to use to close the gap when the parties are some distance apart. You should seek other formulas which might divide the difference more advantageously.

* * *

Final offer. "Final offer" is just a statement that the negotiator has reached her final position and will concede no further. This could be true or false. If the statement is false, then the final offer is just a tactic used to mislead the other party into thinking the stated position is firm. In some ways, this is a risky tactic to use because a party must be prepared to terminate negotiations if the other party rejects the final offer. To claim "final offer" and then concede when the offer is rejected discloses that the offer was not actually final and creates a "cry wolf" reaction to subsequent final offer claims. A party could evade this consequence by linking a retreat from the asserted final offer to the receipt of some significant concession. If consciously used this way, the final offer tactic is similar to a false demand.

Misleading concession pattern. In win-lose or distributive negotiations, each side uses all available information and attempts to figure out the other party's bottom line in order to extract all possible gains. Reading the concession pattern is one way to do that. In theory at least, a party will make smaller and smaller concessions as the bargaining converges on his bottom line or reservation point. Knowing that this is a common view, a negotiator

can mislead the other party by planning a concession pattern which converges at a point above or below his actual bottom line. While “reading” the concession pattern, the other party may then extrapolate it to that point and mistakenly conclude the conceiver has reached his bottom line.

Red herring. A red herring is essentially a false, yet highly distracting, issue which a party can use to bring pressure to bear on the other party in a negotiation. Red herring is often used in politics, where politicians play off easily manipulated public fears to attack opponents regarding their stands, or lack of them, on red herring issues. The American communist or “red scare” in the late 1950s and the early 1960s is a good example. While red herrings may be most useful in negotiations where the parties represent outside constituencies which can be manipulated to bring pressure to bear on a recalcitrant party, negotiators sometimes use them tactically in ordinary negotiations. . . .

Threats, anger, and aggression. The use of threats, angry displays, and aggressive tactics in a negotiation may evidence personality, frustration, or calculation. . . .

Blaming or fault-finding. Perhaps most common in negotiations involving interpersonal issues, blaming, or assigning of fault is an aggressive tactic possibly having several aims. This tactic may invoke conciliatory behavior as a result of induced guilt feelings or a sensed need to mollify. It may distract by focusing the negotiation on a substantively irrelevant, but psychologically volatile or conflictual relationship issue. “Winning” the relationship issue may result in concessions on the substantive issue. Note, however, that a person can use the tactic even in arms-length transactions where the parties do not have a psychologically invested relationship. For example, the department store claims-adjuster could parry a customer claim by asking, “Do you have a receipt?” If a receipt is not actually necessary, the question implies that a receipt is necessary. Thus, the customer is *at fault* for failing to have one, and the store cannot process the claim *for that reason*.

Sudden change of mood. Sometimes, either during a single negotiation session or over the course of several sessions, a negotiator will shift radically from a reasonable, friendly tone to an angry, abusive, hostile tone, or vice-versa. Such a shift may reflect the conscious use of psychological tactics designed to confuse the other party, place it off-balance, and create vulnerability. . . . Response in kind or *tit-for-tat* is an effective way of dealing with such tactics.

Intransigence and entrenchment. Negotiators sometimes just dig in their heels and refuse to budge from a position. They may offer all sorts of reasons for not moving and skillfully counter arguments offered to persuade them to move. The refusal to move can be a ploy aimed at testing the other party’s firmness and discovering just how much concession room exists.

Sowing doubts; dismissals out-of-hand; or put-downs. Sowing doubts about proposals; curt dismissals of offers, positions, and concessions; and various other kinds of put-downs and denigrations are ways of shaping the other party’s perceptions of its own bargaining position and its expectations of what it can get out of the negotiation. . . .

Playing to fears or assumptions. Sometimes negotiators can advantageously manipulate the other party's fears or assumptions.

* * *

Deadlock and walkout. A deadlock occurs when the parties assert they are, or seem to be, hopelessly unable to agree. A walkout is a unilateral termination of negotiation, usually expressed by actually walking out of the negotiating room, often in a righteous huff. Negotiations sometimes become stymied, and the proceedings and lack of progress upset the parties so much that they feel they must leave the negotiations.

Deadlocking is risky behavior because it may mean there will be no negotiated settlement. Deadlocking likely results when a party is concerned with what it may lose through a negotiation. Psychological "prospect" theory is helpful in understanding this concern. This theory holds that persons will act to conserve current wealth, and that they have a risk-averse orientation toward seeking gains and a risk-accepting orientation toward preventing losses. In other words, persons will take risks rather than face a loss but will not take equal risks in order to secure gains. Consequently, parties who enter negotiations concerned with what they may lose are likely to engage in behaviors which risk deadlock, such as escalation tactics.

Whether or not people can articulate the prospect theory, they instinctively understand it. They interpret a party declaring a deadlock to mean that the negotiation proposals under discussion, if accepted, will impose an unbearable loss on it. Knowing that this is the likely conclusion to be drawn, negotiators sometimes consciously use deadlock and walkout as tactics. When used as tactics, they are simply threatening pretenses designed to mislead the other party into thinking the deadlocking party's bottom line has been reached, to test the other party's resolve, and to impel the other party to make major concessions. Such risky and high stakes tactics, however, make credible retreat difficult unless the other side does make a large concession. Consequently, to permit a return to the table without concession and to save face, negotiators often hedge deadlock and walkout threats with language providing an escape if they need it.

* * *

Friendliness. People are generally well-disposed to those who are friendly and more easily persuaded to give or concede them at least some of what they desire. Friendliness can be genuine, reflect good-will, or be a tactic used to mask an underlying aim to gain advantage....

Mutt and Jeff, good guy-bad guy, black hat-white hat. Mutt and Jeff, also called good guy-bad guy or black hat-white hat, is a well-known negotiation tactic combining anger, threats, hostility, and friendliness. In this tactic, two negotiators work together to off-balance the other party psychologically. One negotiator is hard, aggressive, angry, while the other negotiator is soft, friendly, well-disposed, and reasonable. Disconcerted and perhaps threatened by the attacking Mutt, the party being worked on turns to the friendly and reasonable Jeff, whom he or she feels may be an ally of a kind. Softened in this way, the target is more likely to make important information or position concessions to the friendly negotiator.

Negotiator without authority. Persons negotiating for others may or may not have authority to agree to the resolution of any or all issues concerned in the negotiation. A negotiator who does not have authority will have to clear proposed settlements with his or her principal. The negotiator-without-authority device, however, can also be used for tactical advantage in a negotiation, particularly where the other side is misled into thinking there is apparent authority to settle or is unaware authority is lacking. The negotiator who lacks authority or who pretends he lacks authority can explore the other party's positions and even gain concessions without making any real commitments or corresponding concessions of his own. Essentially, it is a way to obtain full information while reserving time to make careful, calculated decisions.

Claims of limited authority or the necessity to seek approval are also forms of the negotiator without authority tactic. A negotiator may invoke limited authority as a tactic to induce settlement within the limits assertedly imposed. The other party may simply not want to take the time or trouble to seek to go beyond the limits.

A negotiator could also assert authority to settle—meaning authority to discuss and make tentative agreements without any imposed limits—but subsequently claim the need to seek approval of any settlement. Although subtly different from the negotiator without authority tactic, this tactic can have the same effect.

* * *

Status, authority, association and credentialing. Although not commonly acknowledged, there are significant wealth, class, and status differences and distinctions in the United States. Most people are aware of them on at least an unconscious level. Wealth, class, and status distinctions and their trappings can sometimes influence negotiations. This occurs when one party is consciously or unconsciously impressed by the status, stature, or authority of the other side and either defers for that reason or makes unwarranted assumptions about the other side's power, strength, or resolve. One inoculates oneself from such influence by being aware of the phenomenon. If bitten, there are the antidotes of carefully considering the relevance of the displayed array, adopting a "show me" attitude and resisting persuasions based on a relative social position alone.

