

The Ethics of Compromise

Carrie Menkel-Meadow

Editors' Note: *Does how we negotiate reflect or shape our character, or both? Does choosing to negotiate have moral implications? What are the ethical and moral implications of making the assumption that negotiation is inappropriate? Here, Menkel-Meadow notes that not all negotiation is based in the idea of compromise, and discusses the ethical and moral underpinnings of our choices in negotiation—choices we can ignore we are making, but cannot avoid making.*

If you negotiate...you treat your principles as mere interests
and emerge compromised.

David Luban, Bargaining and Compromise, at 411 (1985)

Parties might settle while leaving justice undone.

Owen Fiss, Against Settlement, at 1085 (1984)

The compromise process is a conscious process in which
there is a degree of moral acknowledgment of the other party.

Martin P. Golding, The Nature of Compromise, at 16 (1979)

Criticisms of Negotiation as a Process

Most discussions of negotiation, including virtually everything in this book, begin with the assumption that negotiation is not only necessary to order our modern lives, but probably desirable as well. Negotiation is assumed to be a productive human process because it greases the social wheels of agreements and transactions to be made, disputes and conflicts to be avoided or settled, and relationships to be formed or made better.

But, in many circles of political philosophy and even some in law, negotiation is not a good thing at all—being morally defective because of its use of bargaining, traded preferences, and the presumed compromise of important principles.¹ In addition, many have criticized the “privatization” of justice that ensues when parties and their lawyers remove cases from courts, settle for money or other relief, and add insult to injury by signing secrecy agreements.² When this happens we lose our ability to have a public conversation about important social and legal val-

ues, we lose the stuff of which social norms are created (fact and law intensive cases producing richly reasoned precedents) and we diminish our polity by reducing what is (or should be³) debated in the public and transparent sphere. Others would add we are unable to determine, in private negotiations, whether justice has been done, both for the parties who negotiate, and for or “to” others who might be affected by the negotiation process or its outcome.⁴ Most recently, in the face of terrorism and “viral” warfare, some have suggested that there are circumstances in which it is wrong (morally and instrumentally) to negotiate with some other parties whom we cannot trust (such as terrorists or certain nation-states, e.g. North Korea) because to do so would grant them legitimacy they should not have.⁵ [Blum & Mnookin, *Not Negotiating*] Others have suggested that we should always leave negotiation open as an option, especially where violence and war are possible, or where trust may never be fully forthcoming (consider the purchase of used goods or one-shot negotiations, as in a flea market).

Negotiation as a Morally Preferable Process

In this essay I argue the case, as I have before,⁶ that negotiation is a moral and ethical process, worthy of deep philosophical, political, legal and human respect. While most who write about negotiation ethics focus on what I have called the “micro-ethics” of negotiation⁷ (how to behave inside a negotiation, e.g. whether and when it is permissible to be less than fully candid in negotiation, or what “tactics” might be appropriate), here I want to focus on the “macro-ethics” of negotiation—the justification of negotiation as an often morally preferable way of ordering human affairs.

Both I and others have argued the case for the instrumental (Pareto) superiority of negotiation processes, when conducted from a problem-solving, interests-based, or principled conception. There, the argument rests on the notion that well-planned and executed deliberations about true needs and interests of the parties will result in opportunities to “create value,” expand the available resources at issue, and/or solve human and legal problems, as well as create new relationships, entities or transactions.⁸

Here I want to reaffirm that when negotiation is conducted with these goals in mind it is not only instrumentally better (and justified by principles of utilitarianism) but morally superior to other forms of conflict resolution, for intrinsic or deontological reasons: serious problem-solving negotiation means we treat the Others in negotiation as morally constituted equals, or Ends not Means, in the negotiation.⁹ In addition, processes that seek peace, as well as a consensual form of justice, are, I suggest, morally superior to processes that encourage unproductive adversarial argument and continued strife (and perhaps violence). This means that even much criticized compromises¹⁰ may be morally superior, in some instances, to more so-called “principled” resolutions of problems that leave some parties looking for appeal, excuse, or worse, revenge. Of course, much of what I say here should be subjected to closer contextual analysis. Not all negotiations are created equal. Settlement of lawsuits is not the same as peace treaties after war or international treaties about trade or environmental conditions, but in general, I am prepared to say, as others have before me, “as long as the parties keep talking, they are not killing each other.”¹¹

