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Bargaining and Compromise: Recent Work on Negotiation and Informal Justice

In a *Doonesbury* episode, a Hollywood agent and a producer meet to cut a deal:

SID: Bottom line time, babe! What are you offering my boy to produce and write?
MARTY: He'll be looking at two mil five, plus 3 percent net! Sweet, huh?
SID: *Sweet*? This is a joke, right, Marty? You're putting me on, right? You're offering me less than 20 percent of the gross?
MARTY: Okay, 5 percent gross! Take it or you'll never work in this town again!
SID: Don't play hardball with me, you old hack! 15 percent of the gross or we walk!
MARTY: 10 percent or I'm out the door!
SID: Deal. Who loves you, babe?
MARTY: Come to poppa, you little maniac!
(They hug)[1]

This is our stereotype of negotiation; and, we may think, it is not a pretty way for civilized people to order their affairs.

Negotiation is, nevertheless, the only way other than obeisance to outside authority that men and women have discovered to settle their quarrels without violence. It is more common, at least as ancient, and in obvious ways more personal, than obeisance to authority (adjudication). And, of course, in international relations it is the *only* possible alternative to violence.

1. G. B. Trudeau, *You Give Great Meeting, Sid* (New York: Holt, Rinehart and Winston, 1982, 1983), n.p.

In this essay I shall discuss some recent writing on negotiation, compromise, and what is often called "informal justice"—dispute resolution without adjudication. This literature raises a number of interesting philosophical and empirical questions. My concern will be to point these out, and to sketch some arguments that bear on them. I will not try to answer them, however, for the following reason. Most of the questions I discuss are variations of one overarching problem: how to assess agreements that end conflict, but do so in morally disquieting ways—for example, agreements that are lopsided, or that compromise the disputing parties' moral principles. I shall suggest in Section VI that this is a hard philosophical problem; unhappily, I have no solution to it.

In the earlier sections, I show how this issue arises in some (overlapping) literatures on bargaining and dispute-resolution. Section I discusses "how to" books on negotiation; Section II turns to empirical studies; Sections III and IV discuss the ethics of negotiation, focusing on the example of lawyer negotiations. Section V treats negotiation in the context of some recent writing on informal justice.

I. From Pop to PPP

Your shopping-mall bookstore may have a row of popular negotiation books. They tell you how to win through intimidation, how to negotiate your way to success. "Never again will you have to take no for an answer," promises one cover. And they agree that negotiation techniques are universally applicable: they can be used to "reach a fair settlement with an insurance company for a claim," but also to "spend less time on obligatory visits to your parents."[2] "Effectively influence business associates, children, friends—anyone!"[3] "Use the Win-Win approach in dealing with your mate, your boss, Master Charge, your children, your lawyer, your best friends and even yourself."[4]

This is the Pop Paradigm: everyone—your child as well as Master Charge—is an adversary, a suitable target for "the jujitsu approach" (as one pop book describes it). At the heart of negotiation is a set of manip-

2. Michael Schatzki, *Negotiation: The Art of Getting What You Want* (New York: Signet, 1981), p. 6.

3. Gerard J. Nierenberg, *The Art of Negotiating* (New York: Simon and Schuster, 1981), back cover.

4. Herb Cohen, *You Can Negotiate Anything* (Secaucus, NJ: Lyle Stuart, 1980), back cover.

ulative techniques; negotiation is a purely instrumental *modus vivendi*, and the idea that different instruments may be appropriate in different relationships—that jujitsu may not be the thing to use on your parents and best friends—is excluded from consideration simply by being ignored. Sid, meet Marty.

The Pop Paradigm—negotiation is manipulative technique, its goal is getting what you want in a hostile world—describes one common view of what negotiation is about. Current theory, however, tends to focus on a different view, which we may term the "PPP Paradigm" (associated with the Harvard Negotiation Project, particularly Fisher and Ury's best-selling *Getting to YES*,[5] and Howard Raiffa's *The Art and Science of Negotiation*).[6] The three Ps are:

(1) *Positive-sum games*. Negotiation turns zero-sum games into positive-sum games; Pop competition becomes cooperative problem solving.

