

## C H A P T E R   O N E

### *Introduction*

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Conflict is inevitable, but conflict resolution that best serves the interests and aspirations of the disputants is not. Conflicts can persist—as the long history of ethnic and religious strife in the Middle East, Ireland, and many other parts of the world so vividly reminds us—even though there may be a number of possible resolutions that would better serve the interests of the parties. In our everyday personal and professional lives we similarly witness disputes where the absence of a resolution imposes substantial and avoidable costs on all parties. Moreover, many resolutions that are achieved—whether through negotiation or imposition—conspicuously fail to satisfy the economist's criterion of efficiency. Let us cite a few here in which, at least with the benefit of hindsight, alternative resolutions easily can be identified that surely would have left both parties better off.

- Mary and Paul Templeton spend three years fighting over the custody of their seven-year-old daughter Tracy after Mary filed for divorce in 1985.<sup>1</sup> Mary wants sole custody; Paul wants joint physical custody. This middle-income family spends over \$37,000 on lawyers and experts. In the process they traumatize Tracy, who feels caught in the middle, and inflict great emotional pain on each other. Worst of all, they damage each other's rela-

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This chapter's organization and content borrow heavily from two previous works: Mnookin 1993 and Ross and Stillinger 1991. It also reflects the general interdisciplinary orientation of the Stanford Center on Conflict and Negotiation and the diverse contributions of its principal investigators, who are the co-editors of this volume.

<sup>1</sup>This example involves a divorcing family in California included in the Stanford Child Custody Study. The results of the study, which involved some eleven hundred families, are described in Maccoby and Mnookin *Dividing the Child: Social and Legal Dilemmas of Custody* (1992).

tionship with their daughter in a way that renders them less able to sustain Tracy when she needs them most. The ultimate resolution is unexceptional: the divorce decree provides that Mary will have primary physical custody of Tracy and that Paul will be entitled to reasonable weekend visitation. But the costs borne by mother, father, and daughter alike—emotional as well as financial—are far greater than they needed to be.

- In March 1989, after three years of skirmishes at Eastern Airlines, during which Frank Lorenzo, the new owner, had pressed the airline's unions for various concessions and had laid off workers to reduce costs, Eastern's machinists went out on strike. They were later joined by the company's pilots and flight attendants. To exert further pressure on the unions, and to avoid creditor claims, Eastern's management filed for bankruptcy, hired permanent replacements for the strikers, and began to sell off assets. The pilots and flight attendants returned to work, but the machinists union persisted in its strike, determined to get rid of Lorenzo at whatever cost. In one sense, they succeeded, for in 1990 the bankruptcy court forced Lorenzo to relinquish control of Eastern. This "victory" for the union, however, turned out to be a pyrrhic one (see Bernstein 1990). For on January 18, 1991, Eastern Airlines permanently shut down operations. Can there be any doubt that management and workers alike would have been better served by an agreement that responded to the needs and aspirations of both (for example, through a contract tying future employee compensation to company profitability)?
- The titanic struggle between Texaco and Pennzoil over Getty Oil had a clear winner and loser: in 1988 Texaco paid Pennzoil \$3 billion in cash to end the dispute. The case nonetheless suggests a bargaining failure, although of a somewhat subtler sort. The parties reached the settlement in question only after Texaco endured a yearlong bankruptcy proceeding and after protracted legal wrangling in various courts. While the dispute dragged on, the combined equity value of the two companies was reduced by some \$3.4 billion (Cutler and Summers 1988). A settlement *before* Texaco filed for bankruptcy would have saved resources and offered more to the shareholders of both companies (if not to Texaco's management) than the resolution created by the bankruptcy court.
- Our last example involves Art Buchwald's dispute with Paramount Pictures. In 1989, Buchwald and his partner Alain Bernheim sued Paramount for breach of contract, claiming that the studio had based Eddie Murphy's film *Coming to America* on Buchwald's story treatment without offering appropriate acknowledgement or compensation. Buchwald later wrote:

When I got involved, I expected to be in a business dispute that I assumed would be resolved early in the game for a minimal sum of money and, hopefully, an apology. . . . One of the discoveries of a suit such as this is that it makes you hurt deeply, and you don't forgive easily. [Another thing

I discovered:] Do not count on any money in a lawsuit—this is as true if you win as if you lose. (O'Donnell and McDougal 1992, xvii–xviii)

Buchwald's observations capture the nature of the process and the settlement. After three years of bitter litigation, a trial judge awarded Buchwald \$150,000 and Bernheim \$850,000. But this hardly made them winners, for the award was only a small fraction of the \$6.2 million they had requested in their final arguments. Moreover, it was far less than their legal expenses. Despite the contingency arrangement limiting the legal expenses actually paid to his attorney, Buchwald ended up losing money (to say nothing of time, energy, and frustration) in the resolution of his dispute.

Nevertheless, Buchwald was accurate in ridiculing Paramount's claim of victory. How, he asked, could it be a victory for the defendant to pay out nearly \$1 million in damages, and face additional legal fees in excess of \$3 million?<sup>2</sup> No Solomon is required to imagine a more satisfactory resolution—for example, the apology plus modest settlement proposed by Buchwald, perhaps accompanied by a soothing statement on his part acknowledging the absence of any fraudulent or malicious intent on the part of the studio.

These cases, as well as the ever-expanding list of religious, ethnic, and political conflicts that impose staggering costs on the peoples of our world, raise a central question for those of us concerned with dispute resolution: Why do negotiations so often fail even where there are possible resolutions that obviously would serve disputants better than protracted struggle? And why, when resolutions are achieved, are they so often suboptimal for the parties, or achieved only after heavy and avoidable costs? In other words, what barriers stand in the way of successful negotiation and effective resolution of conflict?