Association is a similar negotiation tactic using borrowed authority. There is a certain cachet that attaches to one connected with "important" or "famous" people. These real or asserted connections impress many people, but they are usually the non-thinking. Consequently, negotiators sometimes seek to legitimize themselves and their stances by making some claim of important association. (Name-dropping is a form of claiming legitimation or status by association.) The association may be real or feigned. Negotiators sometimes seek to enhance their bargaining position by involving well-known persons or authorities by actually bringing them to the table or by in some way obtaining their blessing. Asserted but false association is a trickier form of the same tactic. In either case, one should guard against undue persuasions based on authority.

Principle. Appeals to principle are often highly persuasive. On the other hand, negotiators and others, including politicians, sometimes use principles in unprincipled ways as tools to manipulate. Unless simply horse-trading or haggling, most bargainers invoke principles as a justification for positions they take. Indeed, one good way to prepare for negotiations is to develop arguments of principle for the positions one takes. There is a difference, however, between deriving positions from principles and finding principled arguments to support a position taken for other reasons. The latter may be simply rationalizing or seeking to find a high moral gloss for what is actually a calculation for private advantage. One should not be easily taken in by arguments of principle but should seek close, reasoned justifications supported by evidence.

Time, timing and end-game. Time is important in negotiations and can be used in many ways. Usually, the party that is more patient or less pressed for time has an advantage. The need to come to agreement within a specified time may force one to make concessions one would not otherwise make. A negotiator can also pretend that time is important when it is not, forcing the other party to a speedy agreement or to hasty concessions.

Cunning negotiators who know that the other party is under some time deadline or pressure to conclude negotiations can use time to their advantage. As the time deadline approaches, they may begin to stall, to raise new issues or resurrect old ones, to inject new complications, to produce documents containing already rejected agreement language, or generally to appear to unravel what once appeared already settled. The hope is that the need to reach an agreement by a certain time will force the needy party to make significant concessions. It may even force the needy party to concede points already won. Not having a deadline, not announcing a deadline, patience, and a willingness to walk away are ways to deal with such tactics.

Deadline. When both sides bargain competitively but also want a deal, most concessions will likely occur toward the end of the negotiation when the deadline approaches. In the initial stages of a competitive negotiation, the parties mutually explore each other's position and test each other's firmness and resolve. If both parties are competitive, they will both follow the firmness strategy. When they do, the negotiation becomes a contest of respective resolve. As a result, neither party is likely to move much until it appears absolutely necessary. Deadlines under urgency, especially externally imposed deadlines that preclude or seriously inhibit further negotiations bring the parties to the very brink of the consequences of non-agreement. Examples of such deadlines include the beginning of a trial, a company's need for a certain product to meet its own manufacturing deadline, or other contractual obligation. Indeed, it is as the deadline approaches that competitors are most likely to attempt to outwait the other party so that the need to settle and related time pressures cause them to concede.

Setting a deadline to accept or refuse an offer or position can also be a tactic, although it may be dangerous and risky. A deadline may succeed where the side imposing the deadline is committed to accepting the consequences of no agreement and the other side has less resolve. Where the consequences of no agreement are severe for the side refusing to agree, the approach of the deadline enhances psychological pressure and concentrates the mind on the

downsides of refusing to agree. Certainly, if the side refusing to agree is simply bluffing, then the deadline calls the bluff and changes the contest to a test of resolve.

Draftsman or single negotiating text. Sometimes a party to a negotiation will bring to the table a document it has already drafted and offer it as a basic text to set the agenda or to work from in moving toward a final agreement. While this is often a useful technique to advance negotiations, it is also a powerful tactic because a document tends almost irresistibly to set the agenda and focus the parties, not only on particular issues, but also on a prescribed resolution of those issues. It is really a way to take the initiative in negotiations. The other party's choices include either working with the document, ignoring it, offering a counter-document, or using enormous self-discipline in dealing with the document for selective advantage.

* * *

Irrevocable commitment. One problem a negotiator may have is persuading the other party that the negotiator has reached his bottom line, particularly when he has not. One way to accomplish this is to apparently commit oneself to a course of action which shows the other party that the negotiator cannot budge. For example, union negotiators could propose a negotiating position to the union and ask the union to vote on it. If the membership adopts it, then the negotiators can claim to management that they cannot agree to a less advantageous settlement position because the union would dismiss the negotiators and strike.

DAVID LAX & JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN*

123-30 (1986).

[C]onsider two equally senior law partners trying to decide which one gets the prestigious corner office overlooking the bay. Either Cadwalader or Botts will get the office if they can agree, but if they cannot, it will go to Stimson, an annoyingly aggressive junior partner. Because both senior partners want to maintain the traditional privileges and rewards for seniority and performance and because both detest Stimson, each prefers that either one take the office rather than let it fall to the upstart.... Because Cadwalader is a litigator and Botts is a tax man, they have no other real involvement and thus neither has a means to compensate the other for not taking the office. For either senior partner, successfully claiming value means getting the office for himself.

* * *

THE COMMITMENT

Such a distributive bargain can be "won" by the side that first commits credibly and irreversibly to a preferred settlement.

One bargainer commits to a point in the bargaining range by imposing large costs on herself for accepting settlements less attractive than this point. If these costs would make accepting any lesser settlement worse than her

current alternatives, the other bargainer is stuck: he confronts a preordained choice between accepting the commitment point—which at least is in the bargaining set—or taking his own, less desirable alternative.

For example, suppose that Cadwalader, egged on in a rash moment by fellow litigators, makes a bet in the partners' dining room with a greedy but valued client: if Botts gets the office, Cadwalader will pay the client \$50,000. If it bothers Cadwalader more to lose \$50,000 than to see Stimson get the office, this bet changes his valuation of the outcomes: now he would rather let the office go to the upstart than agree to give it to Botts. If Botts believes that the client will not let Cadwalader out of the bet, Botts must choose between giving Cadwalader the office and giving it to Stimson. If Botts does not fly into a rage at the way Cadwalader has rigged the situation, and if, on reflection, he really prefers to see the office occupied by one of the senior partners, he has no choice but to agree to give it to Cadwalader.

* * *

But, making such a commitment binding, credible, visible, and irreversible is difficult. First, the claim might not be believed, even if true. . . . And, such commitments can sometimes be reversed. . . . Botts might attempt to persuade the client to repudiate his bet with Cadwalader for the health of the law firm and because it inappropriately alters the attorney-client relationship. In general, making commitments stick requires ingenuity and, often, a substantial investment of resources.

Even a successful commitment to a position may not obtain the desired agreement. First, if the negotiators make incompatible commitments from which they cannot back down, they will deadlock. If Botts simultaneously makes a similar agreement with his biggest client, and neither he nor Cadwalader budge, Stimson gets the office. Second, the commitment itself can change how the person on whom it has been sprung values the possible outcomes. For example, if Cadwalader's commitment angers Botts and causes him to crave revenge—by keeping Cadwalader from getting the office—more than the tradition that he originally valued, if Botts would feel publicly shamed by conceding, or if he believes that giving in to such tactics would set an intolerable precedent, Botts may come to prefer no agreement to letting Cadwalader win. If so, Cadwalader's commitment may only have been the first move in a destructive escalation of conflict.