(2) *Pareto-optimality*. Negotiation seeks Pareto-improvements until Pareto-optimal outcomes are achieved: each side should seek to squeeze out additional gains for, as well as from, the other until the northeast frontier of the payoff space is reached. (The search for positive-sum games and the search for Pareto-optimal outcomes are not the same thing, since a positive-sum outcome is not always Pareto-superior to a zero-sum, and the northeast frontier may be zero-sum at all points.)

(3) *Principled bargaining*. Rather than engaging in a contest of wills, or trading offers and counteroffers, negotiators should appeal to principles and "objective criteria" such as "fair standards."[7] Instead of merely tossing numbers back and forth in a used-car transaction, we may agree to consult the blue book.

In a fairly obvious way, the PPP Paradigm is diametrically opposed to the Pop Paradigm: negotiation is appeal to standards rather than psychological manipulation, it seeks joint rather than individual gains, and the opposite party is treated as a collaborator rather than an adversary.

5. *Roger Fisher and William Ury, *Getting to YES: Negotiating Agreement Without Giving In* (Boston: Houghton Mifflin, 1981). Since readers may be unfamiliar with this literature of negotiation, I indicate with an asterisk my suggestions for what one should read to make initial acquaintance with the subject.

6. *Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Harvard University Press, 1982).

In point of fact, the two positions are not always that far apart. The Pop author's "Win-Win technique" that tells you "How To Get What You Want" is precisely the art of turning zero-sum ("Win-Lose") into positive-sum ("Win-Win") games. And principled bargaining has been seen by some negotiators as just another manipulative technique. (Even Raiffa refers to the use of "fairness arguments" as a "tactical trick.").[8] Nevertheless, the two paradigms represent quite distinct understandings of how to view negotiation—one as strategic competition and the other as reasoned collaboration.

The PPP Paradigm is in obvious ways more attractive than the Pop Paradigm; but grave questions arise about whether it can work. Consider a negotiation in which party A can turn a zero-sum game into a positive-sum game, but only if A is willing to accept a smaller payoff. (For example: On one strategy, A gets 2 and B gets -2; on the other, A and B each get 1.) According to the PPP Paradigm, A should do this—but it is hard to see what A's motivation would be; evidently, the PPP Paradigm presupposes a sense of community or solidarity between A and B to provide the missing motivation. What is the justification for this?

Similarly, principled bargaining requires the parties to agree on "objective criteria." Fisher and Ury realize that "you will usually find more than one objective criterion available as a basis for agreement"; they recommend, therefore, that you "think through their application to your case" (p. 88). Parties who do this are of course unlikely to use standards according to which they will gain little, and thus the prospect arises that negotiation will stick at the decision about "objective criteria"—unless there are "objective criteria" for settling *that*. (And how does this work against the Pop-Paradigm negotiator who commends a player who "wasn't afraid to change the rules of the game after she determined that the rules as they were written would not be of any use to her"?)[9] The PPP Paradigm seems to presuppose a normative framework shared by the parties.

To what extent are these assumptions realistic? The evidence is quite mixed. One well-known article suggests that negotiation over disputes is generally "norm-centered," that is, reaches results by appeal to norms

7. Fisher and Ury, *Getting to YES*, pp. 88–91.

8. Raiffa, *The Art and Science of Negotiation*, p. 268.

9. David Seltz and Alfred Modica, *Negotiate Your Way to Success* (New York: Farnsworth, 1980), p. 74.

and principles.[10] But the main argument supporting this assertion is a shaky interpretation of a single case study of an African tribal dispute. Even if one accepts the interpretation, the question arises whether the tribal setting creates shared norms and a sense of community missing in an American city. Jerold Auerbach has argued that well-intentioned attempts to transplant the tribal moot to the American inner city failed precisely because these presuppositions were not met.[11] Moreover, a recent study of lawyer and law-student negotiations suggests that legal argument—the appeal to norms—may be simply stylized debate with little bearing on the outcome after the parties begin to "talk turkey."[12] Evidence is divided as to whether lawyers can agree even about the most basic "objective criterion," the economic worth of a case. Studies of medical malpractice claims and personal injury cases suggest that "the adversaries usually agree about the worth of a case";[13] other studies show enormous disparities.[14] (Howard Raiffa has generated experimental data that parties consistently evaluate the worth of their "case" in their own favor, even when instructed to be disinterested.)[15]