The Stanford Center on Conflict and Negotiation was established to explore this question through a program of interdisciplinary scholarship and research. This book, and the interdisciplinary conference from which it arose, represents a part of the Center's work. We will not attempt in this introductory chapter to summarize the chapters that follow. Suffice it to say that the reader will find discussions of several different strands in the Gordian knot of conflict resolution, including approaches illustrated by game-theoretic models (Rubinstein; Wilson), psychological research (Ross; Kahneman and Tversky; Dawes; Bazerman and Neale) and analysis of competing

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<sup>2</sup>Paramount executives, and theorists seeking a normative account for Paramount's decisions, might seek to justify such expenditures on "reputations" grounds—i.e., as an investment to discourage other potential litigants. Such explanations, however, may often reflect after-the-fact rationalizations rather than authentic accounts of calculated decision making or risk-taking.

institutional incentives (Gilson and Mnookin; Parson and Zeckhauser; Arrow). These discussions are set in a variety of contexts, ranging from international diplomacy (Panofsky; Raiffa) to constitution making (Elster), from labor disputes (Dunlop) to environmental negotiations (Sebenius; Susskind; Arrow). Our purpose is to explicate the concept of negotiation barriers and to show how an analysis of such barriers provides a useful departure point both for considering specific instances of conflict perpetuation and for developing a more coherent approach to the problem of dispute resolution. To this end we begin by introducing and distinguishing among three broad categories of barriers.

The first category concerns *tactical and strategic barriers*, barriers which arise from the efforts of bargainers to maximize their short-term and / or long-term outcomes, and which have long been the concern of game theory and the economic analysis of bargaining. In describing the operation of these barriers, we shall be calling attention to the ways that “rational” bargaining strategems—notably, concealment or misrepresentation of one’s true interests and priorities and other hardball tactics—preclude the achievement of the greatest possible “gains in trade” at the lowest cost. As such, these tactics make it impossible for the bargainers to reach efficient agreements. Strategic barriers can cause rational, self-interested disputants to act in a manner that proves to be both individually and collectively disadvantageous.

The second set of barriers are *psychological* and, as the label suggests, they are the special concern of a number of subdisciplines of psychology. These barriers do not arise from any calculated pursuit of self-interest. Instead, they reflect cognitive and motivational processes, or more precisely, biases in the way that human beings interpret information, evaluate risks, set priorities, and experience feelings of gain or loss. These barriers also reflect the fact that bargaining is an interactive social process, one in which parties make attributions and inferences not only about each other’s proposals, but also about each other’s motives and character.

The third category is something of a grab bag. What the barriers in this category have in common, however, is that they relate not to self-interested calculation or individual psychological processes, but rather to broader *organizational, institutional*, and other *structural* factors that compromise the interests and aspirations of disputing parties. These factors range from bureaucratic structures that restrict the free flow of information to political considerations that restrain the freedom of leaders to make necessary compromises, abandon past promises and rhetoric, or risk alienating powerful factions in their constituency. Understanding these barriers takes one into the domains of political science, organizational theory, and transaction-cost economics. We shall note some of these factors a bit later in this chapter, and describe one, the familiar *principal / agent* problem, more thoroughly. Several chapters in this volume dealing with specific environmental, eco-

nomic, or political conflicts also discuss the operation of institutional and structural barriers in considerable detail.

We would be first to concede that the tripartite classification scheme to be presented in this chapter is somewhat arbitrary, and that the list of barriers within each category is far from exhaustive. But the particular classifications and lists are less important than the general approach we are championing. The defining feature of this approach is its assumption that the problem of efficient dispute resolution profitably can be examined at very different levels of analysis—from the cognitive and motivational processes of the individual to the dynamics of institutions or even whole “bodies politic” (Saunders 1991). As such, the pursuit of efficient agreements in the face of conflict is inherently an interdisciplinary enterprise. We further maintain that beyond understanding the nature of particular barriers or types of barriers, it is important to recognize the ways in which these barriers may *interact* to multiply each other’s effect in thwarting the negotiation process. Finally, our approach emphasizes the importance of recognizing that frustrated disputants are apt to misdiagnose or misattribute the sources of a given stalemate—in particular, to make inferences about each other’s negotiation motives and behavior that are not only uncharitable but often erroneous and bound to exacerbate existing feeling of ill will and mistrust.

The succeeding chapters in this volume make it clear that different arenas of conflict, even different specific disputes, may bring into play very different resolution barriers. Indeed, dialogue with dispute resolution practitioners invariably makes one appreciate how important it is to understand the specific history and content of a given dispute, and to appreciate the social, political, or institutional context surrounding a given negotiation. Nevertheless, we think the analysis of barriers offered in this chapter does have some general implications for third parties who seek to facilitate the negotiation process. Accordingly, after outlining the various strategic, psychological, and institutional barriers of concern, we offer some suggestions for those who seek to overcome such barriers.

## TACTICAL AND STRATEGIC BARRIERS

Self-interested actors may fail to achieve efficient outcomes because their rational calculations induce them to adopt strategies and tactics that preclude such efficiency. Negotiators characteristically face a dilemma arising from the inherent tension between two different goals. The first goal consists of maximizing the joint value of the settlement—that is, the pool of benefits or size of the “pie” to be divided. The second goal consists of maximizing their own share of the benefit pool—that is, the size and attractiveness of their particular “slice” of the pie. Disputants, as we shall make clear, can affect

the size of the pie and of their own slice in several ways; but often the strategies and tactics that maximize the size of the pie compromise their ability to achieve the largest possible slice. Conversely, negotiation ploys designed to increase the size of their own slice tend to stand in the way of maximizing, and may even shrink, the size of the pie.

### **The Practice of Secrecy or Deception**

The “negotiators’ dilemma” (Lax and Sebenius 1986) that we have described is particularly clear with respect to the question of revealing versus concealing interests. Clearly, the parties have a strong incentive to ascertain each other’s true interests. Accurate information about goals, priorities, preferences, resources, and opportunities is essential for the principals (or those negotiating on their behalf) to frame agreements that offer optimal “gain of trade”—that is, agreement tailored to take fullest advantage of asymmetries of interests. Such information may even allow the parties to create additional value, that is, to contribute complementary skills or resources that combine synergistically to offer the parties “win-win” opportunities that might not heretofore have been apparent (See Fisher, Ury, and Patton 1991).