* * *

The artificiality of these examples should not obscure the practical importance of commitments. They are potent tactics in much more complex situations. For example, when a major investor attempted a hostile takeover of a large company, he included an interesting clause in agreements over the money he raised for the takeover: the interest rate he would be required to pay for this money would jump by 1.5 percent if he chose to make a counteroffer higher than his initial offer. Or, consider NATO's decision to put a significant number of American troops on the border of West and East Germany to commit the United States to respond to a Russian invasion of West Germany. Although the NATO forces would be unable to repel an

invasion, it would necessarily kill American soldiers and a U.S. administration would incur huge political costs if it did not respond.

* * *

Negotiators sometimes threaten drastic consequences if their highly partisan demands are not met. A threat can be understood as a conditional commitment to do something undesirable if the threatened party does not comply. To take a farfetched example, suppose that a mild-mannered accountant threatens to blow up the seller's car if she does not sell it to him for a pittance. Suppose she refuses. What would motivate him to carry out the threat? It would be costly, messy, and dangerous for him and still he would not have the car. He has a serious credibility problem. Contrast his threat with the implied threat of co-CEO Lew Glucksman of Lehman Brothers to provoke internal upheaval and perhaps take the profitable trading operation to another firm if his abrupt demand to run Lehman by himself was not honored. Glucksman, with a reputation for volatile, vindictive, and even irrational actions, conveyed the powerful impression that his feet were "set in concrete"; he left little doubt that the apparent costs of executing his threat were meaningless to him and that he would act. In general, a threat tends to be more effective the more the underlying commitment to carry it out is binding, credible, visible, and irreversible.

* * *

Making a commitment risks impasse if the other party becomes incompatibly committed. Moreover, a negotiator usually does not know his counterpart's reservation value. With bad luck, too greedy a commitment may be unacceptable and, if irrevocable, will cause a breakdown.

Not surprisingly, some commitments, especially blunt ones, lead to bargaining explosions. The victim may not like the precedent being set for the style of future dealings. Or conceding to a blunt commitment may involve sufficient loss of face as to be undesirable; the commitment can start a destructive escalation of conflict.

Commitments based on "fair" principles and social norms are likely to be more effective than those made to apparently arbitrary positions. (Like committing to a position, one commits to a principle by imposing costs on oneself for abandoning that principle.) This may be true for reasons beyond any natural appeal of focal points.

A number of studies suggest that when a bargainer attributes his concession to his own weakness and the counterpart's strength, a blowup is likely. The bargainer would lose face or self-esteem by conceding. When this new interest (face) is included, he may find that no agreement, which retains self-esteem, is better than an agreement that seems to sacrifice it. This might well be the case for Botts when Cadwalader makes his bet or when someone stubbornly insists on an apparently arbitrarily chosen \$104 settlement without any explanation. In contrast, when the bargainer can attribute the concession to something *outside* the two parties such as a mutually recognized norm, concession may not cause a loss of self-esteem. One might commit to refusing an employee a raise in various ways that do not risk his losing face in the dealing. For example, one may argue that such a raise would set an unacceptable precedent for all other employees in the same job grade or that

one's boss would not accept it. Skillful commitments to norms and external standards are more likely to lead to concessions than commitments to more arbitrary points.

GARY LOWENTHAL, *A GENERAL THEORY OF
NEGOTIATION PROCESS, STRATEGY,
AND BEHAVIOR*

31 U.Kan.L.Rev. 69, 76-77 (1982).

Rigid commitment to a position at or near an opponent's minimum settlement point, therefore, is a basic tenet of competitive negotiation: As a result, the competitor often will find a means to restrict her flexibility, usually before entering negotiations or early in the bargaining process. The plea bargaining strategy of Vice President Agnew in 1973 illustrates this principle. Federal authorities investigated Agnew for receiving kickbacks from contractors, primarily while he was Governor of the State of Maryland. The Justice Department's overriding concern in plea negotiation was for Agnew to resign the vice-presidency as soon as possible, to avoid an extended constitutional crisis. Other prosecutorial priorities included a public disclosure of the facts uncovered during the investigation, and an in-court admission by Agnew that he was guilty of either bribery or extortion, the two most serious allegations made against him. During initial plea negotiations, which were held secretly, Agnew's lawyers indicated his willingness to resign office, so long as he could plead *nolo contendere* to a tax evasion charge, with no admission of guilt by the Vice President, and with a promise that he would not be sentenced to jail. Negotiation reached an impasse when the parties could not agree over the need for Agnew to acknowledge his guilt publicly. In addition, the Justice Department would not go on record with a recommendation against incarceration.

Agnew's response to the impasse was to "go public" with a series of pronouncements designed to rally support for his plight. In a well publicized speech, he took emphatic positions on both his innocence and his intentions concerning a possible resignation from office:

In the past several months I have been living in purgatory. I have found myself the recipient of undefined, unclear, and unattributed accusations that have surfaced in the largest and most widely circulated organs of our communications media. *I want to say at this point—clearly and unequivocally—I am innocent of the charges against me...* (applause)

I want to make another thing so clear that it cannot be mistaken in the future. Because of these tactics which have been employed against me, because small and fearful men have been frightened into furnishing evidence against me ... *I will not resign if indicted. I will not resign if indicted...* (cheers and wild applause)

Agnew's remarks were, by one account, "an unsubtle variety of public plea bargaining: make me a better deal, or I'll turn your country upside down for you." His public pronouncements of innocence and persecution communicated to his many supporters that he would not back down in a confrontation with the Justice Department. He could not, after committing himself publicly to this posture, make major bargaining concessions without looking like a fool.

The Justice Department negotiators were left with the sense that an expeditious resignation of office would not be forthcoming, especially on the prosecutors' terms. Indeed, when negotiations resumed, the prosecution softened its position on the extent of Agnew's public acknowledgement of guilt, and also acquiesced to an agreement calling for no incarceration.

JOHN OESCH & ADAM GALINSKY, *FIRST OFFERS IN
NEGOTIATION: DETERMINANTS AND EFFECTS*

[<http://ssrn.com/abstract=399722>].
(2003).

In every negotiation, someone must go first. Whether bargaining over the price of a used car, seeking agreement on a starting salary, or resolving a household dispute, all negotiators either make or receive the first opening offer. The question of whether to go first often plagues many negotiators. Should I begin the negotiation, or should I wait to hear what the other person offers? The uncertainty surrounding most negotiations and the often mixed motive nature of negotiations only complicate this issue. In such an exchange, the first offer can serve several purposes. For the recipient of the first offer, it can be the first available piece of substantive information, providing insight into the nature of the bargaining zone. For the hesitant, uncertain negotiator, the first offer can help to smooth the process and get the dance going. For the presenter, it can be a strategy for acquiring information, a message about tactics, a symbol of intent, or a valuable anchor.

First offers have powerful effects on outcomes. Because of this power, negotiation scholars and practitioners need to know more about the antecedents and consequences of first offers. . . . We intend to provide insight into the factors that may predict who is more likely to make the first offer, how extreme that offer might be, how the first offer may guide and influence the final outcome, and how the first offer might affect evaluations of outcomes. We also examine the prescriptive question of who should make the first offer and when.

FACTORS AFFECTING WHO WILL PRESENT THE FIRST OFFER

In most negotiations, both parties have an opportunity to make a first offer. Sometimes, the first offer is a list price; for example, in buying a house, the seller makes the first official offer by supplying a list price. However, in this situation the first offer by the buyer can sometimes be considered a first offer. In situations where no price has yet been mentioned, we have a pure form of opportunity to present the first opening offer. What contextual factors lead one or the other negotiator to make that first offer? There are no hard and fast rules for whether a buyer or seller should be the first to step in. Inexperienced negotiators do possess beliefs about appropriate actions in a negotiation, but a content analysis of their cognitive scripts reveal no assumptions about who should make the first offer. We next describe some of the factors that affect who will present the first offer.