Relation of Ends to Means: Negotiation as Ethical Choices

Of course, as part of this argument about the importance of negotiation as a violence-reducing, peace-making, and justice-seeking process, *how* one actually

negotiates matters a great deal. But like others,¹² I suggest here that *how* we negotiate is more than the sum of our behavioral parts. The stance, purpose or mind-set about what we hope to accomplish in a negotiation is an ethical and moral matter, long before we choose any particular behavior.¹³ Thus, whether one chooses an adversarial or competitive stance to “defeat the other side” (perhaps because of assumptions about the empirical world of assumed scarce or contested resources) or a problem-solving orientation that at least hopes that negotiation will make all the parties *better off as a result of the negotiation than they would have been without the negotiation* (and assumes that at least some joint gain is possible) is itself an ethical choice.

Here I am using “ethical choice” in the way at least some philosophers would. Simon Blackwell suggests that we create “ethical environments” by creating and choosing “the climate of ideas about how to live.”¹⁴ Choosing or elaborating models of negotiation, as well as the choice to negotiate, rather than to use some other process, like fighting, litigation or withdrawal, are ethical choices.

In my view, the choice to negotiate is ethical and moral (that is true, right and good) when it treats the Other (or counterpart¹⁵) as an End, not as a Means, in the Kantian sense. To negotiate is to acknowledge that one cannot accomplish one’s own ends alone—one needs others (even if one needs others to apologize, correct, or compensate for a wrong committed). Next, one makes ethical choices when deciding whether to maximize individual gain (often, but not always, at the expense of others) or whether to offer or look for mutually advantageous ways for two or more parties to act together (variously called interest-based, mutual gains or integrative bargaining).

The objective of a negotiation is ethically chosen—it is based, in Blackwell’s terms, on our “ideas about how to live” (I would add, “with others.”) Lawyers, as agents, may think they have to maximize their client’s gain as “zealous” advocates, although so might real estate brokers, sports and entertainment agents, and others, who think the objectives are for principals-clients to determine.¹⁶ The location of legal negotiations within the cultural and legal norms of both 1) the adversary system and 2) the “agency” of legal representation may make ethical choices in legal negotiations seem somewhat constrained.¹⁷

Those who make choices about objectives in negotiation often assume that a limited array of outcomes is possible. So those who see a negotiation as an opportunity to “win” or maximize one “side’s” gain assume scarce resources which must be allocated. More often, especially in litigation settings, sophisticated lawyers now make economic assessments about the expected value of their case (a probabilistic statement of the hoped for legal result weighed by the probabilities, best, worst or most likely outcome, before judge or jury¹⁸) minus the transaction costs of trial as compared to the transaction costs of negotiation and settlement, sometimes purely on the basis of transaction costs or “nuisance value.” Many critics have decried this form of “settlement without the merits”¹⁹ as being a non-law enforcing crass monetary alternative to formal justice. For those who think that negotiated justice should track legal justice this is a bad, some would say immoral, result.

But even if legal justice were achieved in other settings like full trial (and I am quite doubtful about how often that happens), negotiated justice may be better than legal justice in many, if not all, cases. To negotiate is to find out what someone else might need or want out of a situation in order to grant you what you want or need. It necessarily involves inquiry, discussion, and (even if conducted as argument for persuasion), engagement with our fellow human beings, assuming,

for purposes of the special discussion that negotiation is, that the parties are free to work with each other to seek a solution to a mutual problem that would put them in a better position than they would be in without the discussion.