At the same time, parties have a clear incentive to conceal their true interests and priorities—or even to mislead the other side about them. By feigning attachment to whatever resources they are ready to give up in trade, and feigning relative indifference to whatever resources they seek to gain (while concealing opportunities and plans for utilization of those resources), each party seeks to win the best possible terms of trade for itself. In other words, total frankness and “full disclosure”—or simply greater frankness and fuller disclosure than that practiced by the other side in a negotiation—leave one vulnerable in the distributive aspects of bargaining. Accordingly, the sharp bargainer is tempted, and may rationally deem it advantageous—to practice secrecy and deception.

Such tactics, however, can lead to unnecessary deadlocks and costly delays or, more fundamentally, to failures to discover the most efficient trades or outcomes. A simple example illustrates the dilemma facing negotiators, and the barrier imposed by the strategic concealment or misrepresentation of information. Suppose Bob has ten apples and no oranges, while Lee has ten oranges and no apples. Suppose further that, unbeknownst to Lee, Bob loves oranges and hates apples, while Lee, unbeknownst to Bob, likes them both equally well. Bob, in service of his current resources and preferences, suggests to Lee that they might both be made better off through a trade.

Now, if Bob discloses to Lee that he loves oranges and doesn’t eat apples, Lee might “strategically” but deceptively insist that he shares Bob’s preferences and, accordingly, propose that Bob give him nine apples (which he

says have relatively little value to him) in exchange for one of his “very valuable” oranges. Bob might even agree, and thus sell his apples more cheaply than he could have sold them if he had concealed his taste for oranges and suggested a trade of five oranges for five apples (on the grounds that they “both might enjoy a little variety in their diet”).

Note, however, that such an “even trade,” while more equitable, would not really be efficient, because it fails to take full advantage of the differing tastes of the two parties. That is, a more efficient trade would be accomplished by an exchange of Bob’s ten apples for Lee’s ten oranges, perhaps with some “side payment” to sweeten the deal for Lee, or better still, with linkage to some other efficient trade—one in which it was Bob who, at little or no cost to himself, accommodated Lee’s particular needs or tastes.

### **Intransigence and Other “Hardball” Tactics**

Even when both parties in a negotiation know all the relevant information and are fully aware of the potential gains available from a negotiated deal, strategic bargaining over how to divide the pie can still lead to deadlock (with no deal at all), or to protracted and expensive bargaining that essentially shrinks the pie. Suppose, for example, that Selma has a house for sale for which she has a reservation price of \$245,000, and suppose further that Barbara is willing to pay up to \$295,000 for the house. Any deal within a bargaining range from \$245,000 to \$295,000 would make both parties better off than they would be if no sale occurred at all.

As in our previous example, secrecy or deception on the part of the principals could put the transaction in jeopardy. For example, if Selma disclaimed any eagerness to sell, and Barbara claimed interest only in picking up a “bargain” (because Selma’s house “wasn’t exactly what she had in mind”), buyer and / or seller both could lose heart and consummate a deal with some other party that was less advantageous to both of them. But even if Selma and Barbara know, or guess, each other’s reservation price, there still may be no deal—if they disagree about how the \$50,000 “surplus” should be divided.

If Selma and Barbara engage in hardball negotiation tactics, in which each tries to persuade the other that she is committed to walking away from a beneficial deal rather than accept less than \$40,000 of the surplus, the negotiation may end up in deadlock. Selma might claim that she won’t take a nickel less than \$285,000, or even \$294,999 for that matter. Indeed, she might go so far as to give a power of attorney to an agent to sell only at that price (or at least tell Barbara that she has done so) and then leave town in order to make her claim credible. Of course, Barbara could play the same type of strategy, with the result that no deal is made, and both parties suffer for their strategic display of intransigence.

Tough, intransigent bargaining tactics, which may be rational for self-

interested parties concerned with maximizing the size of their own slice of the pie, can often lead to inefficient outcomes. Those subjected to such tactics often respond in kind, and the net result typically is at best additional cost of the dispute resolution process (frustration, fees to agents, and loss of opportunity arising from delay) and at worst the failure to consummate a mutually beneficial agreement. This unfortunate scenario, it should be noted, is particularly likely to unfold when one or both parties believes that “time is on their side”—that they have greater patience or greater resources, or that delay will exact greater costs from the other side than their own side or, more generally, that the passage of time will weaken the other side’s bargaining position relative to their own.

Indeed, in the search for strategic advantage the parties in a conflict or negotiation may threaten to escalate the costs of deadlock, and may carry out their threats (thereby shrinking the size of the pie and the prospect for an outcome satisfactory to both sides). Those experienced in the civil litigation process see this all the time. One or both threaten extensive and costly pre-trial discovery as leverage to force the other side into agreeing to a more favorable settlement. They even make their threat credible, by producing a great deal of “paper” for the other side to deal with, to which the other side responds in kind. And the net result, too often, is simply that both sides unnecessarily spend a great deal of money in the process. *Buchwald v. Paramount Pictures* was such a case, one in which the economic costs of hardball litigation obviously and substantially shrunk the pie, leaving all of the litigants poorer, and angrier, than was necessary.

## PSYCHOLOGICAL BARRIERS

Psychological barriers, in contrast to strategic ones, do not arise from calculated attempts by the disputing parties to maximize immediate or long-term outcomes. Rather, they arise because the parties are subject to psychological processes that render them unable to recognize as advantageous (or unwilling to accept despite their advantages) settlement terms that seemingly meet the requirements of rational self-interest. Again, our list of such barriers is no doubt incomplete, and our classification scheme is far from neat. However, two basic insights, neither of which depends on the specifics of our list, are important.

First, it is critical to recognize that basic cognitive and motivational processes do in fact create barriers to dispute resolution that augment and interact with barriers arising from strategic calculation. Second, it is important to appreciate that disputants who are frustrated by the other side’s apparent intransigence are apt to misdiagnose or misattribute the source of the dead-

lock, both by failing to recognize the impact of various psychological processes and biases on their *own* evaluations and responses and by erroneously inferring subtle, devious, strategic motives on the part of their adversary. As a result, disputants are likely to make unwarranted inferences about their adversaries’ good faith, character, or intent, and to proceed to negotiate—or even *refuse* to negotiate—accordingly.