Power is one determinant of who will open a negotiation. Power in a negotiation is often determined by the strength of one's alternatives to the negotiation, by one's BATNA (Best Alternative To A Negotiated Agreement). A strong BATNA is a source of power because it allows the negotiator to be

less dependent on the current negotiation to meet his or her needs.... Negotiators with better alternatives are more likely to make a first offer in a negotiation. In addition, when a negotiator is placed in a low power role (e.g., candidate in a typical job negotiation), they are less likely to make a first offer. Overall, power, defined either as the strength of alternatives or structurally, predicts who make the first offer.

Stereotype activation is another factor that affects who will make the first offer.... Although gender has no known effect on negotiation propensity and very little effect on negotiating competitiveness, a negotiator's consideration of these stereotypes can have a considerable effect on whether or not that negotiator will make the first offer. Given the perceived relationship between effective negotiator traits and gender stereotypes, simply making a negotiation diagnostic of ability is enough to activate a phenomenon known as stereotype threat. Stereotype threat is concern a person feels about confirming, as self-characteristic, a negative stereotype about one's group. When a negotiation is made diagnostic of ability women are less likely to make a first offer. Thus, although gender per se does not predict who will make the opening offer, once gender stereotypes are activated then gender becomes a determinant of who will step forward first with an offer.

Another factor that determines who will make the first offer is negotiator's past experience with making a first offer. Negotiators who had a first offer immediately accepted spontaneously generated counterfactual thoughts. Counterfactuals are thoughts of what might have been and they represent alternative realities for past events.... If making a first offer (or an extreme first offer) appeared to lead to a poor outcome, the presenter of a first offer might focus on what might have been had he/she waited to receive the offer and these thoughts may make the person gun shy in the context of future negotiations.... Thinking about what might have been in one negotiation can influence the attitude toward making first offers in future negotiations.

Finally, we list two factors that may affect who would make the first offer. Because we have found no empirical evidence in the literature for these factors (and because making a first offer has only recently become a dependent measure), we include information and expertise in a category of future research that needs to be accomplished. The first factor to consider is information, or more specifically, asymmetries in information across the members of the negotiation dyad. We suggest that when negotiators perceive that the other side has more information than they possess, they will be less likely to make a first offer. That is, perceptions that the other side has an information advantage should be negatively related to the probability of making a first offer. Related to information asymmetry is the question of expertise. When the expertise is specific to the item to be negotiated or the market in which the negotiation takes place, expertise could be construed as a type of information advantage. Regardless of the specific content of a negotiation, expertise may also be thought of at the procedural level; expert negotiators have intimate knowledge about the negotiating process. This general proficiency concerning the process of negotiations may affect the propensity to make a first offer, but it is hard to predict whether expertise will increase or decrease the likelihood. Perhaps negotiation proficiency will make people more sensitive to the conditions that lead making a first offer to have an advantage; expertise about negotiations may allow a negotiator to determine in

which negotiations it is wise to make a first offer, figuring out when to use a first offer to anchor an opponent and when to wait for an offer in order to collect information. Thus, expertise may moderate the effect of information asymmetry on willingness to make a first offer.

When looking at all these factors together, the probability of making a first offer appears to be related to confidence, to a phenomenological experience of having control. If one lacks power, defined either structurally or through the available alternatives to the negotiation, one is less inclined to make a first offer. If one is threatened by the activation of a negative stereotype about one's group, then one is less likely to make a first offer. If one is haunted by counterfactual thoughts, by thoughts of what might have been, then one is less likely to make a first offer. The fact that making a first offer can often confer a distributive advantage at the bargaining table, these variables that lessen the likelihood of making the first offer suggest one mechanism through which the negotiating advantages can become self-perpetuating.

FACTORS AFFECTING THE EXTREMITY OF A FIRST OFFER

Extreme first offers can be very beneficial to those who present them, they can anchor the negotiation in one's favor. However, it should be noted that extreme first offers contain an element of risk. For example, an attempt to anchor an opponent could become an inaccurate signal about the presenter's preferences and what the zone of possible agreements is and cause the receiver to terminate the negotiation. The extremity of a first offer therefore should be positively related to impasses (i.e., a situation in which the parties fail to reach a mutually acceptable agreement). In addition, extreme first offers can increase transaction costs; a less extreme first offer lessens the time to settlement by reducing the number of concessions necessary to reach agreement. Thus, if a negotiator perceives high fixed costs associated with bargaining and needs to reduce the cost of negotiating, he or she will make a less extreme first offer. Several social psychological variables also influence the extremity of first offers.

There are multiple points within a negotiator's bargaining position, from target price—the ideal or most preferred outcome—to a minimally acceptable settlement price on which a negotiator can focus. How do these separate points influence the extremity of first offers? Classic negotiation with its root in game theoretic bargaining models, focuses on negotiators' lower bound, such as reservation price, in predicting outcomes but is moot on both the role of target prices in predicting negotiated outcomes and what effect these focal points have on the extremity of first offers. Empirical evidence finds that negotiators who focus on their target prices tend to make more extreme first offers than negotiations who focus on their reservation prices. Power, in the form of alternatives, has been shown to affect aspiration levels in a negotiation which in turn have been shown to affect the extremity of first offers. Therefore, perceived power should affect the extremity of first offers.

Stereotypes can also affect the extremity of first offers. In a series of experiments designed to test effects of gender stereotyping on negotiation behavior, Kray et al. (2001) found that conditions designed to create stereotype threat (making the negotiation diagnostic of ability or linking stereotypi-

cally masculine traits to negotiator effectiveness) affected the extremity of first offers. Whenever stereotype threat was activated, first offers became less extreme.

Kray found that stereotype reactance also affected the extremity of first offers. When stereotypically masculine traits are linked to negotiator effectiveness and the link to gender is only at the implicit level, men make more extreme first offers in their favor and women make less extreme first offers. But when this link to gender is explicitly made, when women are told that their gender confers a negotiating handicap, women react against this constraint and make more extreme first offers in their own favor. Reminding women that their gender implies limitations to their negotiating ability, led women to engage in behaviors than ran counter to the stereotype, making aggressive and extreme opening offers.

Two other factors may affect the extremity of first offers: market information and framing. We can report no studies that directly address them; therefore, we will discuss and make predictions about these factors. We hypothesized that information asymmetry may affect who make the first offer in a price negotiation. Similarly, market information may have effects on the extremity of that offer. Reservation prices are often an indication of either available alternatives in the market or of recent transactions in the market. If a negotiator knows the range of prices for similar, proximal deals, he or she can choose an opening offer that is best for the purposes of anchoring his or her opponent. In an experiment designed to find the effects of first offers in the absence of market information Oesch and Whyte (2002) found that the best anchors were those outside the bargaining zone (above for sellers, below for buyers) but not so far outside as to be discounted or ignored by the recipient. Given this finding, we predict that negotiators with up-to-date market information will have a reasonable proxy for their opponent's reservation price and can therefore target their first offer to maximize their own gain.

Framing of potential outcomes in terms of either losses or gains has robust effects on how people make decisions. [This concept is described in greater detail in Chapter seven, *infra*.] Prospect theory suggest that people are averse to losses more than they are pleased with equivalent gains. Those who frame prospects as a loss are more likely to make riskier choices than those who frame prospects as gains. In negotiations, framing manifests in behaviors such as lower demands, larger concessions, and more settlements from gain frame negotiators. We predict that gain frame negotiators will make less extreme first offers.

