Hard Bargaining in the Classroom: Realistic Simulated Negotiations and Student Values

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Empirical research into the negotiation practices of lawyers shows that "hard bargaining," including at least some unethical conduct, is an inescapable fact of a lawyer's life. To prepare students for legal practice, negotiation instructors must expose them to hard bargaining in the classroom. In doing so, however, instructors should be sensitive to the moral and ethical values of their students, so that the classroom experience does not unduly pressure students to compromise their values.

The simulation is the primary tool of negotiation instruction. By selecting and manipulating simulations, a negotiation instructor can expose students to a wide range of negotiating behaviors, from distributive negotiations marked by the use of power tactics to value-creating negotiations in which participants must consider many interests and collaborative strategies predominate. With that flexibility, however, comes the potential for classroom exercises to pressure students, in ways both subtle and overt, to adopt behaviors that feel uncomfortable.

In this article, I examine the use of simulations to teach different types of negotiating behavior, including hard bargaining. Referring to a number of widely available simulations, I suggest ways to focus student attention on three dimensions of negotiation behavior — the issues over which the parties are bargaining, the objectives the parties

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*seek, and the tactics the parties use to achieve their objectives —
in order to push students to reflect on their own negotiation behavi-
ors and to prepare for the tactics of others. I assess the potential
for simulations to pressure students to compromise their values,
and I conclude with my own thoughts on the goals of a negotiation
course.*

Introduction

Empirical research into the negotiation styles of lawyers shows that legal
negotiators employ a wide variety of approaches and behaviors (Williams
1983; Schneider 2002). The evidence suggests that a majority of lawyers
employ a problem-solving approach to most negotiations, but that a sub-
stantial and even growing number of lawyers are overtly adversarial. While
most lawyer negotiators appear to be ethical, a small but significant
percentage are perceived by their peers to be unethical. These findings
are not news to anyone who has practiced law — we have probably all
encountered both collaborative lawyers looking to maximize joint gains as
well as combative, bullying lawyers looking to extract every drop of value
from the negotiation by any means necessary, plus many variations on
those themes.

Research has shown that parties who employ many of the tech-
niques commonly associated with adversarial bargaining are less likely
to identify sources of value (Pruitt and Lewis 1975). Partly in recognition
of that fact, many negotiation professors start with a presumption that
a problem-solving approach to negotiation is likely to lead to better
results in most cases and so should be emphasized. Regardless of what
we believe the most effective approach to negotiation is, however,
we have a duty to our students to prepare them for what they will
likely encounter in practice. That means exposing them to a range of
negotiation contexts and approaches, including negotiations characterized
by various forms of "hard" bargaining and perhaps even by unethical
conduct.

Assuming there is value in exposing students to hard bargaining, a
negotiation instructor must find effective ways to do that while remaining
cognizant of the students' moral values. When I teach negotiation, I have
as a goal not simply to impart a set of personal interaction skills, but also
to challenge students to examine their moral values. I believe that kind of

introspection is essential if a negotiator is to negotiate successfully with people from other cultures. (Living in New York City, my students have no choice but to negotiate with people from other cultures.) But I do not want to pressure my students to *compromise* their moral values. Simulated negotiations can be intense experiences for students, and I am hesitant to set up simulation experiences in which they feel that they must engage in behavior that feels wrong to them either to receive a good grade or as a response to a social dynamic present in the classroom.

This tension creates difficult choices for a negotiation professor who wants to prepare students for "real-world" legal negotiations. Students learn best by doing. For most negotiation professors, the "doing" consists of participation in simulated negotiations, in which students play the role of either lawyer or client and negotiate with other role-playing students in the class. These role-play exercises can be manipulated in various ways to emphasize different aspects of negotiation. They can expose students to a wide range of negotiating behaviors, from distributive negotiations marked by power tactics to value-creating negotiations in which many interests must be considered and collaborative strategies predominate. They are enormously flexible teaching tools. With that flexibility, however, comes the potential for a classroom exercise to pressure students, in ways both subtle and overt, to adopt behaviors that feel uncomfortable.

In this article, I explore this tension in the use of simulated negotiations. I examine the ways that simulations may be manipulated to focus attention on different types of negotiation behavior, particularly hard-bargaining behavior. As I move through that analysis, I contemplate the moral choices those kinds of manipulations can require. My objective is to help negotiation teachers think more clearly about their options for the use of simulations and about the ramifications of the different choices they might make. I do not have all the answers — indeed I do not have clear answers to some of the main questions I pose. I hope to become a better and more thoughtful negotiation teacher by considering these issues and to help others think through these issues on their own.

I begin by analyzing a number of the common dichotomies routinely used to characterize negotiating behavior. Negotiation instructors tend to use these dichotomies when thinking and talking about their instructional goals for students, but in my experience, different teachers use these terms in ways that are not consistent. I will suggest that a more useful way to conceptualize the behaviors a particular simulation highlights is to think in terms of three dimensions of negotiating behavior: the issues over which the parties are bargaining, the objectives the parties have (how they measure success), and the tactics used. I describe how a

variety of negotiation behaviors that should, in my view, be part of negotiation instruction fit within that framework. I then analyze different types of simulations to assess their utility for teaching these three dimensions and the risks they pose of pressuring students to compromise their values. Finally, I offer my thoughts on the goals of a negotiation course, focusing on ways to address the tension between realism and student values.

Behind the Negotiation Dichotomies

We live in a world of scarcity, in which we must constantly interact with other people who have the power to affect our lives in positive and negative ways. To survive and thrive, we need those other people to take actions that advance our needs and interests. We have a variety of ways of influencing the behavior of others, including personal affinity, physical force, legal or civil authority, moral persuasion, trickery, and negotiation, among others. What distinguishes negotiation from other means of inciting action in our fellow human beings is that negotiation involves voluntary exchange (Nozick 1974).[1] In negotiation, we offer to do things that others desire in exchange for them doing things we desire.