## Equity or Justice Seeking

A proposed change in the status quo, one calling for an exchange of concessions or an allocation of gains and losses, may be rejected even when it offers indisputable advantages over maintenance of that status quo, and even when the future offers no realistic hope of more favorable terms, simply because the proposal violates one party’s or both parties’ sense of fairness or equity (see Adams 1965; Homans 1961; also Berkowitz and Walster 1976; Walster, Berscheid, and Walster 1973).

In cases where the parties have an identical basis for claiming gains (for example, where two partners hold a winning lottery ticket they purchased jointly, bearing both their names) the equitable division may be apparent to all (i.e., a “fifty-fifty” split). Moreover, neither party, is likely to propose, much less agree to, any other division. Indeed, it is interesting in this connection to take note of research on the “ultimatum game,” in which (at least in the simplest form of the game) one party is given the opportunity to propose some division of a given purse, and the other party is obliged either to accept that “ultimatum” or to reject it (in which case neither party gains any portion of that purse). Two results from such research are important in terms of our present discussion. First, ultimatums offering the recipient less than 50 percent of the purse, especially ones offering *much* less than 50 percent, are frequently rejected even though the rejecting party thereby forfeits its only opportunity for gain. Second, the most common offer is a fifty-fifty split, and extremely unequal offers are relatively uncommon, which suggests that the party offering the ultimatum accepts the equity principle, or at least anticipates correctly that the other party would rather see the entire purse forfeited than accept a grossly inequitable division of its purse (Guth, Schmittberger, and Schwarze 1982; Ochs and Roth 1989).

Unfortunately, in allocation dilemmas and other bargaining situations outside the laboratory, the requirements of equity often are less obvious and less easily satisfied. In many cases what parties seek is not an *equal* advance over the status quo (for example, equal shares of material resources, or equal gains in security) but rather an advance that is *proportionate* to the weight and legitimacy of their respective claims (see Bazerman, Loewenstein, and White 1992). Such a requirement becomes particularly difficult to satisfy when the bases for the contending claims are different. If Jones wrote two-

thirds of the chapters in a coauthored text and Smith one-third, or if Jones put up two-thirds of the money for a speculative stock purchase and Smith one-third, they are likely to agree without difficulty or ill will on a similar two-thirds / one-third allocation of any returns on their investment. But if Jones wrote more first drafts and did more of the library research, while Smith provided the outlines from which Jones worked and did more of the subsequent revisions and prose polishing, or if Jones provided more of the capital for the joint enterprise, while Smith provided more time, effort, and expertise, the search for an equitable allocation of returns is apt to be more difficult and contentious.

The pursuit of equity is apt to be especially difficult when the contending parties are longstanding adversaries and the claims in question are not only varied in nature but subject to dispute about facts and relevance—i.e., who started the conflict, who has endured greater wrongs, who made more concessions or exerted more energetic and sincere attempts at conflict resolution in the past, whose present needs and privations are most pressing, who has the most attractive alternatives to negotiated settlement, and so forth. Furthermore, adversaries are more apt to insist on proportionality or equity rather than mere improvement over the status quo when at least one of the parties feels that it has received inequitable treatment in the past, or when it believes that the momentum of history is on its side—i.e., that in future, perhaps through imposition of terms rather than negotiation, it will be more able to achieve what it “deserves.”

By contrast, the search for agreement may be facilitated, and issues of equity may be pointedly avoided, when the parties in question already enjoy and wish to maintain a positive relationship. For example, longstanding collaborators negotiating future publication royalties, like friends negotiating the payment of a restaurant meal, may readily agree upon simple “equality”—that is, equal rather than proportional shares of the royalties—precisely because such an allocation avoids any consideration of equity or proportionality, thereby sparing the parties any potentially disagreeable discussion of respective claims or relative contributions.

Indeed, the “script” in such situations seem quite clear. The party with the stronger claims for a personally advantageous division of cost or benefits (i.e., the colleague who contributed somewhat more to the writing of the book, like the friend who ordered the less expensive restaurant entrée) is obliged to propose simple equality. At the same time, the other party, who stands to gain from equal division of current costs or rewards, is obliged to acknowledge that an unequal division (in favor of the first party) would be more equitable, but to yield graciously when the first party, perhaps citing the quality and / or continuing nature of their joint activities, insists on simple equality.

Our discussion of equity seeking suggests a paradox—one that some theo-

rists and practitioners will no doubt find distasteful. As many thoughtful analysts (e.g., Fisher and Ury 1984) have noted, the art and science of successful dispute resolution demands the discovery (or if necessary the creative construction) of terms that the relevant parties feel are fair and responsive to their underlying needs and concerns, not mere “half-a-loaf” compromises. Our observation here is simply that the explicit pursuit of fairness or proportionality may itself pose a barrier to dispute resolution. To some extent, the resolution of this paradox involves a simple distinction between short-term and long-term perspectives. Agreements that satisfy equity concerns may be more difficult to design, and in many cases may not be achievable; but if they *can* be achieved they are apt to prove relatively stable. Conversely, terms agreed upon that do not satisfy such concerns are apt to come undone in the future, and to create the prospect of renewed hostility (especially if one party or the other increases its power, and feels able to redress the “injustice” of existing arrangements). To some extent, however, satisfaction of the partisans’ subjective senses of equity—at least as an explicit negotiation goal—may simply be an unrealistic and undesirable burden to place on the negotiation process. That is, negotiation may proceed more productively when all that is explicitly sought is the generally obtainable goal of mutual advantage, with no requirement or implication that the disputants thereby concede explicitly or implicitly that the settlement reached reflects the relative merits of their respective cases.