Knowledge of a negotiating opponent's frame also affects perceptions and tactics. Negotiators who know that their opponent has a loss frame are biased toward believing that their opponent will be more cooperative. Thus, they demand more and make fewer concessions from an opponent who they believe to be in a loss frame. We therefore predict that negotiators who believe their opponent to be in a loss frame will make more extreme first offers.

EFFECT OF FIRST OFFERS ON FINAL OUTCOMES

First offers have a powerful effect on outcomes. Early research in negotiation established a positive relationship between the extremity of first offers

and positive in simulated bargaining experiments. Subsequent studies revealed that extreme first offers followed by moderate concessions proved to be the most successful strategy in distributive bargaining. While concessions helped negotiators reach an agreement, the first offer had a more powerful effect on the final outcome because negotiators relied on it as information about their opponent's preferences.

Recent research confirms these early findings. These robust effects led to further inquiry into the psychology of first offers and the effects of first offers on subsequent negotiation process. The most accepted explanation for these first offer effects is the common perceptual bias of anchoring and failure to adjust. An anchoring error occurs when a negotiator pays inordinate attention to an available piece of information that may not be either accurate or valuable then uses it to assimilate new information. The first offer can act as a powerful anchor when a negotiator assimilates new information into a framework that relies on that first offer as a salient decision standard.

* * *

There appear to be a number of conditions that determine when first offers will have a powerful assimilative effective on outcomes. When information is scarce (or in Kahneman and Tversky's vernacular, when judgments are made under uncertainty) negotiators are more likely to be susceptible to anchoring; therefore, when information is scarce, first offers have the potential to act as powerful anchors. The power of first offers to anchor a negotiation ultimately depends on how that first offer is perceived and then used by the recipient of the first offer. Negotiators respond to reference points when deciding on strategy and evaluating alternatives. Examples of reference points in a price negotiation include reservation price, aspiration price, and information about recent transactions in the market. Each of these points has been shown to impact the values of final sale prices. Whereas the simultaneous manipulations of both aspiration and reservations prices across both negotiators have indicated that reservation prices are a better predictor of final outcomes, focusing on aspirations produce more beneficial outcomes via the construction and presentation of first offers. Difficult, specific goals improve individual negotiator outcomes while moderate goals tend to enhance integrative agreements.

But anchoring with an extreme first offer is not universally successful. A first offer may or may not become a salient reference point and/or an anchor. . . . The power of the anchoring effect depends on how a first offer is considered by the recipient of that first offer. For example, extreme first offers have less effect than first offers close to an opponent's expected value. A very extreme first offer may be interpreted as an insult or may lead a recipient to believe that no agreement is possible.

It is clear that in many situations, the first offer in the negotiation has a powerful assimilative effect on outcomes. In fact, extremity of first offers will often explain over 50% of the variance in final outcomes. However, reference points and reference frames have been shown to be important moderators of the assimilative anchoring effect of first offers. Thinking about reference points that are inconsistent with the implications of the first offer can neutralize their assimilative effects and framing and having a negotiation framed in terms of losses can lessen the assimilative pull of first offers.

EFFECTS OF FIRST OFFERS ON EVALUATIONS OF NEGOTIATED OUTCOMES

Negotiators tend to evaluate their outcomes against reference points such as reservation price or target price. An opening offer can also function as a salient reference point for evaluation. If the opening offer is used as an evaluative standard, the negotiator who made that first offer may view all concessions as losses. In addition, extremity of first offer can have a negative relationship with evaluations of the final outcomes. Galinsky et. al. found that first offers have opposing effects on outcomes and evaluations. Extremity of first offer positively influenced final outcomes but negatively influenced evaluations. Extreme first offers can lead a negotiator to do better but a leave a negotiator to feel badly about that objectively superior outcome; extremity of first offers were responsible for systematic disconnect between outcomes and evaluations.

* * *

Two other factors may predict the effects of first offers on evaluation of negotiated outcomes. The first of these is the inferences that negotiators make about their opponents. Although bargaining behavior is often primarily determined by situational constraints, negotiators often attribute bargaining behavior to dispositional factors. We predict that these (mis)-attributions and their self-fulfilling nature is most likely to be influenced by the extremity of first offers. More extreme first offers are more likely to be attributed to an opponent's dispositional competitiveness or greed. Srivastava (2001) found that negotiators perceived their opponents to be more competitive if those opponents made more extreme counteroffers. This may be a side effect of anchoring; one's own first offer anchored their evaluations and attributions of their opponent's first offer. This focus on causal explanations for their opponents' behavior affected their own bargaining behavior and perceptions of fairness.

The other factor that may predict first offer effects on evaluations of negotiated outcomes is the primacy effect. The order of presentation of information affects which pieces of information become most salient. Primacy refers to the tendency of people to remember information and to be most influenced in attributions and evaluations by information presented to them first. Because first offers can be susceptible to this effect, we must consider primacy as a factor that could affect evaluations. If a negotiator feels unfairly treated by an opponent, he or she may recall instances within the negotiation process that led to the fairness judgment. The primacy effect suggests that the first offer will be readily recalled. In a parallel instance, participants in a group task were more sensitive to early fairness-related information than to later fairness-related information.

First offers have been shown to have direct impact on negotiator satisfaction. Making more extreme first offers (which will produce positive objective effects of outcomes) and having a first offer immediately accepted will increase dissatisfaction. First offers also appear to influence attributions for an opponent's behavior and might also impact fairness-related judgments. What is noteworthy is that, whereas first offers have an assimilative effect on final outcomes, they appear to have a contrastive effect on evaluations. First offers are one mechanism that can lead to a systematic disconnection between outcomes and evaluations.

RUSSELL KOROBKIN, *ASPIRATIONS AND SETTLEMENT*

88 Cornell L.Rev. 1-61 (2002).

INTRODUCTION

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

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

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

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

This Article explores the discrepancy between the standard model of litigation, which ignores negotiator aspirations, and the general negotiation literature, which identifies aspirations as central to understanding (and succeeding) in bargaining. The Article also advances a theory of how the effect of aspirations can be incorporated into the framework of the standard model, and provides experimental evidence consistent with the theory. The "refer-

ence point theory of aspirations" holds that negotiator aspirations can affect a variety of factors ("settlement levers") that litigation scholars using the standard model have heretofore identified as important to settlement behavior, and thus that aspirations can indirectly affect settlement outcomes. The experimental results provide preliminary support for the theory, although further research is necessary to understand fully the nature of the relationship between aspirations and settlement outcomes.

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

* * *

ASPIRATIONS IN NEGOTIATION

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

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

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There is a substantial body of empirical research across a variety of settings on the effect of goals on an individual's task performance. Social scientists have found a strong positive correlation between the difficulty of goals and an individual's performance. That is, when people are given (or

choose their own) goals for the performance of tasks, they tend to perform better if the goals are difficult to achieve than if they are easy to achieve. The reasons usually offered to explain these results are that difficult goals cause individuals to direct more attention to a task, to expend more effort, and to do so with more persistence. In other words, goals motivate action.

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

* * *

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

For type #1 pairings the average sale price negotiated was \$232,664. For type #2 pairings the average sale price was \$227,921. For type #3 and type #4 pairings, the average sales prices fell between the other two averages. Thus, the results suggest that high aspirations are correlated with better bargaining outcomes.

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

instruction. Although technically all subjects in these experiments were given identical target prices, the instructions can be understood as advising half to aspire to those high targets and the other half to aspire to the much lower reservation price.