Of course, there are potential problems with many negotiation structures and dynamics—one party may have more power, money, or better lawyers and so the negotiation may not be of actual equals. [Bernard, *Powerlessness*] This can lead to distortions, of potentially serious magnitude, in the negotiation process and the outcome it produces. But certainly the “power imbalance” problem, as it is known to dispute resolution professionals, is present in all other forms of dispute resolution—litigation, arbitration, mediation and certainly, withdrawal or avoidance.

When negotiators seek to explore possibilities for the creation of new entities or transactions, or to resolve disputes in any kind of negotiation, they must take account of the “other” side in a direct and engaged way. This is often more humanely “ethical” than the stylized miscommunication of other forms of dispute resolution.

Solved Problems, Peace, and Yes, Even Compromise

Even when outcomes of “compromise” or “peace” are sought, as opposed to that desideratum of problem-solving or principled negotiation—the pareto optimal solution—such outcomes may be more “ethical” than the binary or draconian solutions of other settings. Consider first that compromise may not be necessary for a successful bargain to be reached—the principled negotiation of Fisher and Ury²⁰ or the problem-solving negotiation suggested by Menkel-Meadow²¹ ask the parties to hold constant their own needs and interests and seek how they may both be satisfied, often by using the Homans principle of “complementary, not conflicting” needs and interests.²² This is negotiation as traded preferences or utilities (I get the icing, you get the cake.) Or, taking Fisher & Ury’s exhortation to use “objective criteria,” the parties might actually use reasoned argument to persuade each other of just, fair, legally required, or factually correct allocations.²³ Or, the parties may use their feelings, emotions, religious or ethical values to make the other side feel guilty or wrong, or kind and charitable, in order to get their way. Here the parties are using a third level of discourse—affective, emotional or value-based claims.²⁴ All of these forms of negotiation involve engaged discourse and interaction with others, assuming that the other party is similarly engaged (whether for instrumental or ethical reasons).

But even that most feared outcome of negotiation—compromise itself—can be thought of as moral or ethical. In many kinds of negotiations there may be no principled reason for allocation—think of child custody in a non-contested divorce with parents having equal parenting skills, or situations where right is either on both sides or on neither. Many years ago, legal scholar John Coons pointed out that “precise” justice sometimes requires solutions that meet in the middle or at least do not allocate everything to one party.²⁵ In many legal (and human and political) cases there will be inevitable indeterminacy of facts or law that may require even that most dreaded of negotiated outcomes—the 50/50 or “split the difference” solution. For, as Coons argues, where there is not a clear principle for allocation, or knowledge of crucial information for proper allocation, it may be most just to split the proceeds between those in dispute. This principled argument for compromise is deeply ethical on at least two levels: (1) it says that where there is no just reason for allocation, the parties should share *equally* in the uncertainty and (2) it is better to resolve a dispute or allocation problem *peacefully* by some method than not to resolve it all.

In the second sense of compromise suggested here, negotiation, even when it leads to compromise, is a moral process—it produces peace, resolution, and its own form of justness (justice) and fairness, especially when legal principles cannot be or should not be controlling. Compromise, bargaining, and negotiation produce resolutions and outcomes and have other moral qualities. They assume (and some would say wrongly) that all who participate live in a shared community and have equal rights to claim something and seek outcomes. Thus, bargaining legitimates the agency of those who seek to negotiate. This can be generalized to see negotiation as a democratic process—it encourages, indeed demands, participation and it cannot succeed, by definition, without “consent of the governed.”

The Politics of Negotiation

Furthermore, compromise, bargaining and negotiation are socially necessary for people to accomplish things, whether they are the unprincipled log-rolling of the traded-for legislative process,²⁶ the hard-bargained-for, split-the-difference solution between equipoised or exhausted and unresolved claims of rights or interests, or the recognition of mutual interest and cooperation (I will let you have some of what you want, if I can have some of what I want). While many have criticized those who compromise, especially “unprincipled” politicians, Machiavelli, at least, has argued that the leader sometimes must compromise, or at least, have no principles of his own, if he is to hold the whole (and conflicting) polity together.²⁷ And Edmund Burke, consummate politician, observed that “all government...every virtue and every prudent act is founded on compromise and barter.”²⁸ By finding “golden means” or agreeable, if not optimal, solutions to contested problems, politicians, like negotiators, make things happen, keep the peace, and often also keep some rough accounting of just deserts for the next time around. And in better case scenarios, negotiators can actually solve problems and get parties just what they need.²⁹