### Biases in Assimilation or Construal

As we have noted, disputants are bound to have differing recollections and interpretations of the past—of causes and effects, promises and betrayals, conciliatory initiatives and rebuffs. They are also bound to have differing interpretations or construals not only of the *context* of their dispute, but also of the *content* of any proposals designed to end that dispute.

Such differences may reflect the operation of both cognitive and motivational biases—that is, the tendency for people to “see,” and remember, what their theories, beliefs, and expectations on the one hand, and their needs, wishes and self-interest on the other hand, dispose them to see (Abelson 1981; Bartlett 1932; Bruner 1957a, 1957b; Fiske and Taylor 1991). At the same time, they fail to recognize the influence of such biases on their own views, believing that they see things as they are in objective reality, and that it is only those who fail to share their views who are subject to such biases (Griffin and Ross 1991; Ross and Ward, in press).

Cognitive and motivational biases alike thus lead disputants to feel that they have acted more honorably in the past, have been more sinned against than sinning, and are seeking no more than that to which they are entitled. Each side in the dispute, moreover, is apt to feel that *its* interests are the

ones that most require protection in any future agreement—for example by avoiding ambiguities in language that could be used as a loophole by its adversary, while at the same time avoiding rigidities in formulation that could compromise its own legitimate need to guard itself against unforeseen future developments. And, when its adversaries make parallel claims, or when third parties offer relatively evenhanded summaries of the past or commentaries about the legitimacy of respective claims, each side is apt to perceive bias in such effort and to infer unreasonableness, hostility, or devious strategic intent on the part of that third party.

The disputants, as we have noted, may show similarly divergent biases in the way they interpret prospective settlements of their conflict. Specifically, each side may interpret its potential concessions in a manner that maximizes their apparent significance and value but interpret the other side's potential concessions in a manner that minimizes their apparent significance and value. Thus the "impartial review board" proposed by the mayor's task force to deal with alleged incidents of police brutality is apt to be interpreted very differently by the members of the outraged community ("a bunch of political hacks who don't understand our experiences and would take the word of the police over that of people like us") and by the police ("outsiders who would worry too much about political implications and wouldn't understand our problems and frustrations"). Acceptance of such an "impartial" board, accordingly, would be seen as a far greater concession to the community by the police officers who would be subject to its review than by the community members who would gain the opportunity to air their grievances before it.

Often, a difference in construal may reflect a difference in perception of motives and intent. For example, one adversary in an arms negotiation may feel that a package deal that would increase its ability to launch a successful first strike but decrease its ability to retaliate to such a strike would represent a major concession on its part (because it has no intention to launch a first strike, while the other side has yet to prove its trustworthiness). By contrast, the other adversary will feel the proposal to be equitable or even generous (because, from *its* viewpoint, it is the other side's trustworthiness rather than its own that remains to be proven).

When such differences in construal and / or evaluation are great enough, a conflict that appears to be quite tractable (i.e., amenable to agreements offering mutual advancement of interests) from the viewpoint of outsiders proves highly intractable in light of the views of the adversaries. But even when the differences in perceptions and evaluations are not great enough to render the conflict totally intractable, these differences may be great enough to make the two sides disagree about which side would be making the larger concessions and, therefore, which would be entitled to receive more generous concessions in the future. And again, the net result of these biases will be a tendency for the adversaries to assess the overall valence or balance of

a given proposal (especially when the matter of equity is taken into account) in terms that would strike an outside observer as biased and self-serving. Moreover, when the adversaries hear *each other's* characterization of the proposals' content and equitability, the result is likely to be heightened enmity and distrust.

### **"Reactive" Devaluation of Compromises and Concessions**

Beyond the barriers posed by biased assessment of content and context there is a further problem resulting from the dynamics of the negotiation process. The evaluation of specific package deals and compromises may *change* as a consequence of knowing that they actually have been offered, especially if they have been proposed by an adversary.

Evidence for such "reactive" devaluation, obtained in both laboratory and field settings, is reviewed in Chapter 3 of this volume. It appears that a given compromise proposal is rated less positively when proposed by someone on the "other side" than when proposed by an apparently neutral third party (or, of course, when proposed by a representative on one's own side). Furthermore, it appears that proposed concessions are rated more positively than withheld concessions, and that a given compromise is rated less positively after it has actually been put on the table or unilaterally enacted—less positively, that is, than it had been rated beforehand, when it was merely a hypothetical possibility (see Ross and Stillinger 1991; Ross and Ward 1994, Stillinger, Epelbaum, Keltner, and Ross 1990). A range of cognitive and motivational processes, discussed in more detail in Chapter 3, has been proposed to account for such phenomena. These range from the perfectly rational tendency for negotiators to view an adversary's willingness to offer rather than withhold a given concession as informative of that concession's *value*, to the motivational bias that frequently makes people devalue whatever is at hand or readily available relative to whatever is unavailable or withheld.

It seems likely that different reactive devaluation mechanisms may operate to different degrees in different negotiation contexts (depending on the *ambiguity* of the terms of the proposal, the nature of the *relationship* between the source of the proposal and the potential recipient, and other contextual factors). It also seems likely that reactive devaluation will be most pronounced and most destructive in its effects when concessions are offered *unilaterally*, with the explicit or implicit suggestion that they should be reciprocated. In such cases the recipient of the unilateral concession is apt to believe that its adversary has given up nothing of real value and, therefore, to resist the suggestion that it should offer something of real value in return.

As a result, strategies that would attempt to build goodwill, break deadlocks, and stimulate reciprocal concessions through initial unilateral conces-

sions (see Osgood 1962, 1980; also Lindskold 1978) face a formidable obstacle. When such concessions are *large*, they may increase the recipients' level of aspiration and their conviction that further large gains can be won by hard bargaining (see Siegel and Fouraker 1960). Nontrivial unilateral concessions may even invite exploitation (and reinforce the position of the "hardliners" within the adversary camp who have urged intransigence). When such concessions are *small*, they are apt to be perceived as trivial, token, and manipulative in intent. Against a background where each side feels that it historically has been more flexible and reasonable than its adversary—i.e., where each side feels that it is now the other side's turn to make concessions—the prospects for disappointment, distrust, and misattribution seem great, and alternative strategies seem called for.