Although the experimental results described above strongly suggest that aspirations play a role in determining bargaining outcomes, they provide no insight into the mechanism or mechanisms by which aspiration levels might have this effect. In other words, the observation that high aspirations appear to be associated with better outcomes does not explain how aspirations affect the judgment or behavior of negotiators in ways that lead to such results. Negotiation scholars within the legal community routinely advise their readers that negotiators with high aspirations tend to obtain more-beneficial bargaining outcomes. Although the implication that aspirations drive bargaining is quite clear, explanations as to why this would be the case are usually less so—if they are attempted at all.

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THE REFERENCE POINT THEORY OF ASPIRATIONS

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

1. *Aspirations as Anchors*

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

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

1000. Presumably, the difference in average responses was due to the different anchors (10 versus 200) to which the subject groups were exposed.

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

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

2. *Aspirations as Frames*

Prospect theory predicts that the utility consequence of options depends not only on the absolute value of those options, but also on whether the options represent a "gain" or a "loss" relative to some external reference point. While classical rational choice theory leads to the prediction that two plaintiffs who obtain a settlement that is \$10,000 greater than their reservation prices should be equally pleased (because the absolute value of their transaction relative to their alternatives is the same), prospect theory allows for the possibility that the utility consequences of such a settlement could vary depending on the reference point the litigants use as the basis for evaluating the transaction. Because utility depends on whether the prospect is framed as a gain or loss, this implication of prospect theory is often called the "framing effect."

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

It is possible, however, that litigants might reference their aspiration levels when evaluating settlement proposals or, alternatively, reference a combination of reservation price and aspiration level. In either case, prospect

theory and rational choice theory would predict different utility consequences for particular settlement proposals. Any particular settlement proposal is more likely to fall short of a high aspiration level than a low aspiration level. Thus, if a litigant evaluates a settlement in reference to his aspiration level, prospect theory leads to the prediction that a high aspiration will increase the likelihood that any particular settlement proposal will be viewed as unsatisfying rather than satisfying.

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

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

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

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

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REVISITING PRESCRIPTIVE ADVICE: SHOULD NEGOTIATORS SET HIGH ASPIRATIONS?

A. *Benefits of High Aspirations*

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

1. Negotiators with high aspirations might set higher reservation prices, thus skewing the range of mutually agreeable outcomes in a way that is beneficial to the negotiator.
2. Negotiators with high aspirations might determine that fairness requires a more profitable outcome for themselves, thus skewing the range of possible settlements in their favor.
3. Negotiators with high aspirations might demonstrate more patience at the bargaining table, which should, on average, improve the negotiator's payoff when a settlement is reached.

4. Negotiators with known high aspirations might cause their opponents to demonstrate less patience and thus to accept less desirable settlements than they otherwise would.

5. Negotiators with high aspirations might be more likely to reject offers that are superior to their reservation price, thus forcing the opposing party to make concessions in order to assure an agreement.

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

B. Increased Risk of Impasse

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

* * *

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

C. Reduced Satisfaction with Outcomes

A second cost to litigants of adopting high aspirations is the potential that they will obtain less utility from any eventual settlement amount than they might have enjoyed had they instead maintained lower aspirations. Recall that in the "Arnold and Charles" scenario nearly all subjects thought Arnold, who had a \$10,000 aspiration and obtained a \$15,000 settlement, would be happier than Charles, who obtained the same settlement but had an aspiration of \$20,000. The higher a litigant's aspiration, of course, the less likely she will be

to achieve the aspiration, often resulting in less satisfaction for the litigant, even holding outcomes constant.

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

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

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

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

CONCLUSION

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

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

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

DON A. MOORE, *MYOPIC PREDICATION, SELF-DESTRUCTIVE SECRECY, AND THE UNEXPECTED BENEFITS OF REVEALING FINAL DEADLINES IN NEGOTIATION*

94 Org. Beh. & Human Dec. Proc. 125-139 (2004).

In his 1980 bestseller, *You Can Negotiate Anything*, Herb Cohen tells the story of his first big business negotiation. His firm had sent him to Japan for a week to negotiate a deal with a potential partner. When he arrived, his hosts asked him when his return flight left. He told them. Cohen spent most of the next week being entertained at numerous parties, events, and outings. When-

ever he would ask about the negotiations they always assured him that there was plenty of time. They only started talking seriously about the deal the day before Cohen had to leave, and they worked out the final details in the limousine ride on the way to the airport. Cohen came away from the experience convinced that he had gotten the short end of the stick, and explained his strategic weakness by saying, "They knew my deadline but I didn't know theirs." His advice, like that of other practitioner-oriented negotiation guidebooks was to never reveal deadlines in negotiation.

Deadlines in negotiation provide a useful context in which to study the psychology of strategic prediction, primarily because deadlines are situational constraints that are imposed similarly on both negotiators. This allows us to ask questions that extend theory and research in a number of ways. Prior work has demonstrated that people tend to better appreciate situational influences on their own behavior than on the behavior of others, and that people tend to focus on a single causal factor when predicting outcomes. While these tendencies have many important implications that have generated a great deal of research, perhaps the most intriguing, and one that has received relatively little attention, is that in social interaction where two individuals are subject to the same situation, people will predict that the situation will influence themselves more strongly than it will others. The implication is that people think both that they will benefit more from beneficent circumstances than will others, and that they will suffer more in the bindings of situational constraints.

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TIME COSTS, TIME DISCOUNTING, AND FINAL DEADLINES

To understand the effects of time pressure in negotiation and why it is an interesting case for the problem of social prediction, it is important to distinguish the different types of time pressure. Time pressure arises from costs that people pay for the passage of time. Most negotiations include some form of time costs. The cost of delay includes the opportunity costs of the negotiators' time, but it may also include costs of bargaining agents such as attorneys or forgone income such as in labor strikes. Time discounting is a slightly different form of time pressure in which the value of the goal or prize declines with time. While time costs can exceed the value of the negotiating surplus (the value of the object being negotiated) time discounting affects only the value of the surplus. A negotiation over the price of a shipment of fresh ripe berries is subject to time pressure from time discounting because the berries will spoil. Most interesting for the present discussion is a special case of time discounting in which the value of the negotiating surplus drops to zero. This point represents a final deadline, after which no deal is viable. Schedules like Herb Cohen's airplane departure from Japan can impose final deadlines on negotiations.

In negotiation, one's own time pressure has consequences for one's opponents as well, and changes in the opponent's strategies influence one's own optimal responses. At the deadline, for example, the negotiation is over not only for the party with the deadline but for the negotiating partner as well. It is this feature that makes final deadlines interesting: One player's final deadline ends the negotiation for both sides, forfeits the negotiating

surplus, and leaves both sides with their alternatives to a negotiated agreement. If negotiators' predictions are myopic, then they will focus on the fact that the deadline will force them to concede more quickly. The fact that it will lead their opponents to concede more quickly as well will receive less thought.

Time costs and final deadlines both create incentives to speed up work, leading to similar decrements in performance. Time pressure tends to have a detrimental effect on the cooperative aspects of the negotiation. Negotiators under time pressure are less likely to have time to come to agreement, and when they do come to agreement they are less likely to find wise agreements that integrate their interests. The present paper, however, is focused on the competitive or distributive aspects of negotiation.

STRATEGIC CONSEQUENCES REVEALING TIME PRESSURE

Evidence clearly shows that when negotiators face different time costs, the resulting agreement tends to favor the party under less pressure. The party under greater pressure obtains a smaller share of the bargaining surplus for two reasons. First, negotiators with time costs are less demanding. The greater their time costs, the lower their aspirations and the more rapidly they concede. Second, the opponent is empowered with a threat of delay. An opponent who knows that the other party is paying time costs can credibly threaten delay.