The moral attractiveness of negotiation is at stake in the issue between Pop and PPP. On the former view, negotiation seems little more than a continuation of the war of all against all by other means; on the latter, it is a reasoned and mutually beneficial process. Thus moral issues ride on the answers to social scientific questions. Is it indeed the case that the PPP Paradigm requires a shared normative framework and "communitarian" values in order to succeed, as Auerbach's fascinating book suggests about informal justice in general? Do these exist in contemporary society?

10. Melvin Eisenberg, "Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking," *Harvard Law Review* 89 (1976): 637–81.

11. *Jerold Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers* (New York: Oxford University Press, 1983), pp. 118–19.

12. Robert Condlin, " 'Cases on Both Sides': Patterns of Argument in Legal Dispute-Negotiation," *Maryland Law Review* 44 (1985): 65–136.

13. D. A. Waterman and Mark A. Peterson, *Models of Legal Decisionmaking* (Santa Monica, CA: Rand, 1981), p. 8. See Patricia Murch Danzon and Lee A. Lillard, *The Resolution of Medical Malpractice Claims: Research Results and Policy Implications* (Santa Monica, CA: Rand, 1982), pp. vi, xii.

14. Douglas Rosenthal, *Lawyer and Client: Who's In Charge?* (New York: Russell Sage, 1974), pp. 204–205; Gerald Williams, *Legal Negotiation and Settlement* (St. Paul, MN: West Publishing Co., 1983), pp. 110-14.

15. Raiffa, *The Art and Science of Negotiation*, p. 94.

II. What is a Successful Negotiation?

Social scientists from several disciplines—economics, social psychology, anthropology, and political science—have studied negotiation extensively,[16] mostly to learn under what empirical conditions, and with what patterns or "styles," negotiations yield successful outcomes. Their results range in interest from banalities verifying what we all knew anyway—"bargainers who demand little will usually reach agreement, but achieve low profit"[17]—to surprising discoveries and sophisticated mathematical theories. The problem with assessing these, however, is that we first need to know what it *is* for a negotiation to succeed. As we shall see, this is a complicated issue—but without addressing it, empirical research begs a crucial question.

I shall illustrate this in a moment, but first it will help to look briefly at the general problem. Consider private parties in a damage suit trying to settle out of court. What should we ask from their negotiations? When would we say they had succeeded?

Minimally, we might say that a negotiation succeeds if it does not break down without producing a settlement. But we can easily devise more ambitious criteria: that the parties are satisfied, or equally satisfied, with the outcome, that an informed and impartial third party is satisfied with the outcome, that it duplicates the so-called shadow verdict (the outcome a fair court would arrive at) less litigation costs, that its outcome is consistent with morality or with public values, etc.

In a simple and well-known example, Rich and Poor are offered $1,000 to divide as they will, provided that they agree on a division. Rich offers Poor $100, threatening to walk if Poor doesn't accept; since Rich can afford to make good on the threat, and Poor needs the money, Poor accepts. On the first, minimal, criterion listed above, this is a successful negotiation because it produced an agreement. Indeed, it may be successful on the "equal satisfaction" criterion as well, if $100 gives Poor

16. *The reader seeking one-volume introductions to each of these aproaches will do well to consult the following: Oran R. Young, ed., *Bargaining: Formal Theories of Negotiation* (Urbana, IL: University of Illinois Press, 1975), Jeffrey Z. Rubin and Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975), P. H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (New York: Academic Press, 1979), I. William Zartman, ed., *The Negotiation Process: Theories and Applications* (Beverly Hills, CA: Sage, 1978). The mathematically-minded reader should consult Alvin E. Roth, *Axiomatic Models of Bargaining* (Berlin: Springer-Verlag, 1979).