Different people will approach that process of voluntary exchange in different ways. When negotiation theorists contemplate these different approaches to negotiation, they often invoke dichotomies: distributive versus integrative (Korobkin 2008); competitive versus cooperative (Williams 1983); adversarial versus problem solving (Menkel-Meadow 1984; Schneider 2002); power versus principle (Fisher, Ury, and Patton 1991; Dawson 2001). The use of dichotomies like these can, of course, lead to the over-simplification of highly complex modes of human interaction. The scholars who employ them are cognizant of that risk; they typically use the dichotomies to indicate divergent points along spectrums of behavior and not as mutually exclusive categories.[2] When used in that way, these and other related dichotomies can be helpful to both the negotiation theorist and the negotiation educator. They function as a kind of shorthand that allows us to talk cogently about certain fundamental differences in the way different people approach negotiations.

If the negotiation dichotomies can be helpful as shorthand for certain types of negotiation behavior, however, they can also sow confusion when they are grouped as sets. The temptation is strong to link *distributive-competitive-adversarial-power* and contrast that set of characteristics with *integrative-cooperative-(problem-solving)-principled*. And there is some reason to associate those sets along those lines. "Hard-bargaining" tactics such as put-downs, positional commitments, threats, and phony persuasive arguments — tactics we think of as adversarial and competitive — are

prevalent in many distributive negotiation contexts. And we know that negotiators who employ them are less likely to realize joint gains in situations with integrative potential (Pruitt and Lewis 1975). Tactics understood as cooperative and problem solving are far more effective for the value creation that is the heart of integrative bargaining. In turn, a negotiator seeking to find joint gains may be more likely to employ methods of "principled" negotiation such as fairness and the use of objective criteria (Fisher, Ury, and Patton 1991).

But the different dichotomies, even if understood as points along a spectrum, operate in different dimensions of negotiation behavior. Charles Craver made this point in a recent article. He offers a descriptive theory of legal negotiation, suggesting that many skilled negotiators are "competitive problem-solvers" (Craver 2010). By this, he means that many legal negotiators employ a nonadversarial style in the service of competitive objectives. They are cooperative when it comes to value creation, but competitive when it comes to value claiming. They try to expand the pie and then capture as much as possible of the resulting surplus for themselves.

Craver's insight exposes the shortcomings of the dichotomies as general labels for different negotiation styles. Depending on the circumstances, negotiators adopt different approaches toward the things they want to exchange, the outcomes they hope to achieve, and the methods they plan to use. In the terminology I will use, those are the issues, the objectives, and the tactics of the negotiation. As Craver shows, a negotiator might have a very aggressive objective — to gain as much as she can — but use collaborative methods to identify the issues. Negotiators can also seek principled outcomes but use power tactics to get there. They can be adversarial in one dimension, but problem solving in another.

In this section, I disaggregate these three dimensions of negotiation — the issues, the objectives, and the tactics — and examine how different negotiation behaviors fit within them. I analyze the negotiation dichotomies from the perspective of the three dimensions to show how the behavior of individual negotiators frequently crosses lines between and among the dichotomies. In so doing, I attempt to draw out some key lessons that a negotiation class should emphasize if students are to understand the full range of negotiation behavior.

Issues

The issues in a negotiation are the subjects of the parties' proposed exchange. In the simplest transactional negotiation, when the parties do not anticipate an ongoing relationship, the single issue is the price to be paid for an item for sale. Simple purchase and sale agreements fall into this class, as do many tort settlements, in which plaintiffs "sell" their claims to defendants. Other negotiations involve far more complex sets of issues. A

negotiation to enter a business relationship, such as a partnership or a joint venture, may involve a mix of concerns about money, status, power, allocation of risk, and a host of other considerations.

The distinction between integrative and distributive bargaining turns on the issues included in the negotiation. In Russell Korobkin's terminology, an agreement is integrative if it "create[s] more cooperative surplus than the terms of whatever type of agreement would be customary under the circumstances" (Korobkin 2008: 1326). Korobkin doesn't precisely define distributive bargaining but suggests that distributive bargaining involves the zero-sum division of some defined item of value. In other words, distributive bargaining is bargaining over a single issue, typically when the key term is price. Integrative bargaining involves manipulating the issues in the negotiation to create sources of value that would not normally accrue in that type of negotiation.[3]

Like the distributive/integrative dichotomy, the dichotomy between adversarial and problem-solving approaches also turns largely on the issues in the negotiation. The adversarial/problem-solving dichotomy became a focal point of the legal negotiation literature following publication of Carrie Menkel-Meadow's landmark article "Toward Another View of Legal Negotiation: The Structure of Problem Solving" (Menkel-Meadow 1984). Menkel-Meadow described an "adversarial orientation" toward negotiation in which the negotiator sees the negotiation as a zero-sum game characterized by incremental compromises over the distribution of money along a linear scale. In other words, adversarial negotiators are predisposed to assume a negotiation is distributive.

In contrast, a problem-solving negotiator adopts "an orientation to negotiation which focuses on finding solutions to the parties' sets of underlying needs and objectives." Problem solvers look for integrative gains by identifying a broad range of possible solutions that satisfy both parties' interests, monetary, and nonmonetary. The primary difference, then, is that adversarial negotiators haggle over a single issue, money, whereas problem-solving negotiators expand the issues under consideration in an attempt to find integrative gains. In Menkel-Meadow's words: "The orientation (adversarial or problem solving) leads to a mindset about what can be achieved (maximizing individual gain or solving the parties' problem by satisfying their underlying needs) which in turn affects the behavior chosen (competitive or solution searching) which in turn affects the solutions arrived at (narrow compromises or creative solutions)" (Menkel-Meadow 1984: 760).