Unlike time costs, one party's final deadline has direct consequences for the other party. Herb Cohen's Japanese counterparts could not have claimed victory if he had boarded his plane and left without having made an agreement. They too would have been left without an agreement.... Evidence shows that negotiators concede only as fast as they need to come to an agreement before a deadline. When both sides know about a final deadline, both know they need to come to agreement before the deadline or risk losing the benefits of a deal. On the other hand, if only one negotiator knows about a final deadline, that party will be racing to come to an agreement before time runs out, while the opponent will hold out, expecting a longer negotiation. The negotiator's faster concession rate will result in an agreement that favor the opponent.

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The results ... suggest a revision to the general advice that time pressure should not be revealed to competitors in negotiation. Bargainers who faced final deadlines obtained better outcomes when their opponents knew about their time pressure than when the time pressure was kept secret. Nevertheless, participants expressed the belief that revelation would hurt them, suggesting that most would not have revealed their final deadlines to their opponents given the chance. The experiment's findings, then, were unexpected, based both on the prior research literature and participants' own expectations. It is particularly noteworthy that participants' erroneous predictions came after having experienced several rounds of negotiation first-hand. Even participants with some experience appear to not fully appreciate that a final deadline ends the negotiation for the other side as well as for themselves.

* * *

This research makes several important contributions. First, it supports the hypothesis that when interacting people face similar situational constraints, each expects the situation to bind his or her behavior more tightly than it will the behavior of others. Second, the effect of this bias is magnified because people fail to see that others may see things just as they do. Third, these myopic and egocentric predictions influence behavior; when given the choice, the majority of negotiators do not reveal their final deadlines, even though doing so would have helped them by speeding up their opponents' concessions. The desire to keep deadlines secret suggests an important failure of strategic perspective-taking: Most participants did not see that telling the other side about a final deadline would speed up their concessions. The results, then, suggest a dual myopia in strategic thought. Not only did negotiators focus on the situation's effect on themselves when making predictions, but they failed to imagine that situational constraints would influence others in the same way as it did them. These predictions and behaviors are all the more remarkable because they do not appear to have been influenced by experience, at least not the experience that participants in these studies obtained....

Another contribution of this research is to distinguish time costs from final deadlines. Despite the fact that the two types of time pressure have very different effects in strategic situations, prior research has often failed to distinguish the two. Because final deadlines are necessarily symmetric in that they end the negotiation for both sides negotiators with final deadlines stand to benefit from others knowing about their deadlines. However, this piece of advice must come with one caveat: Often, revealing the reason for a final deadline simultaneously divulges the fact that he has poor alternatives to negotiation. For example, if one is negotiating over the sale of one's used car, saying, "We need to work out a deal in the next 15 minutes because I am moving out of the country and my flight leaves today," tell the other side more than the fact that one has a final deadline in 15 minutes. It also tells them that if they don't buy the car, it will have to be abandoned or given away. Revealing the existence of a final deadline need not include the reason for that deadline if the reason implies one has bad alternatives.

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An important practical question unanswered by the present research is when and how one should reveal one's deadlines in negotiation. Is it best to reveal them at the outset? What sorts of statements help make a final deadline credible? Another set of questions surrounds the strategic use of final deadlines. Given the pernicious effects of time costs, is it possible for negotiators with heavy time costs to pre-commit to final deadlines that will reduce the opponent's ability to threaten them with delay? These questions will have to be answered by future research.

CONCLUSIONS

The present findings suggest that negotiators with final deadlines may benefit from revealing their final deadlines. However, the findings also suggest that negotiators may be reluctant to follow this prescription because they predicted that revelation would hurt them. The reasons for these erroneous predictions and the choice to maintain self-destructive secrecy appear to arise

from myopic processes of prediction: Participants were able to imagine how a final deadline would affect their own behavior, but did not see how their own final deadlines were also their opponents' final deadlines. Prediction is fundamental to purposeful behavior. Wise specification of strategy necessitates the ability to consider alternative courses of action and anticipate their consequences. The results documented here suggest some of the systematic errors that result from the way people simplify the tremendous complexity of predicting social outcomes.

KRISTINA A. DIEKMANN, ANN E. TENBRUNSEL &
ADAM D. GALINSKY, *FROM SELF-PREDICTION TO
SELF-DEFEAT: BEHAVIORAL FORECASTING,
SELF-FULFILLING PROPHECIES, AND THE EFFECT
OF COMPETITIVE EXPECTATIONS*

85 J. Personality & Soc. Psych. 672-83 (2003).

In strategic interactions such as a negotiation, it is important to consider the strengths and weaknesses of one's opponent. However, how should one think about the other party in a negotiation? How do expectations of others, especially competitive expectations, impact behavior? Can people accurately predict, or forecast, how they will actually behave when faced with a competitive opponent?

The present research examined the influence of negotiator's expectations of their opponent on forecasts, behaviors, and negotiation outcomes. The fact that people's impressions and expectations of others, let alone rivals, are skewed negatively, with the general view toward others being described as sinister and misanthropic, raises the question of what effect competitive expectations about an opponent have on a negotiation. Specifically, we explored how negotiators, when faced with a competitive opponent, think they would behave and how they actually behave in a negotiation and whether there is a disconnection between their forecasts for their behavior and their actual behavior. We also demonstrate that these expectations have profound, consequential impact on the amount for which negotiators are willing to settle.

Study 1 focused on behavioral forecasts—namely, on individuals' predictions of how they would behave when possessing a competitive expectation of an opponent. The next studies focused on actual behaviors. Specifically, Study 2 examined the impact of competitive expectations of an opponent on the setting of one's own reservation price and the making of counteroffers during a negotiation. Study 3 investigated whether expectations of an opponent's competitiveness influence actual negotiated outcomes. Study 4 directly tested the disconnection suggested in the previous three studies by examining forecasts and actual behavior within the same sample.

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THE EFFECT OF COMPETITIVE EXPECTATIONS

One important question is whether or not expectations of one's opponent have any effect in competitive social interactions and if so, what kind of effect. Research on expectations in prisoner's dilemma games (PDGs) suggests that

expectations of one's opponent do in fact matter. An individual's decision to cooperate or defect is based partly on his or her prediction of what the other party will do. Kelley and Stahelski's (1970) classic study showed that individuals who expected the other player in a PDG to be competitive became more competitive themselves.

Given the above literature, it would seem that expecting a negotiating opponent to be competitive would lead the focal negotiator to become more competitive in return. Although both are instantiations of competitive social interaction, a prisoner's dilemma and a negotiation are structurally different, and thus we contend that they activate different motivations. In a PDG, it is always better for the individual to defect rather than cooperate, although these individually rational decisions to defect can lead to mutually undesirable outcomes. This rationality of defection is especially true when one expects the opponent to be competitive, because cooperating when an opponent defects leads to the worst possible outcome for the cooperating individual. Thus defecting, acting competitively in the face of a competitive opponent, protects one's own interests. A competitive response to a seemingly competitive opponent in a PDG is a wise, self-protective strategy.