17. Dean G. Pruitt, *Negotiation Behavior* (New York: Academic Press, 1981), p. 21.

the same level of satisfaction that $900 gives Rich. On others, it is not. If simple equality is an important social value, only a $500/$500 split would be satisfactory; if public policy is strongly redistributive, or if we are (or should be) committed to the Biblical and Marxist principle "to each according to his need," a $50/$950 split may be a successful outcome. Depending on the notion of success at work, different empirical conditions would likely have to be met for negotiation to succeed.

These differences, moreover, concern only the outcome of the negotiation. When we look at the process as well, we may be even less inclined to consider the $900/$100 split satisfactory: after all, it resulted from sheer economic bullying on the part of Rich. Most of us, indeed, are likely to consider the $900/$100 outcome to this negotiation outrageous.

Nevertheless, we often find social scientific work presupposing the least ambitious criterion of success: A negotiation is successful when it produces an agreement (even if the agreement is lopsided).

Social psychologists, for example, have studied bargaining between subjects who are delegated to represent teams. Rubin and Brown report that

> a negotiator having a strong sense of identification with a group and its proposals will be more competitive than a negotiator who identifies less with his group. . . . These results . . . suggest that the best negotiators may not be those who, as representatives, are highly committed to their reference group's positions.[18]

The ensuing discussion is couched in terms that beg the question of what one wants from negotiation. "Constituents' best interests" are equated with coming to an agreement with the other side; commitment to one's constituents' proposals is described as "narrowing of vision" and "reduction of bargaining effectiveness" caused by one's own "needs for positive evaluation . . . by audiences"; the "best negotiators" are those who are flexible enough to abandon their constituents' bargaining position to facilitate agreement.[19] But can't "best interests" ever be served by failing to settle? Can't commitment by a delegate be a laudable and important sense of responsibility? Isn't flexibility sometimes a sellout? Clearly, we have here an unarticulated and undefended idea of what good negotiation is; without further analysis of this idea, we do not know what

18. Rubin and Brown, *The Social Psychology of Bargaining and Negotiation*, p. 53.
19. Ibid., pp. 53–54.

to make of the apparently paradoxical finding that a loyal bargaining agent may ipso facto be ineffective.

A second example: several theorists analyze negotiations descriptively by dividing them into stages (e.g., "agenda definition," "ritualization of outcome," etc.;[20] "Diagnosis Phase," "Detail Phase," etc.[21]). Schemata such as these, when they are not trivial, can be useful for localizing, and thus diagnosing, problems that cause negotiations to break down. The authors, however, sometimes believe that the schemata also tell us how negotiations succeed. This is true only if "succeed" is equated with "not break down." The schemata are in this respect like Masters and Johnson's famous analysis of the phases of orgasm, which tells us the details of what happened, but not whether it was good. And only a full-fledged normative theory of sexual love can tell us if it was good that it happened—failed orgasms, after all, can sometimes be successful terminations of what was, all things considered, a bad scene. Analogously, only a full-fledged normative theory of dispute-resolution can tell us whether a negotiation succeeded because it reached an outcome; perhaps, after all, it succeeded precisely because it failed to.

What, then, *do* we want from negotiation, if not simply agreement? There may be no general answer to this question. After all, why should we want the same sort of thing from haggling over the price of a sofa, bargaining about factory safety, settling a Title IX class action suit, and negotiating a Middle Eastern peace treaty? We may get a determinate answer to our question only when we look at a determinate context.

In the remainder of this essay I shall examine one such context: the negotiated settlement of legal disputes (though to some extent the arguments will generalize to other contexts). Because the values at stake in adjudication are well understood, the contrast between it and negotiated settlement provides a specially clear context for thinking about negotiation—one that offers hope of answering our question about what successful negotiation is. That is because legal negotiation is primarily an alternative to trial (the vast majority of lawsuits are settled out of court by negotiation between lawyers). Legal negotiation is successful, then, if it takes over the functions of trials. For only then can legal negotiation provide an alternative to adjudication.