### Loss Aversion

In an important series of studies, Daniel Kahneman and Amos Tversky (1979, 1984) showed that decision makers tend to attach greater weight to prospective losses than to prospective gains of equivalent magnitude. This work is reviewed in Chapter 3 of this volume. The most obvious implication of such "loss aversion" for the art and science of negotiation is worth emphasizing here, namely, that parties in a dispute will prove reluctant to trade concessions—even when a dispassionate analysis of the parties' interests and expressed values suggests that the relevant trade would be mutually advantageous.

Consider, for example, a conflict between a management determined to cut costs and a union determined to advance the interests of its workers. In principle, a third-party mediator should be able to serve both sides in the conflict by identifying benefits currently held by workers that have been highly costly to management but only moderately valuable to the workers (for example, a health insurance policy that calls for no copayment) and prerogatives currently held by management that have been highly aversive to the workers but only moderately valuable to management (for example, the ability to dictate working hours rather than allowing flexible work schedules). The phenomenon of loss aversion, however, suggests that the obvious proposal by a mediator—i.e., that the union trade its "no copayment" insurance benefit for management's willingness to give up its scheduling prerogative—may meet a cooler-than-expected reception from both sides, unless the mediator finds a way to discourage them from framing what they are ceding as "loses" and what they are receiving as "gains" (see Neale and Bazerman 1991).

In other negotiation contexts a proposed trade of "land for peace," or more flexible custody arrangements for more generous child support terms, may meet a similarly cool reception for a similar reason—even without the equity

concerns and without the problems of biased construal and reactive devaluation that we have outlined earlier. And again, the prospects for misunderstanding and misattribution are obvious. Each side is apt to see the other side's reluctance to trade concessions, or its apparent unwillingness to offer "fair value," as unreasonable, or as strategic in intent, or as evidence of its lack of "seriousness" in the negotiation.

The phenomenon of loss aversion also manifests itself in the tendency for decision makers to risk large but uncertain losses rather than accept smaller but certain ones. This tendency, in turn, holds an obvious implication for civil litigation. Defendants may unwisely decide to litigate rather than settle out of court—i.e., risk a large loss or award to the plaintiff rather than accept the certainty of a small one. By contrast, plaintiffs may unwisely decide to settle when their expected gain would actually be increased by undertaking the risks of litigation. In other words, the plaintiffs would show the familiar bias of "risk aversion" in the domain of gains by accepting a modest but certain gain rather than gambling on the prospect of a potentially large but uncertain one (Rachlinski 1994).

### Judgmental Overconfidence

Litigants deciding whether to go to trial, political leaders deciding whether to undertake a military adventure, and labor negotiators deciding whether to risk a strike may all be led to decide affirmatively rather than reach negotiated settlements because of a phenomenon that Kahneman and Tversky (in Chapter 3 of this volume) term "optimistic overconfidence." Such overconfidence (which is but one aspect of the more general and much documented tendency for people to place unwarranted confidence in their predictions about future events) would be reflected in the tendency for the disputants to overestimate the likelihood and probable extent of their success in achieving their objectives. The primary source of this overestimation is an obvious asymmetry in the availability of information. That is, each side tends to have greater access to the factors that strengthen its position or would promote its success than to the factors that would weaken its position or promote its adversary's success. In particular, disputants know their own goals, assumptions, and plans better than they know their adversary's; and they fail to make adequate inferential allowance for such gaps in their knowledge by lowering their subjective certainty of success. Essentially, they adopt an "insider's" rather than an "outsider's" perspective, one that focuses too much on what they know or assume about the particular case at hand, and too little on the type of base-rate information or historical precedent that ought to alert them to the possibility of miscalculation and protracted, costly struggle.

*One might imagine that the decision makers would be protected from the*



consequences of their overconfidence by the opportunity to compare their own assessments with those of peers and advisers. But a number of organizational or institutional factors (of the sort to be described in the final section of this chapter) limit the value of such consultation. As Irving Janis noted in his well-known discussion of "groupthink" (Janis 1972), counselors may hold their position precisely because they share the views of their leader; moreover, they may be reluctant to express doubts or disagreement lest their courage and loyalty be doubted. Indeed, even in the absence of shared norms and conformity pressures, group deliberation may generally serve to heighten rather than temper judgmental overconfidence. Recent research conducted by Dunning and Ross (1992) and by Heath and Gonzalez (in press) suggests that group deliberation in the context of estimation or prediction—even the simple exchange of predictions and numerical confidence assessments in the absence of real discussion—increases judgmental overconfidence. In other words, exposure to the views of one's peers seems to increase subjective certainty more than it increases objective accuracy.

Optimistic overconfidence can also be expected to occur where the outcomes in question involve predictions about judgments of others. In particular, disputants are apt to overestimate the degree to which their assessments will be shared by peers (Ross, Greene, and House 1977). The unwarranted assumption made is that other individuals—at least if they are objective and fair-minded—will come to one's own views, once they are exposed to the "truth." This assumption is apt to prove particularly costly in litigation contexts, where attorneys and their clients must decide whether to reach negotiated settlements or risk the inevitable costs and uncertainties of trial before judge or jury.

#### **Dissonance Reduction and Avoidance**

People involved in protracted conflict or unsuccessful negotiation are likely to try to minimize the amount of psychic regret or "cognitive dissonance" (see Festinger 1957; also Aronson 1969) to which they are subject. Such attempts at reducing and/or avoiding dissonance create obstacles to dispute resolution in two respects. First, disputants are continually motivated to rationalize or justify both their past failures to settle and whatever costs they are bearing in continuing the struggle. This objective is accomplished by convincing themselves (and telling others) that the rejected proposals were even more one-sided, or that those offering them are even more untrustworthy, or that the causes for which they are struggling are even more noble, or that the prospects for better terms in the future are even more favorable, than they had seemed prior to the disputant's decision not to settle. These additional justifications, which successfully reduce the parties' dissonance, in turn constitute additional psychic barriers to settlement.