Andrea Kupfer Schneider also employed the adversarial/problem-solving dichotomy to categorize lawyer negotiators in her empirical study of the negotiating styles of lawyers in Milwaukee and Chicago (Schneider 2002). Schneider's work updated the groundbreaking study of Phoenix lawyers undertaken by Gerald Williams in 1975. Williams had classified lawyers as competitive or cooperative, focusing primarily on the tactics

they used (Williams 1983). Schneider used his survey as a starting point but added data points designed to assess the extent to which lawyers seek to expand the issues under consideration.[4] One of her main goals was to find out whether a generation of lawyers trained in a problem-solving approach would have a greater capacity and respect for integrative bargaining. Her findings tie a problem-solving style to a broader view of the issues at stake; they also show an increasing awareness of the value of integrative bargaining, apparently reflecting the new emphasis on problem solving in law school negotiation instruction.[5]

Charles Craver's recent work is, in some ways, a reaction to the adversarial/problem-solving dichotomy as Menkel-Meadow and Schneider frame it. Craver's competitive problem solver seeks to win as much as possible for himself, but he does not fall into the trap of assuming a negotiation is purely distributive (Craver 2010). To the contrary, a competitive problem solver excels at identifying unexpected issues that might expand the cooperative surplus. He looks for creative solutions, but then seeks to maximize his individual gain by capturing as much of the cooperative surplus as possible. In the common metaphor, he expands the pie and then tries to eat it all. Thus, as Craver seeks to show, a negotiator may adopt a problem-solving orientation toward the issues, but an adversarial one toward the objectives.

Objectives

If the issues are the subject matter of the negotiation, the objectives are the parties' goals with respect to those issues. A party's objective is what it hopes to achieve in the negotiation. Speaking in general terms, a party to a negotiation can have a range of possible objectives. At one extreme, a party may seek to extract as much value as possible from the immediate transaction without regard to future interactions with that counterparty or third parties. At the other extreme, a party may be entirely selfless, wanting only to satisfy the desires of the counterparty and others (Peppett 2002).

In practice, most negotiators adopt different objectives in different circumstances, and they change their objectives in response to the other side's behavior. For example, mixed objectives characterize Craver's competitive problem solver. His ultimate goal is to win as much for himself as possible, but he recognizes the importance of rapport and reputation to maximize future value. He has an intermediate objective of finding points of congruence where value-creating trades can be made. That is consistent with his ultimate goal: the more value he creates, the more value he can claim.

Furthermore, the choice of objectives involves moral decisions that are often ambiguous. This point becomes apparent in thinking about the distinction between power and principle. In the way they casually recommend tactics designed to capture value, proponents of power negotiating

seem to assume a maximalist goal for most negotiations, though they seldom make a normative argument for doing that.[6] Advocates of principle, in contrast, make a normative argument for a less-than-the-whole-pie set of objectives. Roger Fisher and William Ury's *Getting to Yes: Negotiating Agreement Without Giving In* is the most prominent example of this type (Fisher, Ury, and Patton 1991). Fisher and Ury admonish negotiators to seek principled bargains rooted in fairness and objective criteria. They caution against overreaching, arguing that unfair results often do not last, harm relationships, and can cause conscientious regret in the "victorious" party. Fairness of outcome is an important aspect of principled negotiation for both instrumental and moral reasons, thus principled negotiators should adopt fair objectives.

But fairness is not a straightforward concept. Different individuals understand fairness in different ways in different contexts so that even where both parties have a goal of a "fair" outcome, they may hit impasse (Welsh 2004). When a party is committed to receiving an outcome she considers fair, her refusal to accept worse terms may appear to be a power tactic. When her refusal to deal could be considered unreasonable on some objective metric, her "principled" goal may be better understood as a power tactic. Fairness is in the eye of the beholder. Adherence to principle does not necessarily entail fairness, any more than reliance on power necessarily entails unfairness.

Because the selection of objectives is fluid and involves ambiguous moral choices, distinguishing "competitive," "adversarial," or "power-based" objectives from "cooperative," "problem-solving," or "principled" objectives can be difficult. Individual negotiators must assess particular situations in light of their interests and fashion a set of objectives that serve those interests. As they engage in that process, they need to be aware of many factors, not least the importance of relationships and their own internal moral compasses.

Tactics

A party's tactics are the methods it uses within the negotiation to accomplish its objectives. Tactics can include: making extreme opening offers; misleading a counterpart about one's authority to agree; feigning a willingness to walk away; making small and declining concessions; and threatening to harm a counterpart. But tactics can also include: referring to objective criteria, asking questions about the basis for an extreme offer, apologizing, disclosing a genuine interest, and brainstorming.

The traditional dichotomies hold up best when applied to tactics. The first set of tactics I just described seem characteristic of "power-based," "competitive," or "adversarial" approaches to negotiation. The second set seems characteristic of "principled," "cooperative," or "problem-solving" approaches to negotiation. But only the most socially inept person would

employ exactly the same set of tactics no matter what the negotiation context. An actual negotiator is likely to employ certain power-competitive-adversarial tactics in some contexts — buying a car, settling a tort claim — but rely on more principled-cooperative-problem-solving tactics in others — negotiating deals with business partners, for instance. Most of us are, at times, competitive and adversarial, and at other times cooperative and principled.

So it may make more sense to think of tactics in contextual terms. Rather than talking about competitive tactics and cooperative tactics as general categories, we would do better to ask what kinds of tactics are common and what kinds are effective (not the same thing) in particular contexts. Negotiation students should see the effects that different tactics have in different situations. They should understand why certain tactics are effective in one situation but counterproductive in another. They should know which tactics are effective for creating value and which for claiming value.

Those instrumental lessons about the effectiveness of negotiation tactics are important. Students need more than that, however, to mature into competent practicing lawyer negotiators. They need to grapple with the moral and ethical dimensions of their conduct. The way people treat each other matters. While our ethics are contextual, some kinds of behavior meet with near-universal disapprobation. Lying, while widely practiced (Reilly 2009), is a serious moral issue for many people. Lying is certainly an issue for lawyers, who work amid a web of laws, rules, and regulations mandating truthfulness in various iterations. The rules of professional responsibility that govern lawyers' negotiation ethics do not really attempt to establish the line between truth and falsehood — they instead give some general advice and list a few examples of what constitutes acceptable falsehoods and what constitutes unacceptable ones.[7] That means lawyer negotiators must figure out on their own how to navigate the boundary between truth and falsity.