Although a negotiation (e.g., negotiation over sale price on a house) and PDG can both be characterized as mixed-motive interactions, the motivations are quite different. A buyer in a negotiation, for example, not only wants to get the best price on an item but often ultimately wants to possess that item. Although opting out of the game is not an option in a typical PDG, walking away from the negotiating table and declaring an impasse is an option in a negotiation. This would suggest that negotiators, compared with PDG participants, have more power because they have the luxury of terminating participation in the negotiation; in essence, negotiators have more alternatives than PDG participants, and number and strength of alternatives are often associated with power in competitive social interactions. However, negotiators typically enter a negotiation wanting to get a deal accomplished; they are highly motivated for the negotiation to be completed and declared a success rather than for it to end in impasse and be declared a failure. In fact, impasses diminish a negotiator's sense of self-efficacy and produce negative emotions and feelings of inadequacy. Because negotiators consider an impasse to be a sign of failure and seek to avoid it, responding competitively to an opponent whom one expects to be competitive may not appear to be the wisest course of action: A competitive response may result in an impasse and its concomitant feelings of failure. Faced with a seemingly competitive opponent, a negotiator may become less competitive, lowering his or her reservation price, demands, and counteroffers to secure an agreement. Thus, in stark contrast to a PDG, we predict that armed with competitive expectations, negotiators will disarm themselves and respond with less competitiveness.

BEHAVIORAL FORECASTING

Although we believe that expecting a competitive opponent will lead negotiators to act less competitively and to incur substandard outcomes, do negotiators recognize that this is how they will respond, or do they think that they will fight fire with fire, responding with a commensurate amount of competitiveness? This raises the larger question of how accurately people can predict their own affective states, preferences, and behavior in the future.

A multiplicity of studies have suggested that people are not very good forecasters at all. For example, work on affective forecasting suggests that judgments of predicted and actual reactions to positive and negative hedonic events often diverge. When predicting emotional states in the future, individuals fail to consider that other events will intercede, thereby lessening the impact of any one event. This problem of focalism leads people to predict that their future reactions will be more intense than they actually are. Furthermore, people seem to anchor on their current state and feelings when making predictions about their future state and feelings.

Not only can individuals not successfully predict how they will feel in the future, but research on behavioral forecasting suggests that people are not very good at accurately predicting their own future behavior. People are only moderately accurate in predicting whether they would engage in certain behaviors and make particular choices in the future and exhibit overconfidence in their self-predictions. Furthermore, people are overly optimistic in how quickly they can accomplish their goals and tasks, subjecting themselves to a fallacy of easy planning and quick implementation, and are also overly optimistic in how successful they will be in achieving desired outcomes. Generally, from a distance people are confident in success, but as the moment of truth approaches optimism quickly dissipates.

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Consistent with this literature on behavioral forecasting errors, we believe that individuals will fail to accurately predict how they will behave when faced with a competitive opponent in a future negotiation: When actually negotiating, individuals will become less competitive, but when making forecasts, individuals predict they will become more competitive.

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Extending this logic, we believe that individuals making predictions will overlook the motivations that will be brought to bear in the future situation. In the current investigations, we focused on one particular motivation in negotiations: the desire to reach an agreement and avoid an impasse. Negotiators, in predicting their responses to a competitive opponent, will focus on ways to confront and battle that competitiveness but without considering their desire to reach agreement. Negotiators may think they will be champs but in the end they become chumps.

Consistent with this reasoning, participants in a pilot study, who were simply instructed to imagine they were about to negotiate with either a very competitive or less competitive opponent, believed that they themselves would become significantly more competitive when facing a very competitive opponent compared with a less competitive opponent. However, given the lack of specificity of the situation (i.e., participants were not given any specific negotiation situation to consider), it is possible that these participants were imagining a situation far different from the ones faced by individuals in actual negotiations and from the one our participants faced.

* * *

[Detailed description of 4 empirical Studies]

GENERAL DISCUSSION

The purpose of this article [is] to examine (a) whether and in what direction negotiators' expectations of their opponent's competitiveness influence negotiators' forecasts of how they would respond and (b) how negotiators' expectations of their opponent's competitiveness affect their actual behaviors and negotiated outcomes. Study 1 found that negotiators who expected a very competitive opponent predicted they would become more competitive than those who expected a less competitive opponent. In Study 2, we turned to actual behaviors and examined the effect of competitive expectations on the setting of reservation price and counteroffers made during a negotiation and on offer acceptance. We found that negotiators who expected a very competitive opponent became less competitive than those who expected a less competitive opponent by setting lower, less aggressive reservation prices; by making lower, less aggressive counteroffers (i.e., making greater concessions); and by being more likely to accept a final offer that slightly exceeded their BATNA. Study 3 examined negotiators' actual behaviors and outcomes in a face-to-face negotiation and found that negotiators who expected a more competitive opponent set lower, less aggressive reservation prices and agreed to lower, less favorable negotiated outcomes, demonstrating that randomly assigned expectancies were fulfilled. Study 4 then tested directly the discrepancy between forecasts for future behavior and actual behavior suggested by the previous studies and found again that negotiators predicted they would become more competitive when facing a very competitive opponent, but they actually became less competitive. Results further show that negotiators facing a very competitive opponent were significantly more relieved to reach an agreement than those facing a less competitive opponent. In addition, the target of the competitive expectancy came to see the self as more generally competitive; the self-fulfilling nature of expectancies was extended to self-perceptions. The combination of these studies reveals a discrepancy between what negotiators thought they would do versus what they actually did when expecting a competitive opponent.

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Behavioral Forecasting

Across multiple studies, we found that there is a disconnection between how individuals think they will respond when negotiating with a very competitive opponent and how they actually respond. Negotiators think they will become more competitive, but they actually become less competitive. We demonstrated behavioral forecasting inaccuracies across different samples and within the same sample of participants, using both decontextualized and fully specified prediction situations, and found similar inaccuracies in behavioral self-predictions across these various methodologies.

Why are people inaccurate in predicting their future behavior in the face of competitive expectations; in particular, why do they think that they will fight fire with fire in negotiation? Whenever people fail to recognize the actual motivations that will be inspired by future situations, errors in behavioral forecasting should emerge. In the current studies, we contend that negotiators failed in their forecasts to take into account the desire to reach a deal, to

avoid the concomitant sense of failure that results from reaching and impasse. Thus, negotiators who possessed a competitive expectation of their opponent were more likely to accept a final offer and therefore avoid a sure impasse and felt more relief about avoiding an impasse.

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SELF-FULFILLING NATURE OF EXPECTANCIES

Expectations of an opponent's competitiveness consistently influenced the focal negotiator's reservation price and predicted outcome, which resulted in a lower, less favorable outcome. Expectancies that were randomly assigned and thus unrelated to the actual competitiveness of the opponent seemed to have been fulfilled. Negotiators who expected their opponent to be very competitive became less competitive by reducing their reservation prices and counteroffers, allowing their opponent to appear to be competitive and to get superior outcomes. After the negotiation, those possessing competitive expectations came to see the opponent as being rather competitive; their expectations of competitiveness were confirmed. These negotiators may have seen their opponent as being intransigent in his or her demands when in fact they were too tractable in their own. By reducing their demands in the face of a seemingly competitive opponent, negotiators burdened with competitive expectations ended up creating a reality that they possibly wished they had not created. They had gone from a self-fulfilling prophecy to a self-defeating one: Their erroneous expectations of their opponent led to genuinely inferior outcomes and enabled their opponent to claim more value.

For Further Reading

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3. Steven J. Brams, *FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION*. Cambridge UK: Cambridge University Press (1996).
4. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519-40 (1996).
5. Robert J. Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute-Negotiation*, 44 MD.L.REV. 65 (1985).
6. Herb Cohen, *YOU CAN NEGOTIATE ANYTHING* (1980).
7. Jules Coleman, *Negating Negotiation Avoidance Techniques*, 34 THE PRACTICAL LAWYER 83-95 (1988).
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9. Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 J. PERSONALITY AND SOCIAL PSYCH. 657-69 (2001).