Thus, the solutions that bargaining and negotiation produce, through a process of engagement, consent, and decision, by giving something to everyone, may have greater participation, legitimacy and longevity than other ways of doing business. Jon Elster, in a study of comparative constitutional processes, has noted that the “second best” form of secret, committee-based, bargaining that produced the American constitution, filled with compromises, has been more robust than the more open, principled, and plenary forms of decision-making that formed the first French constitution.³⁰ In these observations the instrumental (robustness) may become its own form of moral justification (despite the injustice of slavery and the lost lives of the Civil War, the United States has had a more robust form of government and peacefulness than many other countries). The brilliance of our Framers then, was not only in the substance of their constitutive documents, but in the processes they selected to create them.³¹

Not all legal disputes are constitutional conventions, but neither are all legal disputes simple cases between a single plaintiff and defendant. If there is an ethical justification for self-determination and participation in dispute processes, then negotiated processes may have a higher claim on modern complex, multi-partied, multi-issue disputes than traditional forms of litigation.³² As the new field of multi-party negotiation and consensus building has demonstrated,³³ the complexity of managing multiple stakeholders, with some conflicting and some complementary interests, requires processes that allow trades, joint fact finding, contingent agreements, coalition building and simultaneous participation. Although freighted with its own ethical dilemmas (side-deals, hold-outs,

enforcement of commitments, deception, and use of caucuses and separate meetings³⁴) the negotiation of multi-party disputes permits both instrumentally satisfying and more ethical processes and outcomes to be utilized. More people participate, and instead of looking for majority votes, or “lowest common denominator” solutions, parties seek solutions that satisfy as many needs as possible, without making any party necessarily worse off. This facilitated negotiation, or “consensus building” is intended to improve on what conventional processes of voting and strategic behavior usually produce. Often enough, it does.

Means: Choosing and Doing

Chosen objectives in negotiation (whether to seek joint or individual gain), in turn, often mold the behavioral choices negotiators make. Professional agents, like lawyers, are probably most likely (despite professional ethics rules which require consultation³⁵) to choose their own means. The relationship of means to ends in negotiation remains one of assumption and prescription, with little actual empirical verification and description. While many negotiators believe it is to their advantage to lie, cheat, steal, dissemble, or simply to deflect inquires about bottom lines, preferences and reservation prices,³⁶ we actually don't know how effective these tactics are in achieving the ends of their deployers.³⁷ We do know, however, that those lawyers who are perceived as unethical are also perceived as ineffective. [Tinsley, et al., *Reputations*] We do know that these behavioral choices can get their users into legal, and occasionally, ethical trouble. Fraud, mutual or even unilateral mistake, some omissions or failures to correct bad information³⁸ or even negligent misrepresentations may, under state law (and some specialized federal laws, like securities laws³⁹) void agreements made and cause liability to be assessed against their perpetrators. And, although rare, some of the most adversarial behaviors may run afoul of lawyers' ethics rules that may result in professional discipline, such as violations of Model Rule 3.3 (Candor to Tribunals); Rule 4.1 (Truthfulness in Statements to Others⁴⁰) and Rule 8.4 (Misconduct).

The dictates of these rules and laws are far from clear, however, and so negotiation practices vary a great deal.⁴¹ The question of what factors influence choices about practice and behaviors continues to be studied and debated—whether professional socialization and culture,⁴² gender⁴³ or ethnicity⁴⁴ or nationality in both domestic and international contexts.⁴⁵

When agreements are breached or push comes to shove, the parties may litigate about what standards should govern their behavior, and with what results. Thus, many who choose particular behaviors because they believe, perhaps wrongly, such behaviors will permit them to “win”⁴⁶ at negotiation may be committing triple errors of judgment: (1) assumptions that “tough tactics” will be effective for individual gain maximization; (2) exposure to potential legal and other liability for formal rule or law violations and; (3) misconceptions about the effectiveness of objectives chosen (perhaps attempting to achieve joint gain would be more likely to ensure that each negotiator actually gets what he wants).⁴⁷

Thus, “bad” ethical choices about ends and means can lead to instrumentally suspect outcomes—ineffective, unenforceable or regretted outcomes—not to mention the “economic waste” of not seeing if joint gain or resource enhancement is possible. But such choices are more than instrumentally problematic.