Beyond misrepresentation, many negotiation tactics can be used in a negotiation to manipulate the other party, including threats, bullying, retracting offers, and much more. The rules of professional responsibility ignore those kinds of tactics almost entirely, but tactics like those implicate deeply held ethical norms, notably the Kantian maxim to treat others as ends rather than means. These ethical questions inform Jonathan Cohen's work on "stance" in negotiation. In Cohen's formulation, stance refers to a nego-tiator's internal psychological orientation toward the other party. He argues for a "respectful stance," which means seeing the other party "not merely as an instrument or object but also as a person" (Cohen 2001: 743). Respect in Cohen's sense is a matter of orientation, with both intentional and behavioral characteristics. A negotiator with a respectful stance will engage in good behavior — no lying, coercion, threats, incivility, or psychological

assaults — and will also have good intentions, treating others fairly, while listening to them and respecting their autonomy.

Cohen's formulation has a value as an aspirational precept, but it can be difficult to put into practice in the push and pull of an actual negotiation. A lawyer who wants to refrain from misleading his adversary or using manipulative pressure tactics has limited options for influencing the other side's behavior. He can make reasonable arguments and refer to objective criteria, but his primary tactic for dealing with a recalcitrant counterparty is to walk away. The problem is that his attempt to present a realistic, fair offer and to walk away if it is not accepted may be perceived as merely a hard-ball tactic. The other side may assume that there is "play" in an offer and become even more recalcitrant when the party making the offer refuses to budge. In this way, the unofficial "rules" of negotiation, in which bluffing and puffery are accepted parts of the game, can work against a negotiator who holds honesty, candor, and fairness as first principles.

Negotiation students need to work through these various issues. The only way to do that is to test the boundaries by experiencing different tactics within a realistic negotiation situation.

Negotiation Pedagogy: Controlling the Variables to Replicate the Real World

The most realistic law school experiences are the ones that occur in live-client clinics and, to a lesser extent, during externships. By definition, these experiences put students directly in real-world lawyering situations. But clinics are an inefficient way of teaching a skill like negotiation, both because of the expense of maintaining the low student–teacher ratios required and because of the limited range of experiences a typical clinical experience will provide. Externships suffer from similar limitations, exacerbated by the usual lack of full-time faculty supervision.

The compromise for most negotiation instructors is the simulation. Inevitably, simulations flatten the negotiation experience. Emotion, for example, never plays the role in a simulated negotiation that it plays in real life because, among other reasons, the stakes are so much lower. That drawback comes with the benefit of flexibility. By using simulations, the instructor can control many of the situational variables to expose students to a wide range of negotiation contexts and to emphasize particular negotiation skills.

Simulations may be manipulated to draw attention to the three dimensions of issues, objectives, and tactics. Students can be directed to address a single issue in a distributive negotiation or multiple issues in a more integrative framework. They can be challenged to claim as much value as possible or to seek more balanced outcomes. They can be led, subtly or expressly, to adopt a range of tactics. By manipulating simulations, a negotiation instructor can thus create a range of different classroom dynamics

and learning experiences. At the same time, the manipulation of simulations in these ways poses the risk that students will feel pressured to compromise their values.

In this section, I explore the use of simulations in these ways and the risks they create. I will describe how simulations can be used in general terms and then offer examples of simulations that are widely available, either by adoption in the leading textbooks or through the Clearinghouse of Harvard's Program on Negotiation (PON). My beginning assumption is that the instructor has chosen to introduce some degree of "hard" bargaining into the classroom, with distributive negotiations and power tactics employed. My objective is to show how instructors can bring out forms of hard bargaining through emphasis on the issues, objectives, and tactics involved in simulations.

Manipulating the Issues

Many students enter a negotiation course burdened with the "fixed-pie" bias. They assume that negotiation is a zero-sum game in which one side's gains must come at the expense of losses to the other side. A central challenge for the negotiation instructor is to disabuse students of that bias. Most negotiations — particularly transactional negotiations — involve more than one issue. Opportunities exist to create value by trading on interests that the parties value differently. The ability to identify and exploit those interests is a defining characteristic of a good negotiator. At the same time, distributive negotiation is an inescapable fact of life for many lawyers, especially those who litigate and settle lawsuits between parties who do not have ongoing relationships. Students need to understand the dynamics of value claiming prevalent in those contexts.

To fully understand how the addition and subtraction of issues affects negotiation, then, students should ideally experience an integrative negotiation, a distributive negotiation, and combinations of those in which each is more salient than the other. They should see how a negotiation in which many interests are present gets slowly concentrated, issue by issue. They should see (and even be frustrated by) a negotiation in which money trumps all other considerations. And they should learn how to move between integrative and distributive bargaining situations.

One of the best exercises for dislodging the fixed-pie bias is to set up a classroom exchange in which students trade items that they value differently. Jay Folberg has created a good version of this kind of exercise for the *Resolving Disputes* textbook he coauthors (Folberg et al. 2010). In the exercise, students are asked to rate a set of snacks (pizza, fruit, chips, soda, etc.).[8] Then the instructor distributes those snacks randomly to the class. Students note the "values" of the snacks they receive and then are given opportunities to make trades with other students. As the exercise progresses, all students either increase their point values or choose to retain

what they have. The vast majority of students are made better off through trades, and a handful neither gains nor loses. In total, the collective utility of the class, measured by the point values of the snacks the students acquire, always increases dramatically from the initial position to the final position. The exercise thus demonstrates Pareto efficiency in a very tangible way (Raiffa 1982).

At the other extreme, an instructor can set up a "pure" distributive negotiation in which students bargain over a single issue, invariably money. This kind of negotiation exposes students to the positional commitments and haggling that characterize much value-claiming activity. Distributive negotiations can also be effective vehicles for teaching the fundamentals of best alternative to a negotiated agreement (BATNA), reservation price, and aspiration (Fisher, Ury, and Patton 1991). Students can see how initial offers affect final agreements, and they can test common shortcuts for overcoming impasse, including splitting the difference, resort to round numbers, and holding out until the other side "blinks" (Shell 2006).