20. Gulliver, *Disputes and Negotiations*, p. 121.

21. I. William Zartman and Maureen Berman, *The Practical Negotiator* (New Haven: Yale University Press, 1979).

The defining features of adversary adjudication are usually thought to be three: formal rules of procedure, adjudication by an impartial tribunal, and assignment to the parties of the task of presenting their sides of the matter.[22] Corresponding to these are three values: *procedural fairness*, *neutrality* or *outcome fairness*, and "*getting one's day in court.*" I will refer to the latter as "*voice*" to emphasize that the value of party presentation is being able to make one's own arguments, that is, having one's point of view on the principles and facts represented in a public forum.

III. Procedural Fairness

How, then, does negotiation reflect the values of procedural fairness, outcome fairness, and voice? Let us begin with procedural fairness. Negotiation, which usually takes place behind closed doors, lacks both written rules and the scrutiny of an umpire. But negotiators can temper their actions for moral reasons; even the Pop literature insists on ethical behavior. Ethical constraints may serve as a surrogate for procedural rules.

A common view of the relationship between negotiation and adjudication is this: at trial the parties are protected against each other's cheating by a watchful tribunal and a set of procedures designed to deter and expose lying. But people settle cases to avoid the expense of adversary trial and the risk of losing everything. The quid pro quo is giving up the protections trial affords. When they consent to negotiate, parties are aware that these are the terms of the situation, and therefore they have in effect waived their rights to restrained treatment. They have sat down at the poker table.

The legal folklore suggests that the "hardball" negotiator and the *caveat emptor* approach, though not exactly norms, are certainly normal. A well-known article encourages lawyers to "outnumber the other side," "arrange to negotiate on your own turf," "be tough, especially against a patsy," "after agreement has been reached, have your client reject it and raise his demands," "appear to be irrational when it seems helpful," etc.[23] In practice, imbalances in threat-advantage, information, and skill are systematically exploited. Negotiators lie or conceal vital information; they

22. See, e.g., Lon Fuller, "The Adversary System" in Harold J. Berman, ed., *Talks on American Law* (New York: Vintage, 1961), pp. 30–32.

23. Michael Meltsner and Philip G. Schrag, "Negotiating Tactics for Legal Services Lawyers," *Clearinghouse Review* 7 (1973): 269–73.

bluff and puff. Thus, for example, Steven Pepe of the University of Michigan Law School has studied the responses of hundreds of lawyers to an ethically-charged negotiation problem. One side is given information that the adversary's clients are illegal immigrants. Many lawyers use the threat of deportation to force a favorable settlement, despite the fact that this comes very close to extortion.[24]

According to the waiver theory, hardball negotiation tactics are perfectly legitimate because the parties have in effect agreed to settle the case by a contest of skill. Against this view it can be argued that, precisely because going to trial can be expensive and time-consuming, parties are often compelled to the bargaining table and cannot reasonably be said to have consented to anything.

Particularly important is the question of candor. Can negotiators lie to each other? May they withhold information beneficial to, but unknown by, the opposite party? Or even: *Must* they withhold such information? What if it is information they would be required to disclose in trial?

Obviously, complete candor is impossible in negotiation—otherwise parties could not even make convincing initial offers that differ from what they are ultimately willing to accept. Moreover, it seems unlikely that if parties really knew each other's bottom lines they would reach agreement easily: How can I agree to give you $10,000 if I know you would have taken $5,000? Finally, everyone expects a certain amount of "puffing" in negotiation: "Two thousand dollars? Why, if I was arguing this in front of a jury I wouldn't dream of asking less than $70,000!" "Look, I'm a reasonable person, but you have to understand that my client is *angry*—I don't know if I can talk him out of trial, and I wouldn't think of taking a $2,000 offer back to him."

The fact that such behavior is both expected and transparent seems to mitigate the moral wrong of lying. Sid and Marty expect each other's threats. Indeed, it is an old view that a lawyer's lies are not really lies because he or she is not operating in a context where truth is expected. Thus Charles Fried:

> You and I agree that over a defined period of time, or within a limited context (when we are playing poker, for instance) we will feel free to lie to each other. Surely the statements we make to each other pursuant

24. Steven Pepe, "Standards of Legal Negotiations: Summary of Preliminary Findings," (Ann Arbor: Michigan Law School, 1983), p. 4.