If negotiators, especially legal negotiators, persist in assumptions of resource scarcity or individual gain maximization, the behaviors they choose will perpetuate the myths or assumptions of adversarialism as well as our short and brutish lives. Thus, the ethical environment we create, in Blackwell's sense, is comprised

not only by the ideas we have about how we should live, but by the behaviors we choose to live with. If the theory of conflict resolution has taught us anything, empirically, it is that escalation of conflict begets more conflict and it is harder (though not impossible) to de-escalate.⁴⁸ And more conflict, producing even shorter and more brutish lives, will clearly prevent our achieving good or at least better solutions to our many problems.

So, to conclude, how we choose to negotiate (whether to negotiate at all, how we make our choices about what we are trying to accomplish, and what behaviors we choose to accomplish those objectives) is an ethical matter. By choosing different negotiation models or behaviors we are choosing the “ideas” by which we live, and as I have suggested here, some ideas are morally superior to others.

Endnotes

¹ See e.g., David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 *PHILOSOPHY & PUBLIC AFFAIRS* 397 (1985) and Jules Coleman & Charles Silver, *Justice in Settlements*, 4 *SOCIAL PHILOSOPHY & POLICY* 102 (1986).

² See e.g. Owen Fiss, *Against Settlement*, 93 *YALE LAW JOURNAL* 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEORGETOWN LAW JOURNAL* 2619 (1995); Susan Koniak, and George M. Cohen, *Under Cloak of Settlement*, 82 *VIRGINIA LAW REVIEW* 1051 (1996); Carrie Menkel-Meadow, *Public Access to Private Settlements: Conflicting Legal Policies*, 11 (6) *ALTERNATIVES TO HIGH COST OF LITIGATION* 85 (June, 1993).

³ Hannah Arendt, among other political philosophers, has written eloquently on the need for “public conversations” about public matters, see e.g., HANNAH ARENDT, *THE HUMAN CONDITION* 22-78 (1958). David Luban has called this the “public life conception” of political decision-making.

⁴ The question of the effects of negotiation processes and outcomes on others who do not participate in the negotiation is an important question, receiving insufficient attention in our literature. For some useful exceptions to this see Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 *VERMONT LAW REVIEW* 1 (1981); CARRIE MENKEL-MEADOW & MICHAEL WHEELER, *WHAT’S FAIR: ETHICS FOR NEGOTIATORS* (2004). Dispute resolution professionals call this the problem of “generations” (as in environmental mediation) or stakeholders (those with an interest in a negotiated matter). Economists call this the problem of ethical “externalities”—those who are outside a bargaining process but will be affected by it.

⁵ See e.g. Robert Mnookin, *When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 *UNIVERSITY OF COLORADO LAW REVIEW* 1077 (2003). This argument usually focuses on Chamberlain’s ill-fated negotiations with the Nazi regime at Munich. It was also made during the Viet Nam peace talks (the shape of the table negotiations originally excluded the Viet Cong) and again during Israeli peace talks when the participation of the Palestinian Liberation Organization was at issue because of the fear of “legitimation” of an organization of “terrorism.”

⁶ Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 *GEORGETOWN LAW JOURNAL* 2663 (1995); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA LAW REVIEW* 754 (1984) [hereinafter *Toward Another View*].

⁷ Carrie Menkel-Meadow, *Ethics, Morality and Professional Responsibility in Negotiation*, in *DISPUTE RESOLUTION ETHICS* (Phyllis Bernard & Bryant Garth eds., 2002).