To give students a "pure" distributive negotiation experience, a simulation must be crafted to exclude interests other than money. Simulations involving either the settlement of a dispute or a sales transaction are the most conducive. Students can be instructed in such a situation that the only subject of the negotiation is the cash value of the settlement or of the item for sale. *SuperSlipster*, a simulation created by Matt Smith with Robert Bordone and Michael Moffitt and available through PON, is a negotiation for the settlement of a personal injury claim that can be used in this way. On the transactional side, Noam Ebner and Yael Efron created the *Moving Up* negotiation, a simulation involving the purchase of an apartment (Ebner and Efron 2009). The simulation has a relatively small zone of possible agreements, and it is designed to limit the possibilities for integrative bargaining, so that students are forced to bargain positionally in a distributive framework.

Beyond the extremes of a "pure" integrative or "pure" distributive negotiation, students should experience the ways that the issues under consideration expand and contract as a negotiation proceeds. Most negotiations hold at least some potential for integrative gains, and all negotiations in which the zone of possible agreements (ZOPA) is not a single point require the distribution of surplus value. Students should understand how issues are added in a search for value and should then see how the value that is created is apportioned between the parties.

Many simulations are structured as disputes with money as the primary issue but with the potential for integrative gains. They tend to be conflict situations in which the parties have had a relationship and the possibility of repairing the relationship still exists. They may involve employers and employees, partners, or commercial entities. In a typical formulation, emotions are high at the outset, leading to an initial focus on

money, but each party is in a position to satisfy the other party's other interests if they can reestablish trust.

Students working through these simulations learn to ask questions to determine the other side's interests. To a lesser extent, they may recognize the importance of intangible interests, such as the desire for respect and the value of apology, but given the inherently artificial circumstances, those lessons may ring hollow. At a minimum, simulations of this type open the door to class discussions about the value-creating opportunities that sometimes lie beneath an apparently distributive bargaining situation.

Any number of simulations fit this pattern. As just one example, the *Waltham v. Foster* role play created by Dwight Golann involves a commercial dispute between a supplier of automotive fluids and its trucking company customer (Folberg et al. 2010). Emotions are high because of disparaging comments made by the customer, but the parties have financial incentives to continue their relationship. The outcome of litigation is highly uncertain, leading to a large zone of possible agreement on the monetary claim, and thus room to overcome impasse by adding issues and trading on other interests.[9]

Simulations like *Waltham v. Foster* place students in an apparently distributive context and require them to seek out interests and issues that will expand the scope of the negotiation. A fourth type of simulation places students in a negotiation context with multiple interests and issues, explicitly requiring them to find sources of value by trading on differences, but then also rewards them for effectively claiming value after the interests and issues have been fleshed out. Scored simulations often work this way. An example from PON is *DEC v. Riverside*, created by David Lax, James Sebenius, Lawrence Susskind, and Thomas Weeks, which involves a negotiation between a manufacturer and a government regulator over the handling of effluents from the manufacturer's operations. The simulation requires students to negotiate a number of issues, and students receive points based on the agreements they reach on each of the issues. They cannot maximize their points unless they cooperate in a search for joint gains, so they are incentivized to share information to find value-creating trades. But the scoring also allows students on each side of the dispute to be compared against one another based on points "won." By making the outcomes public to the class, an instructor can provoke a robust discussion about the "negotiator's dilemma" — the tension between sharing information to create value and shielding points of leverage to better claim that value.

In my own negotiation courses, I use all four of these types of simulations. I want students to understand how joint gains are achieved (normally by trading on differences), what a distributive negotiation looks like, how to seek out interests and issues to shift from a distributive to an integrative negotiation, and how to claim value once all joint gains have been exploited. Exploring these questions is a straightforward process — as

I have just described, many good simulations exist that can be used to challenge students on these points. Further, using simulations like these to manipulate the issues in a negotiation poses relatively little risk that students will feel pressured to compromise their values, at least as long as the simulations are not graded based on individual outcomes. Students can experiment, being either forthright or guarded in revealing information, being either aggressive or moderate in claiming value, and can see by way of class discussion the effects that different approaches have.

The disadvantage of not grading outcomes is that some students will not take the exercise as seriously as if it were graded, which can distort the negotiation experience. Grading outcomes, on the other hand, adds stakes to the negotiation and thus may create a more realistic negotiation. As I suggested, however, if students are graded against one another they will feel pressure to claim value in ways that may make them uncomfortable. Because this is a problem raised primarily by the manipulation of objectives, I will discuss it in the next section.

Manipulating the Objectives

When we negotiate with friends and loved ones, we often consciously choose to concede value to our counterparts. Indeed, we often refrain even from asking for things we privately desire. On the other hand, when negotiating at arm's length in the absence of an ongoing relationship — to purchase a car, for example — most people want to get the best deal possible. As those examples show, our goals for a negotiation are contingent: they depend on the context.

In situations in which an individual negotiator is able to establish her own goals for a negotiation, the choice of a goal is a simple decision, if not necessarily an easy one. By that I mean that the process of establishing a goal is simple in that it requires only one person's input, but that it may involve difficult ethical dilemmas about fairness and the potential for taking advantage of others. Life is more complicated for lawyer negotiators, however, who must pursue goals set by their clients. A lawyer negotiator may have to subjugate his own goals to his client's. A lawyer negotiator may not have the option of conceding value to the other side.

To learn to negotiate effectively, students should experience negotiation in a range of settings that call for different ways of establishing goals. They should negotiate in roles with and without ongoing relationships requiring cultivation. Moreover, students training to be lawyers should experience negotiations in which their goals are set by someone else. They should be confronted with one of the primary dilemmas a legal negotiator faces: what it means to zealously represent a client in a negotiation.

The best vehicle for teaching students negotiation skills within the context of an ongoing relationship in which fairness and mutual satisfaction predominate as goals is a simulation in which the parties negotiate to form

some joint enterprise, such as a partnership or joint business arrangement. Exercises such as these can be structured as one-on-one negotiations between principals or as negotiations between agents. Kathleen Murphy created a simulation that involves two lawyers seeking to create a partnership, which works well to demonstrate a one-on-one negotiation.[10] The facts of the simulation are detailed and cover a range of issues, and the parties can reach agreement on any terms that they consider fair. As long as the instructor does not grade on outcomes, which could incentivize more competitive behavior, most students will reach an agreement that both consider fair. The post-simulation debriefing can explore different scenarios for the evolution of the practice, pushing students to assess how they will view the relationship if the terms of the deal turn out to favor one party over the other. Some students will realize that the long-term relationship would be better served if they bargained "harder" at the outset to ensure that their interests are protected. Students learn that one-sided agreements are not durable agreements and that durable agreements require effective negotiation on both sides.