> to this agreement are lies only in a rather special sense, if at all. . . . [T]he statements are like moves in a game, which people should be entitled to play.[25]

Is negotiation simply a "lying game" in this sense? To say that it is is consistent with the waiver theory, according to which the parties have waived their moral right to candor when they entered the negotiation. For this reason we may think that the "lying game" analysis falls prey to the same objections as the waiver theory. More than that, however, it is clear that the "lying game" view cannot be the whole story: a lie succeeds only when its victim does not believe that it is a lie, and this points to the fact that negotiators actually expect a good measure of forthrightness from their counterparts. We are thus left with the problem of discovering what negotiation practices are amenable to the "lying game" analysis.

IV. Outcome Fairness

Negotiation is obviously not the only arena in which people engage in "hardball" behavior. The general justification of such behavior in the legal context is that it is required by the adversary system of justice, which is predicated on the idea that the lawyers on each side of a case are responsible only for arguing the interests of that side, with the impartial tribunal acting as referee.

Murray Schwartz has argued that because of this conception of legal ethics, negotiators must have higher standards of behavior than litigators, since the tribunal essential to the fairness of the adversary process is missing. (Schwartz's view is obviously the antipode of the waiver theory.) He suggests that a negotiation has failed in fairness if it results in an "unconscionable" outcome—where the notion of unconscionability is given legal content in contract law.[26] His suggestion amounts to characterizing procedural fairness partly in terms of outcome fairness. Let us, then, consider outcome fairness.

Schwartz's proposal is an *extrinsic* criterion of outcome fairness—one that is imposed on the negotiation from outside. It may seem obvious

25. Fried, *Right and Wrong* (Cambridge, MA: Harvard University Press, 1978), p. 72.

26. Murray L. Schwartz, "The Professionalism and Accountability of Lawyers," *California Law Review* 66 (1978): 669–97.

that criteria of outcome fairness must come from outside the negotiation itself, but in fact this is a difficult question.

In some by-now-classic essays, Thomas Schelling pointed out that in cooperative games in which communication between the players is precluded, structural features in the game help them agree on a solution.[27] If our task is to match coins without speaking to each other, we coordinate on "heads." If we must choose a letter of the alphabet, it will be "a"; if we have agreed to meet but neglected to set a time, we both come at noon, etc. These are "right" answers in an odd sense, since if both of us agreed on a "wrong" answer, it too would be right—it is just that some answers are easier to find than others, since the question is "What should I do based on what he or she does, given that he or she is asking the same question?"

Schelling suggested that these same structural features about a situation operate when the players can communicate—crucially, in a negotiation. I can agree to buy your car for $4,000, but it is almost impossible to agree to $4,009, and if you hold out for just that as your bottom line despite my $4,000 offer, you simply endanger the deal. This is a structural fact about the situation.

Such "focal points" of negotiations need not be fair solutions in any intelligible extrinsic sense. If, in our game of matching coins, someone has offered us rewards as follows

	Me	You
Both Heads	$2	$1
Both Tails	$1	$2
No Match	0	0

we should still coordinate on "heads," because it is our best chance to coordinate at all. But here, for no good extrinsic reason, I win twice as much as you.

This raises a question: If the "solution-point" to bargaining encounters may be determined by the initial structure of the encounter, does this

27. *Schelling, "An Essay on Bargaining" and "Bargaining, Communication, and Limited War," in *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1960).

not generate an "intrinsic" criterion of outcome fairness? One such criterion is well known to welfare economists. John F. Nash demonstrated in 1950 that, under certain plausible constraints on the payoff space and the concept of "acceptable solution," a unique solution to a bargaining problem exists. Nash's solution-point is a function of the status quo, the outcome that would result if negotiations broke down: it is the unique point at which the product of the parties' gains in utility over the status quo is maximized. The status quo is a structural feature of the encounter, and thus the "Nash point" may be seen as a built-in solution-point of the problem.[28]

Nash describes his solution as "the amount of satisfaction each individual should expect to get from the situation" (p. 155), and thus as a "fair bargain" (p. 158). Given Nash's assumptions, it is the solution at which negotiators would arrive without slip-ups or discrepancies in skill. Its fairness has been questioned—in part because the status quo need not be fair (a problem for any intrinsic criterion), in part because the Nash solution has some counterintuitive consequences.[29] The Nash solution, moreover, does not incorporate structural features of situations other than the status quo and a measure of utility. Indeed, the simplest bargaining process that yields the Nash solution is one in which the parties base their pattern of concessions purely on subjective estimates of the risk that negotiations will break down (the so-called Zeuthen-Hicks-Harsanyi solution).[30] This is, to say the least, a stripped-down view of the psychology and ethics of the bargaining process.