Second, the prospect of settling a longstanding conflict threatens new dissonance—especially when additional costs and suffering have been borne since the rejection of similar terms in the past, and especially when such refusals have been buttressed with public pronouncements and actions. Rather than embracing today what could have been achieved yesterday without any additional financial, economic, human, or political costs, it is enormously tempting to "stay the course" and to convince oneself, and anyone else who can be persuaded, that more advantageous terms (terms that could truly justify one's past expenditures and sacrifices) can be won in future.

The implications of dissonance theory, however, are not entirely bleak for the process of dispute resolution. The human tendency to avoid and reduce psychic pain can also ease the process of acceptance and reconciliation. Once the agreement in question is a fait accompli, and resumption of conflict has become an unattractive option, the same dissonance-reduction or rationalization processes will lead all concerned to find new justifications for and new advantages in the agreed-upon terms of settlement.

#### **INSTITUTIONAL, ORGANIZATIONAL, OR STRUCTURAL BARRIERS**

The third set of barriers to be considered does not involve motives or biases in the judgments and behavior of the principal parties involved in conflict. These barriers reflect the fact that conflicts typically involve individuals and interest groups other than the principals. They also reflect the contexts within which conflict and negotiation occur and the institutions through which disputes are likely to be managed. Again, the list we offer is meant to be illustrative rather than complete or definitive.

##### **Restricted Channels of Information and Communication**

Sometimes channels of communication are nonexistent, or so restricted that the parties have no opportunity to air their grievances or to provide each other with the information about priorities and interests necessary for them to frame efficient settlement proposals. Such barriers to information transfer can be bureaucratic and institutional, reflecting divided or even conflicting responsibilities and areas of expertise (for example, the responsibilities of technical experts, financial officers, advisory boards, elected officials, and decision makers). They can also be political, or even legal. When countries break off diplomatic relations, undertaking discussions with the "enemy" can open politicians and citizens alike to political charges of disloyalty, lack of resolve, or broken promises. Lawyers, officeholders, entrepreneurs, and

union officials all face restrictions on whom they can meet with and what they can discuss privately. (See Chapter 12 for Elster's account of the costs and benefits of public versus private diplomacy, and Chapter 13 for Arrow's discussion of some problems in the social organization of information acquisition.)

### Multiple Interest Groups

As the chapters later in this volume on environmental disputes and negotiations attest, a number of structural problems or barriers arise when negotiations involve multiple interest groups. Often, people affected by a decision or settlement plan will not or cannot be represented at the bargaining table (and while their absence may actually increase the odds of an agreement's being reached, it may decrease the likelihood that the agreement will address all relevant interests). The problem of multiple interest groups becomes particularly intractable when very different interests, and stakes, are involved for different parties—for example, in negotiations about the placement of waste disposal sites, parks, hospitals, or halfway houses. In such cases a small well-defined set of individuals stand certain to gain or lose a great deal of money, while larger and less easily defined groups of individuals face prospective gains and losses that are less certain and involve less concrete matters of "quality of life." The institutions available for handling such disputes may be poorly equipped to weigh and resolve such competing claims. They may even be prevented by legal, ethical, or political constraints from entertaining settlement plans and procedures of the sort that might offer the greatest efficiency (e.g., use of "side payments," and creation of "markets" for distribution of costs and benefits).<sup>3</sup>

### The Principal / Agent Problem

A final barrier to be discussed is suggested by recent work relating to transaction-cost economics, and is often called "the principal / agent problem" (Pratt and Zeckhauser 1985). The basic idea is familiar. The personal interests of an agent (whether it be a lawyer, employee, or officer) serving as a negotiator may be quite different from the interests of the principal party that agent represents. Indeed, aligning such interests—whether by formal

contract or norms—proves very difficult; and this difficulty may constitute a barrier to efficient resolution of conflict.

Litigation is fraught with such principal / agent problems. In civil litigation, for example—particularly where the lawyers on both sides are being paid by the hour—there is very little incentive for the opposing lawyers to cooperate. Indeed, the incentive structure of the situation may induce them to favor costly, noncooperative litigation. This may be particularly true if the clients have the capacity to pay for trench warfare and if they are angry enough to derive satisfaction from the costs they impose on the other side. Clients who crave a decisive, formal judicial decision that would offer them "vindication"—something that negotiated settlements can rarely offer—are especially likely to line the pockets of their agents in this fashion. Commentators have suggested that such asymmetries of interest help us understand why so many cases settle on the courthouse steps, and not before. Such a late settlement allows the attorneys to avoid the possible embarrassment of an extreme and unfavorable outcome, while at the same time providing substantial fees. (P'ng 1983). All the agents remain obliged to do is to explain their sudden eagerness to settle to clients who crave outright victory in court, who are now overly optimistic about the prospect of such victory, and eager for the trial to begin.

The Texaco / Pennzoil dispute may have involved a principal / agent problem of a different and subtler sort. Mnookin and Wilson (1989) have argued that the interests of the Texaco officers and directors diverged from those of the Texaco shareholders. Although the shareholders would have benefited from an earlier settlement, the litigation was controlled by Texaco directors, officers, and lawyers who were themselves defendants in fourteen lawsuits (eleven of them derivative shareholder actions, brought after the original multibillion-dollar Pennzoil verdict in the Texas trial court).<sup>4</sup>

Facing the risk of personal liability, the directors and officers of Texaco had an incentive to pursue protracted litigation (paid for by the shareholders) in the remote hope of a total victory and exoneration, rather than accept a negotiated resolution. In any case, they rejected initial settlement offers, even though in so doing they subjected the corporation to the risk of a \$10 billion judgment, along with ever mounting litigation costs. The case ultimately did settle, but only after a bankruptcy proceeding in which the bankruptcy court eliminated the risk of personal liability for Texaco's officers and directors.

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<sup>3</sup>In this regard, it is also worth noting the formal arguments demonstrating the "impossibility" of satisfying simultaneously a set of desirable conditions or requirements for the aggregation of individual preference orderings (Arrow 1963).