The *MedLee* negotiation by Candace Lun and Jeswald Salacuse (available through PON) is a negotiation over the creation of a joint venture between an American manufacturer and an Asian distributor to sell medical devices. It is structured so that agents of each company (company employees, not lawyers) negotiate on behalf of the principals, who had already entered into a memorandum of understanding. In addition to the issues of cross-cultural negotiations that it raises, this simulation creates a good framework for examining goal setting between principals and agents. The principal players are given guidance as to their objectives that are circumscribed by their corporate and social cultures. For example, the American entity wants an egalitarian governing structure that rewards merit, while the Asian entity wants a hierarchical governing structure that rewards loyalty. Agent-negotiators must meet with the principals to ascertain the objectives, then negotiate with the principals' objectives in mind. At the end of the exercise, the agent-negotiators must report back to the principals, justifying the outcomes they reached. In this way, the *MedLee* negotiation can challenge students to examine their capacity to negotiate effectively toward goals set by someone else.

Because of the built-in relationships that students in law school or business school negotiation classes have with their peers, the conditions for collaborative, relationship-enhancing negotiations already exist in most classrooms, and creating them requires little effort. Indeed, the reputational costs of appearing "uncollegial" to classmates make many students hesitant to push for the best deal they can get in any negotiation. The lack of both concrete stakes and genuine psychic investment also contribute to a naturally conciliatory atmosphere in a classroom negotiation setting.

It can sometimes be more difficult to create realistic scenarios in which students seek to claim value. One common negotiation exercise that pushes students to claim value in a reductive way is the prisoner's dilemma game (Kaplow and Shavell 2004). In a traditional prisoner's dilemma game, two people are put in the role of prisoners. They are told that if neither one "rats" ("defects" in the common game-theory jargon) on the other, they will both face moderate sentences. If one rats and the other does not, the one who rats goes free, and the other faces a long sentence. If both rat, both receive long sentences, but not as long as in the second scenario. As long as the two are not able to communicate, the rational strategy for both is to rat, leading to lengthy sentences for both.

Translated into a negotiation context, a prisoner's dilemma game can be constructed so that the players are negotiators faced with a choice of whether to disclose information (necessary for creating value) or withhold information (often advantageous for claiming value). The game can be purely an abstract exercise in which students are given a binary choice without context, or it can be contextualized so that students are put in a negotiation situation. *Win as Much as You Can*, a version of the game created by Dwight Golann, gives students a contextual choice to "compete" or "cooperate" by flipping a card labeled X and Y (Folberg et al. 2010). *The Construction Venture*, created by Russell Korobkin and included in the materials for his textbook (Korobkin 2009), puts students in roles negotiating a business venture in which they have the choice of whether to "reveal" or "conceal" a strategic point. In both versions, competitors play the game multiple times — in game-theory jargon this is known as an "iterated prisoner's dilemma" — and the game can be repeated under different conditions (competitors allowed to communicate, greater value in certain rounds, etc.).

Many negotiation instructors resist using a prisoner's dilemma game, believing that its formalistic "payoff" structure is unrealistic and may lead students to the false conclusion that negotiation entails a binary choice between competing and cooperating, with cooperators often at the mercy of competitors. That is a fair criticism — and a genuine risk. On the other hand, the prisoner's dilemma does convey important lessons. Not least is the importance of trust. In a prisoner's dilemma game in which the participants communicate, it is not unusual to see negotiators look each other in the eye and then solemnly pledge to cooperate. When they do then cooperate, students get a memorable lesson in the power of keeping one's word. They also see how a negotiator must modify his objectives depending on the relationships he is in and the ones he wants to maintain.

A final way to manipulate objectives is to grade students on the outcomes of their negotiations. Students can be ranked, based on outcome, against all others in the class sharing the same role. Any distributive negotiation with money as the sole or primary issue can be used in this way.

Students can be told that their grades for the exercise depend on getting the best possible monetary result. Charles Craver uses his *Peterson v. Denver* simulation to that effect (Craver 2009). For negotiations with multiple issues, issues can be assigned points and students can be told that their grades depend on accumulating the most points. Russell Korobkin's *Blockbuster* negotiation is structured in that way (Korobkin 2009).[11]

Grading students on their outcomes adds stakes to negotiations that sometimes seem sterile. Students take these negotiations "seriously" in a way that they may not for ungraded negotiations. Students who are naturally inclined to avoid conflict or accommodate negotiating partners must face those tendencies. That is a valuable exercise for people who are entering a career in which they will inevitably represent people who are egocentric, greedy, or vengeful, and want primarily to crush the other side.

Some students feel uncomfortable in a negotiation in which they are pressured to claim value from a negotiating counterpart. That discomfort may arise from strong moral or religious convictions or it may merely reflect the student's temperament. A risk exists that some students will feel pressured to make demands that they would not in good conscience make if negotiating on their own behalf. This dilemma has real consequences because the students know that the better the deal they get for themselves, the worse grade their counterparts will get.

My view is that this is a reasonable predicament to impose upon the students. Again, assuming they become lawyers, they will face these kinds of problems in their practice lives because they will negotiate in situations in which they do not set the negotiation objectives. They should learn strategies to deal with them while they are in school and do not yet face the pressures of representing real people with real problems. To moderate the stress students may feel, however, I keep the point values for graded negotiations relatively low. In my experience, most students follow the instructions, attempting to claim as much value as possible, while a small handful invariably choose to accept a lower grade in order to relieve their discomfort with the competitive structure of the exercise.

Manipulating the Tactics

Tactics are the actions a negotiator takes in a negotiation to achieve her goals. Tactics include everything from making opening offers to bluffing to asking questions designed to elicit the other party's interests. Because tactics reflect the individual choices negotiators make in response to the progress of the negotiation, they are more difficult for an instructor to manipulate than either issues or objectives. Students can be taught and encouraged to use certain tactics — brainstorming, for example, or using a tapered concession pattern — but once in the negotiation, students should respond fluidly to the changing dynamics. They should use a wide range of tactics, and they should use them appropriately under the circumstances.