28. *John F. Nash, "The Bargaining Problem," *Econometrica* 18 (1950): 155-62. Roth shows that if Pareto-optimality (one of Nash's original constraints) is replaced by the weaker condition that a solution must be greater than or equal to the status quo, we still get either the status quo or the Nash point as the only solutions. Roth, *Axiomatic Models of Bargaining*, pp. 14-15.

29. For criticisms of the Nash solution, see Amartya K. Sen, *Collective Choice and Social Welfare* (San Francisco, CA: Holden Day, 1970), pp. 121-22; Jules Coleman, "Liberalism, Unfair Advantage, and the Volunteer Armed Forces," in Robert K. Fullinwider, ed., *Conscripts and Volunteers: Military Requirements, Social Justice, and the All-Volunteer Force* (Totowa, NJ: Rowman and Allanheld, 1983), pp. 110–12; Ehud Kalai and Meir Smorodinsky, "Other Solutions to Nash's Bargaining Problem," *Econometrica* 43 (1975): 514–15; and David Gauthier, *Morals By Agreement* (Oxford: Oxford University Press, forthcoming).

30. *John Harsanyi, *Rational Behavior and Bargaining Equilibrium in Games and Social Situations* (Cambridge: Cambridge University Press, 1977), pp. 149–53. However, Zeuthen's is not the only model of the process that yields the Nash solution. John G. Cross, in *The Economics of Bargaining* (New York: Basic Books, 1968), assumes that each side begins with a preference ordering, an estimate of the other side's concession-rate over time,

Many models of bargaining neglect strategic and psychological factors such as focal points, advantages in information, or even the effect of give-and-take on the compromise that results from the bargaining process—to say nothing of negotiators' own sense of decent conduct. This suggests expanding the "intrinsic" notion of fairness so that it includes all factors except "slip-ups" and discrepancies in skill.

We might, for example, define an intrinsic criterion of outcome fairness empirically, say as *the average outcome that (equally) skilled negotiators would arrive at over a number of trials*. This takes seriously Nash's equating of a fair solution with "the amount of satisfaction each individual should expect to get from the situation." Of course, lawyers will discuss the merits of the case during negotiations and will sometimes base their settlement on what they think the verdict will be. But often other considerations outweigh the merits—ability to tolerate delay, focal points, the toughness of the opposition as revealed in the bargaining sessions, etc.[31] These are relevant to what an individual "should expect to get from the situation." In that case, a noteworthy result follows: a negotiation that duplicates the shadow verdict may actually be unfair, because the court looks at the merits of the issue and ignores the structure of the case viewed as a bargaining problem. This would happen whenever the side that is weaker on the merits of the case had a structural bargaining advantage. But in what sense does the intrinsic notion characterize outcome fairness, then?

We have moved in a circle here, defining procedural fairness partly in terms of outcome fairness and outcome fairness partly in terms of procedural fairness. For to determine an intrinsic criterion of fairness we must know what moral constraints are imposed on the negotiators; at the same time, our view of outcome fairness helps to determine the answers to the moral questions. Thus, there will be no simple right answer to any of these questions; one may, however, be able to construct alternative "packages" of answers, which may be more or less acceptable on other grounds. The circle need not be vicious.

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and a schedule of costs arising from delay in reaching agreement. If these are the same for both sides, the Nash solution results. Moreover, the Nash solution has been arrived at experimentally: Otomar J. Bartos, *Process and Outcome of Negotiations* (New York: Columbia University Press, 1974).