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<sup>4</sup>In 1985, a Texas jury awarded \$7.53 billion in compensatory damages and \$3 billion in punitive damages to Pennzoil. See *Texaco, Inc. v. Pennzoil Company*, 626 F. Supp. 250 (S.D.N.Y. 1986).

The principal/agent problem, we should emphasize, does not relate exclusively to the distribution of *financial* costs and benefits. Agents may bargain and respond to settlement possibilities in a manner that gives heavy weight to their “reputations” either for “toughness” or “cooperativeness.” They may have ideological axes to grind, or may feel that their clients do not know their own best interests. Alternatively, they may feel that their clients give their own interests too much weight and the “public’s” interest too little weight. In a real sense, agents and other third parties bring their own mix of strategic concerns and psychological biases to the negotiation process—all of which can constitute barriers to efficient dispute resolution.

#### OVERCOMING BARRIERS: THE ROLE OF MEDIATORS

The study of barriers can do more than help us understand why negotiations sometimes fail when they should succeed. It can also contribute to the appreciation, development, and evaluation of techniques for overcoming these barriers. In this regard, let us briefly consider the role of third-party mediators, and discuss some of the ways that “neutrals” can facilitate the efficient resolution of disputes.

First, let us consider strategic barriers. To the extent that a neutral third party is trusted by both sides, it may be able to induce the parties to reveal information about their underlying interests, needs, priorities, and aspirations that they would not disclose to their adversary. This information can permit a trusted mediator to help the parties formulate the most efficient “trades” possible, or even to “enlarge the pie” by helping the parties to combine their resources and opportunities in ways that had not previously been considered by either party.<sup>5</sup> Moreover, a skilled mediator can lessen the adversaries’ incentive, and hence their temptation, to engage in the various hardball tactics that waste resources and breed ill will.

Mediators can also do much to overcome or attenuate psychological barriers. Perhaps most importantly, they can foster a problem-solving atmosphere, one that encourages the parties to move beyond political posturing and recriminations about past wrongs to recognize fully the gains from an efficient and fair resolution of the dispute and to work to achieve them. In a sense, the mediator can turn the parties’ attention away from the direct pursuit of equity to the pursuit of enlightened self-interest. While divergent

views of the past are inevitable, the mediator can employ techniques designed to at least help each side understand the case from the other side’s perspective. The mediator can also endeavor to reframe the status quo, the impact of particular resolutions, and the costs of continued struggle in a manner that minimizes (or even takes advantage of) the participants’ aversion to accepting losses, especially losses that are certain. The mediator similarly can dampen the principals’ overconfidence about the prospects of pursuing a non-negotiated settlement—perhaps by offering the disputants’ relative “base rate data” regarding outcomes and costs, or by exposing them to the reactions of disinterested parties apprised of the essential facts of the case.

The phenomenon of reactive devaluation sometimes can be avoided (and almost always can be reduced) if the settlement proposal in question can be made to come, or seem to come, from the third party or some collaborative effort rather than one of the principals acting unilaterally. Indeed, this blurring of authorship is one of the objectives accomplished when, after talking separately to each side about what might or might not be acceptable, the mediator takes responsibility for generating a proposal that he or she presents as a response to the principals’ own stated priorities. The mediator can also help the parties to understand *why* a particular concession is being offered, and why it is being offered *now*—lest attribution be made which would encourage devaluation rather than reciprocation of those concessions. Such explanations could also reduce some of the dissonance associated with making concessions and accepting the various costs associated with ending protracted struggle.

The skilled mediator similarly can help overcome organizational barriers, such as those posed by principal/agent problems. A mediator may bring clients themselves to the table, and help them understand their shared interest in minimizing legal fees and costs, in circumstances, where the lawyers themselves might not be doing so. Similarly, in circumstances where a middle manager is acting to prevent a settlement that might benefit the company but might be harmful to the manager’s own career, an astute mediator can bring another company representative to the table who does not have a personal stake in the outcome.

Finally, the mediator can serve as educator and relationship builder. Parties can be made aware of the barriers to dispute resolution discussed in this chapter and can be encouraged to seek ways of overcoming them, or at least to recognize that they often spring from the nature of conflict and negotiation rather than the character flaws of their adversary. Through such education and the many confidence-building measures and personal opportunities for more informal and humanizing contact that skilled mediators encourage, personal relationships can be built and improved. In this way the enmity that heightens the impact of virtually all of the barriers we have described can be attenuated.

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<sup>5</sup>This perspective poses interesting theoretical and empirical questions for further research: From a game-theoretical perspective, when would a “rational” strategic party reveal information to a mediator that would not be disclosed to the other party? To what extent do mediators succeed in securing accurate revelations?

## CONCLUSION

In closing, we would like to underscore three basic ideas. The first concerns the important task around which this chapter has been organized, that is, recognizing the existence and exploring the nature of the many barriers to be overcome in the pursuit of efficient and fair dispute resolution. We trust that this chapter, and the chapters that follow, will help the reader to appreciate the importance of this task, not only for researchers, but for practitioners as well.

The second idea concerns the inherently interdisciplinary nature of the field of dispute resolution. This book is an example of how barriers can be explored from a variety of different perspectives. It draws principally on work relating to game theory and the economics of bargaining, principal / agent economics, cognitive psychology, and social psychology. Other disciplines, however, also have much to offer. Our understanding of conflict resolution would surely be enriched by careful exploration of barriers from the perspectives of other social sciences, including anthropology, sociology, and political science. History, literature, philosophy, theology, and other humanities similarly offer potentially useful contributions.

The third idea is a corollary of the second. No theoretical perspective, and no single discipline, has a monopoly on useful insights concerning the barriers to the fair and efficient resolution of conflict. Indeed, progress with respect to our understanding of conflict is going to turn very fundamentally on the ability of people from different disciplines to learn from one another and to work together to improve both theory and practice. One goal of this research should be to go beyond a better understanding of why negotiations fail when they ought to succeed—to help us, both as disputants and third parties, to overcome the barriers and achieve greater and more consistent success in the negotiated resolution of conflict.