To force them to use a particular tactic in a negotiation would make the negotiation feel artificial, and the use of the tactic would likely be transparent to the counterparty.

Tactics also raise trickier ethical questions than issues or objectives. Many common negotiation tactics are inherently manipulative. A party who opens the negotiation by giving a small gift to her counterparty may consciously hope to trigger a reciprocity norm, in an attempt to obtain greater concessions. A party who retracts a previous offer may have the scarcity effect in mind, hoping to create a sense of urgency to settle in the counterparty. These and other common tactics at least push against the ethical norm of treating others as ends and not means.

Other tactics raise less subtle ethical problems. Foremost among these is misrepresentation. Misrepresentation is a fact of negotiation. A negotiator usually does not want his counterparty to know his reservation point, and negotiators commonly engage in various forms of verbal obfuscation to keep that information secret. Sometimes, they affirmatively report a reservation point that does not reflect their true intentions. But that behavior is condoned both by the norms of negotiation practice and by the Rules of Professional Responsibility that govern lawyers. As James White put it in his well-known critique of *Getting to Yes*, "in one sense the negotiator's role is at least passively to mislead his opponent about his settling point *while at the same time to engage in ethical behavior*" (White 1984: 118). White's suggestion, reflected in the ethical codes, is that certain misrepresentations are not unethical. But anyone who has taught negotiation has encountered students who find it morally unacceptable to lie about one's intentions, regardless of what the rules of professional responsibility say.

Given the practical difficulties of mandating specific tactics and the inherent ethical questions raised by manipulative and deceptive tactics, the topic of tactics presents the greatest challenge to the negotiation instructor looking for realistic simulations. It is important to expose students to a variety of different negotiation tactics, not least the tactics associated with "hard bargaining." Manipulation and deception are common in real-world negotiations. Students should, at a minimum, learn how to recognize and deal with them. The trick is to do that without creating artificial or ethically untenable role-play experiences.

The most straightforward way to produce "hard-bargaining" behavior is to mandate it. Charles Craver's *Singlepart-Largecorp* purchase agreement simulation expressly instructs students on one side of the negotiation to adopt "cooperative/problem-solving" tactics, and students on the other side to adopt "competitive/adversarial" tactics. Students in the competitive role are told to "limit disclosure of critical information," "begin with more extreme opening offers," and, in their discretion, "over- and under-state the value of the items being exchanged for strategic purposes" (Craver 2009: 112).

As I have suggested, some students will find it troubling to adopt the competitive tactics of a hard bargainer. They may feel pushed to engage in behavior they consider unethical, even in the comparatively benign context of a simulated negotiation. A less intrusive way to spark hard bargaining is to manipulate objectives. Students told to seek as much as possible in a negotiation will typically engage in hard-bargaining tactics to some degree, such as bluffing about a willingness to walk away or making extreme offers. Some students will go even further, pushing the envelope on either active misrepresentations or the withholding of information.

Russell Korobkin has this effect in mind in his *White Album* negotiation, a simple sales transaction for the purchase of an autographed Beatles album (Korobkin 2009). The simulation is set up so the parties have no prospect of future dealings, must consummate a cash deal in a short period of time, and have a large zone of possible agreements to work with. Since the only issue is money, the simulation can be graded based on the agreements reached, creating an incentive to claim value. Korobkin stacks the deck for the buyer by giving the buyer information about the sale price for a comparable album while giving the seller no information on comparables. Further, the buyer is told that he already has the comparable album so that the comparable album is not a genuine alternative for him. But the buyer may choose to withhold that information in order to conceal his actual reservation price. Thus, even without specific instructions, the negotiation is constructed to incentivize the use of certain "power" tactics by one of the parties. Power tactics will typically not be used in every group; when they are used, they are used in a nonartificial way, and they are used at the option of the students.

Several negotiation simulations are designed to incentivize misrepresentation or concealment. Korobkin's *Mossyback Lane* simulation does this in the context of a real estate transaction (Korobkin 2009). Each party is given private facts that reduce its leverage. The facts are probably "material," in the sense that it would be an ethical violation to affirmatively misrepresent them. The students must decide whether to disclose the harmful facts and how to respond if questioned directly on them. Again, the simulation can be graded based on outcome to add consequences to that decision. The *Cubit Properties-Nyquist* simulation created by Richard Perlmutter and included in the *Resolving Disputes* textbook materials creates a similar set of issues, also in a real estate transaction (Folberg et al. 2010). That simulation adds a layer of complexity, however, by putting the student negotiators in the role of agent, so that the ethical choice must be made with another party's interests in mind.

In the *Cubit-Nyquist* simulation, the lawyer negotiators are told that their clients give them full authority to reach agreement on the best terms possible and are not given express instructions on handling the damaging private information. In the *DONS* negotiation available through PON by Robert

Bordone and Jonathan Cohen, lawyer-negotiators are given damaging private information and are told that their clients want to keep that information confidential. *DONS* involves a tort claim for negligently infecting a romantic partner with a deadly disease. After making an initial demand, the plaintiff learns that he does not actually have the disease. He wants his lawyer to withhold that information and seek a large settlement in order to punish the defendant. The negotiation can be set up with students in the roles of both principals and agents, so that they can work through their handling of that issue and a similar disclosure issue on the defense side.

Again, some students will push the boundaries on these issues, while others will not. I can usually anticipate which students are likely to use more aggressive and adversarial tactics and which will refrain. I have found that a good way to bring a variety of tactics to light for an entire class is to videotape one or more groups of students doing the negotiations. Then I show portions of one or more negotiations to the class in order to start a discussion of different tactics, their effects, and their ethical ramifications. That way, even students who have not directly experienced certain hard-bargaining methods can see their effects and work through strategies for dealing with them.