⁸ The classics in this literature are ROGER FISHER, ET AL., *GETTING TO YES*, (2d ed. 1991); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); DAVID LAX AND JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR* (1986), and *Toward Another View*, *supra* note 6, all written within a few years of each other. Much of the work here was based on the earlier path-breaking work of Mary Parker Follett, especially her “Constructive Conflict” essay, now available in, MARY PARKER FOLLETT—*PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920s* (Pauline Graham ed., 1995).

⁹ Jonathan Cohen, *When People are the Means: Negotiating with Respect*, 14 THE GEORGETOWN JOURNAL OF LEGAL ETHICS 739 (2001).

¹⁰ The philosophical, sociological and political study of compromise is attracting scholastic attention again in Europe, if not in the United States, see special issue, *Compromis/Compromise*, 43 INFORMATION SUR LES SCIENCES SOCIALES 131-305 (2004). See also, MARTIN BENJAMIN, SPLITTING THE DIFFERENCE: COMPROMISE AND INTEGRITY IN ETHICS AND POLITICS (1990) and NOMOS: COMPROMISE IN ETHICS, LAW AND POLITICS, (J. Roland Pennock & John W. Chapman eds., 1979) [hereinafter, COMPROMISE].

¹¹ "Keep the parties talking" may be one of those close-to-universal rules in negotiation, whether in international negotiations or hostage negotiations. "One of the things we adopted early on was the motto "Talk to Me"—it's not "Listen to Me, I know better than you do"—it's "TALK to Me." Often times by setting up this dialogue, and allowing this person to tell us what was wrong, we found out that many of the things that we thought were problems just weren't." See Jack Cambria, et al., *Negotiation Under Extreme Pressure: The Mouth Marines and the Hostage Takers*, 18 NEGOTIATION JOURNAL 331, 334 (2002). Of course, it is essential to be sure the parties are not doing other nasty things while talking—that's why the U.S. wanted (and needed) verification during the nuclear disarmament talks. And constant talking and no decision can, of course, harm some parties more than others (plaintiffs for example, who may need the money for which they are suing).

¹² See, e.g., G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE, 201-33 (1999); HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 344-55 (1982); HOWARD RAIFFA, WITH JOHN RICHARDSON AND DAVID METCALFE, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING 507-22 (2002).

¹³ As I discussed in *Toward Another View*, *supra* note 6, the purpose, goal, mind-set or "orientation" toward a negotiation problem or one's negotiation counterpart precedes in analysis any actual behavioral choice, see *Toward Another View*, *supra* note 6, at 759-62. This means that when we choose to use negotiation as a process we are making a choice about what we want to accomplish ("solve a problem" or "beat the other side") that then influences what behaviors we choose (collaborative or competitive) which we think will have an influence on the outcome achieved. (The links between these choices and their actual affects is, in fact, an empirical question, and we have precious little data to support whether anyone's assumptions in these choices are actually right.) But, the point here is, the choice of how to orient one's self in a negotiation—that is how to conceptualize the problem at hand—is, in my view, an ethical one.

¹⁴ SIMON BLACKWELL, BEING GOOD: A SHORT INTRODUCTION TO ETHICS 1 (2001).

¹⁵ Jonathan Cohen has recently offered an important ethical intervention in our negotiation discourse, suggesting that how we "label" or name the Other in negotiation is also a moral choice, which reflects the orientation, mind-set or sensibilities with which we approach others, see Jonathan Cohen, *Adversaries? Partners? How About Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution*, 20 CONFLICT RESOLUTION QUARTERLY 433 (2003). See also, Elizabeth Thornburg, *Metaphors Matter: How Images of Battles, Sports and Sex Shape the Adversary System*, 10 WISCONSIN WOMEN'S LAW JOURNAL 225 (1995).

¹⁶ This would be consistent with a reading of Model Rule of Professional Conduct, Rule 1.2, which states that "a lawyer shall abide by a client's decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued."