Hard Bargaining and the Goals for a Negotiation Course

In presenting various ways of "exposing" students to hard bargaining across the three dimensions of issues, objectives, and tactics, I have consciously avoided discussing the instructor's goals for the class. Again, I start from the premise that students should have some degree of experience with hard bargaining, but I recognize that different instructors will have different learning objectives. Some may want to expose students to hard bargaining in order to teach them how to deal with aggressive counterparts, while encouraging students to adopt less adversarial approaches themselves. Others, however, may affirmatively teach students how to claim value using power tactics. The simulations I have described can be used with either of those approaches.

I view my role as a law professor as equipping students to perform effectively as practicing attorneys. In the negotiation setting, that means giving them an understanding of the types of negotiation behavior they are likely to encounter, a sense of the effects different forms of negotiation behavior are likely to have, and a set of skills they can use to achieve the outcomes they and their clients desire. From an ethical perspective, I have an obligation to make sure my students understand the law and professional rules that govern their behavior, as well as an obligation to help them examine their own ethical values so that they can make informed and thoughtful decisions about how to conduct themselves in the many nuanced situations they will encounter.

I do not see it as my role to create a certain *type* of negotiator. I have, over the years, developed a negotiating style that is consistent with my values and temperament. I want each of my students to go through that same process. I do not believe that there is any one "correct" way to negotiate, and the available empirical evidence supports that belief. The Williams and Schneider studies both indicate that lawyers can be effective — and ineffective — using either a more competitive and adversarial approach or a more collaborative and problem-solving approach. By the time they reach law school, all people have internalized certain ways of viewing themselves in the world and certain ways of interacting with others. They are unlikely to be effective negotiators if they try to adopt a negotiation approach that is inconsistent with those underlying behavioral tendencies. They can lean toward the competitive side or lean toward the cooperative side — or each in different contexts — as long as they are effective and operate within some set of socially acceptable ethical bounds.

In sum, I want all my students to know how to create value by identifying underlying interests and finding value-creating trades, and I want all my students to know how to claim value by using leverage and a sound offer and concession strategy. I want them to understand how common negotiation tactics — ethical, unethical, and borderline — work and the circumstances in which they are most often used. I want them to develop their own ethical boundaries for their negotiation behavior. And I want them to be prepared to do all of this in the context of a principal–agent relationship.

I have used the negotiation dichotomies in this discussion, and I also use them in class. Again, they are useful forms of shorthand. But I also question them in class, as I have questioned them here. I do not want my students to think that there are two kinds of negotiation, or worse, that there is one "good" kind of negotiation and one "bad" kind of negotiation. Humans are complex; negotiation is among the more complex forms of human interaction. The best negotiators expand or contract the issues under consideration as needed to reach agreement under the best possible terms. They set objectives thoughtfully based on the circumstances and relationships of the parties. They employ different tactics depending on the context of the negotiation and the behavior of the counterparty. Those are the negotiators I hope I am producing.

NOTES

1. In Nozick's formulation, a voluntary exchange occurs when both parties to the exchange are the recipients of "productive activities." Productive activities are "those that make purchasers better off than if the seller had nothing *at all* to do with them."

2. Not all work examining negotiating styles employs dichotomies, even when it uses dual-factor analysis. For example, in their book *Beyond Winning*, Robert Mnookin, Scott Peppet, and Andrew Tulumello (2000) use the nondichotomous empathy-assertiveness framework to describe different styles of negotiation behavior.

3. This is a simplification of a topic that begins to look much more complex when subjected to critical examination. Gerald Wetlaufer argues persuasively that many types of trades commonly considered "integrative" in the negotiation literature are not in fact "win–win" (Wetlaufer 1996). That point, while valid, does not affect my analysis because the manipulation of issues is critical to creating value whether or not the resulting agreement actually represents a "win" for both sides.

4. Schneider added the following sets of bipolar descriptors to her survey:

• Did not demonstrate accurate understanding of my client's underlying interests/ demonstrated accurate understanding of my client's underlying interests.

• Viewed negotiation as a process with winners and losers/viewed negotiation as a process with a possible mutually beneficial outcome.

• Conceptualized problem in terms of bargaining between positions/conceptualized problem in terms of underlying interests, motivations, and needs.

• Conceptualized problem solely in terms of legal entitlements/used legal entitlements as one of several factors in determining a solution.

• Had a broad view of the case/had a narrow view of the case.

Each of those focuses consideration on the willingness of the other party to explore multiple issues, as opposed to haggling over bargaining points on a linear scale. Schneider found that adversarial bargainers who are perceived as ineffective by their peers tend to adopt a narrow focus on the issues in the negotiation.

5. Schneider found that effective problem-solving negotiators are now more likely to be described as seeking to meet the interests of both parties. Meeting the needs of both parties requires an effort to contemplate a range of issues because it is all but impossible to meet the needs of both parties if money is the only subject of the negotiation.

6. Richard Dawson (2001: 9) explicitly advocates a value-claiming strategy: "Let's face it, when you're sitting down in a negotiation, chances are that the other side is out for the same thing as you are. . . . They want to take money out of your pocket and put it right into theirs." Dawson is careful, however, to recommend ways of claiming value that do not appear overly adversarial, so as not to harden the stance of the other party.

7. Rule 4.1 of the Model Rules of Professional Responsibility provides that a lawyer shall not make false statements of "material fact," and then in the comments defines "material fact" to exclude certain types of statements, including "estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement," as well as "the existence of an undisclosed principal."

8. It is possible to set up similar exercises using anything students value differently. In larger classes, I have created a seat exchange exercise in which students make trades based on their preferences to sit in the front or back, sides or middle, and with friends or with space to spread out.

9. An advantage of the *Waltham v. Foster* simulation is that the author has created videos of mediations of the simulation that are effective classroom tools for debriefing.

10. The *Law Partnership Negotiation* is available through the ABA Section of Dispute Resolution at http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/katemurphy.authcheckdam.pdf. It may be used in law or business classes with appropriate recognition of the author.

11. A number of PON simulations also have this structure, including the aforementioned *DEC v. Riverside*, *Negotiated Development in Redstone* by Lawrence Susskind and John Forester, and *Meridia and Petrochem* by Abram Chayes and Antonia Handler Chayes.

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