¹⁷ But some lawyers have recently chosen to take themselves out of those constraints by limiting what they will do in negotiation or litigation, calling themselves, "Collaborative lawyers," see, e.g., PHYLLIS TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (2001). Of course, whether lawyers can limit their representation, by contract or otherwise, is also a legal and ethical question; John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO STATE LAW JOURNAL 1315 (2003).

- ¹⁸ See e.g. Marjorie Corman Aaron & David Hoffer, *Decision Analysis as a Method of Evaluating the Trial Alternative*, in *MEDIATING LEGAL DISPUTES* (Dwight Golann ed. 1996).
- ¹⁹ Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *STANFORD LAW REVIEW* 497 (1991).
- ²⁰ FISHER, ET AL., *supra* note 8.
- ²¹ *Toward Another View*, *supra* note 6.
- ²² GEORGE HOMANS, *SOCIAL BEHAVIOR* (1961).
- ²³ In one of the earliest articles on legal negotiation Melvin Eisenberg argued that negotiations, in both disputes and deals, were “norm” based with various forms of reasoned elaboration characterizing what occurred in a wide variety of settings, see Melvin Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 *HARVARD LAW REVIEW* 637 (1976).
- ²⁴ I have recently suggested that conflict resolution engages in three different kinds of discourse, reasoned argument, traded preferences (bargaining) and affective and value-based claims, for which different kinds of processes might be appropriate, see Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 *NEVADA LAW REVIEW* 347 (2004).
- ²⁵ John E. Coons, *Compromise as Precise Justice*, in *COMPROMISE IN ETHICS, LAW AND POLITICS* (J. Roland Pennock & John W. Chapman eds., 1979).
- ²⁶ See, e.g., Martin Golding, *The Nature of Compromise: A Preliminary Inquiry*, in *COMPROMISE*, *supra* note 10, at 14; Joseph H. Carens, *Compromise in Politics*, in *COMPROMISE*, *supra* note 10, at 123.
- ²⁷ MACHIAVELLI, *THE PRINCE* 68-70 (Harvey Mansfield trans., 2d ed. 1998).
- ²⁸ Edmund Burke, *On Conciliation with the Colonies*, in *SPEECHES AND LETTERS ON AMERICAN AFFAIRS* 130-31 (Ernest Rhys ed., 1942) (1977).
- ²⁹ Or, as those great philosophers, the Rolling Stones, have said: “You can’t always get what you want, but if you try, sometimes, you can get what you need” *YOU CAN’T ALWAYS GET WHAT YOU WANT* (ABKCO 1969).
- ³⁰ Jon Elster, *Strategic Uses of Argument*, in *BARRIERS TO CONFLICT RESOLUTION* (Kenneth Arrow, et al. eds., 1995).
- ³¹ Dana Lansky, *Proceeding to a Constitution: A Multi-Party Negotiation Analysis of the Constitutional Convention of 1787*, 5 *HARVARD NEGOTIATION LAW REVIEW* 279 (2000); Jack Rakove, *The Great Compromise: Ideas, Interests and Politics of Constitution Making*, 44 *WILLIAM & MARY LAW REVIEW* 424 (1987).
- ³² See Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 38 *WILLIAM & MARY LAW REVIEW* 5 (1996).
- ³³ Lawrence Susskind, et al., *What We Have Learned About Teaching Multiparty Negotiation*, 21 *NEGOTIATION JOURNAL* 395 (2005); LAWRENCE SUSSKIND, ET AL., *THE CONSENSUS BUILDING HANDBOOK* (1999).
- ³⁴ See, e.g., Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 *TENNESSEE LAW REVIEW* 63 (2002); JOHN FORESTER, *THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES* (1999).
- ³⁵ See Model Rules of Professional Conduct, Rules 1.2, 1.4 and cmt.
- ³⁶ For the classic index of competitive ploys to use in a position-maximizing legal negotiation, see Michael Meltsner & Philip Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 *CLEARINGHOUSE REVIEW* 259 (1973). For more general advice about how to attempt to take advantage of others see HERB COHEN, *YOU CAN NEGOTIATE ANYTHING* (1982); HERB COHEN, *NEGOTIATE THIS! BY CARING, BUT NOT T-H-A-T MUCH* (2003); JIM CAMP, *START WITH NO* (2002).
- ³⁷ For one attempt to get at some empirical measurement of negotiation behaviors, even if only second-hand reports of others’ behaviors, see Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 *HARVARD NEGOTIATION LAW REVIEW* 143 (2002).

³⁸ See, e.g., *Stare v. Tate*, 21 Cal. App. 3d 432 (1971) (valuation error made by one spouse and taken advantage of by other spouse's knowing professionals in divorce proceeding caused agreement to be rescinded and reformed!)

³⁹ Donald Langevoort, *Half-Truths: Protecting Mistaken Inferences By Investors and Others*, 52 STANFORD LAW REVIEW 87 (1999).

⁴⁰ "A lawyer shall not make a false statement of material fact or law to a third person; or fail to disclose a material fact to a third person when the disclosure is necessary to avoid assisting a criminal or fraudulent act by a client...." MPRC Rule 4.1 (2005).

⁴¹ See, e.g., Schneider, *supra* note 37.

⁴² See, *id.* Michael Wheeler and I have been studying lawyers, law students, business students and business people in their "Negotiation Choices" about representations made in the sale of property and have so far discovered differences in the professions—lawyers and law students are more likely to take advantage of unsuspecting partners with respect to market price but are more likely to disclose possible environmental defects (the influence of knowledge of the law of real estate disclosures?). And law students and lawyers are also slightly more likely to do what their superiors tell them to do. See also, JAMES FREUND, SMART NEGOTIATING: HOW TO MAKE GOOD DEALS IN THE REAL WORLD (1992) for an inside view of large law firm negotiation practice and ethics.

⁴³ The debate about whether women negotiate differently and more "ethically" continues apace, still, in my scholarly opinion, unresolved, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); RAND JACK AND DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING ROLE OF WOMEN AND MEN LAWYERS (1989); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism and Legal Ethics*, 2 VIRGINIA JOURNAL OF SOCIAL POLICY & LAW 75 (1994); DEBORAH KOLB & JUDITH WILLIAMS, EVERYDAY NEGOTIATIONS: NAVIGATING THE HIDDEN AGENDAS IN BARGAINING (2003); LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2003).

⁴⁴ See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARVARD LAW REVIEW 817 (1991); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of its Cause*, 94 MICHIGAN LAW REVIEW 109 (1995).

⁴⁵ See, e.g., FRANK L. ACUFF, HOW TO NEGOTIATE ANYTHING WITH ANYONE AROUND THE WORLD (1997); JEANNE BRETT, NEGOTIATING GLOBALLY: HOW TO NEGOTIATE DEALS, RESOLVE DISPUTES AND MAKE DECISIONS ACROSS CULTURAL BOUNDARIES (2001); Jeffrey Z. Rubin and Frank Sander, *Culture, Negotiation, and the Eye of the Beholder*, 7 NEGOTIATION JOURNAL 249 (1991).

⁴⁶ It is common in the popular literature on negotiation to hear the phrase "win-win negotiation" as the alternative to binary, competitive negotiations in which one side "bests" the other in some way. I prefer to avoid this term. Most negotiations are not "win-win" in the sense that both parties win what they want. A good negotiation is one in which each party does better than it might have done without the negotiation taking place (such as losing litigation or failing to establish a new transaction)—but seldom will both sides actually "win" everything they want. See Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA LAW REVIEW 905 (2000).

⁴⁷ Even if competitive maximizers were successful in "winning," their victory over another negotiator may cause anger, resentment, and a regret factor so strong that the defeated party will seek revenge, or at least fail to comply with the agreement, causing additional hardship and expense in enforcement of an agreement, that may be avoidable.

⁴⁸ DEAN PRUITT & JEFFREY Z. RUBIN, SOCIAL CONFLICT, ESCALATION, STALEMATE AND SETTLEMENT (1986); ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); ROBERT AXELROD, THE COMPLEXITY OF COOPERATION (1997).