31. The Condlin paper (note 12 above) emphasizes that legal argument often turns out to be irrelevant to negotiations.

V. Voice

Recently a woman who did not make partner in her law firm won a Supreme Court decision that professional partnerships are bound by Title VII of the Civil Rights Act and can therefore be sued for sex discrimination. However, her sex-discrimination suit did not go to trial: she settled with the firm for an undisclosed sum of money. Thus, the firm's promotional practices never did receive the scrutiny of the courts. Even so, many other large-firm mavens expressed dismay that the firm had not settled sooner and avoided the Supreme Court's inconvenient ruling.

This example illustrates the obvious point that by settling out of court you give up your day in court, and the less obvious point that this may not make your adversaries unhappy. For, while they give up money or a consent decree, you give up voice. If you litigate, you will either triumph or else emerge bloody but unbowed, in either case holding your principles intact. If you negotiate, however, you treat your principles as mere interests and emerge compromised. Smiling evasively at the onlookers as you shake hands with an adversary you despise, you are not alone in wondering what principle you went to court to vindicate.

Now of course many negotiations involve only money, and seem therefore to have little or nothing to do with principles. In our example of Rich and Poor the demand for voice tells us nothing about how to divide up the thousand dollars.

There is a crucial difference, however, between legal disputes and a concocted game such as the division of $1,000. Even though the litigants' bottom-line concern is often the amount of money they will pay or receive, legal disputes turn on more than the bottom line—they turn on judgments of value and responsibility. The litigants have *arguments* about why they deserve the award they are requesting. And so a negotiation between the parties about money will reflect the compromise of principles and values, the invention of alternative ways to look at deadlocked issues, the resolution of simple demands into more complex packages that can be log-rolled—in short, the accommodation of plural perspectives, and not merely the division of loot.

(This fact highlights another inadequacy in many social psychological studies of negotiation behavior. When researchers use pointless and concocted games to model conflict situations, the dimension of bargaining that represents the accommodation of values tends to disappear. Then

hardline or accommodating behavior appears to be nonrational in its source—whereas in real-life bargaining the diagnosis can seldom be so simple.)

The question is whether negotiation can reflect the value we have termed "voice" at all. This problem appears concretely in the contemporary debate over informal justice, or alternative dispute-resolution.

The background to this debate is the so-called litigation explosion and current discontent with our courts. Law teachers and scholars have become increasingly enamored of alternative dispute-resolution mechanisms, including negotiation and its close cousin mediation.[32] This is in part because these alternatives offer to relieve gridlocked dockets, but in part because it is thought that informal justice "expresses certain fundamental values; rapid and thorough airing of controversies, participation by the disputants in resolving their own conflicts, reduction of dependence on professionals, greater involvement of citizens in an essential aspect of democratic government."[33] Court procedures have been designed to provide litigants with financial incentives for negotiated settlements.[34]

Zeal for alternative dispute-resolution has in its turn provoked powerful objections. Often (it is asserted) alternative dispute-resolution simply does the disadvantaged out of their hard-won legal rights;[35] pressure to settle falls unevenly on parties, forcing the weaker to settle for less than it

32. See Williams, *Legal Negotiation and Settlement*; *Harry T. Edwards, and James J. White, *The Lawyer as a Negotiator* (St. Paul, MN: West, 1977); Gary Bellow and Bea Moulton, *The Lawyering Process: Negotiation* (Mineola, NY: Foundation Press, 1981); *Carrie Menkel-Meadow, "Legal Negotiation: A Study of Strategies in Search of a Theory—A Review Essay," *American Bar Foundation Research Journal* (1983): 905–1008; Carrie Menkel-Meadow, "Toward Another View of Negotiation: The Structure of Legal Problem-Solving," *UCLA Law Review* 31 (1984): 754–842.

33. Richard L. Abel, "Introduction," in *Abel, ed., *The Politics of Informal Justice*, vol. 1, *The American Experience* (New York: Academic Press, 1982), p. 12.

34. See, for example, the Proposed Amendment to Rule 68 of the Federal Rules of Civil Procedure, 712 F. 2d No. 2 at CXII (12 September 1983). The unamended Rule 68 gives a party an incentive to settle by requiring the party to pay its adversary's trial costs if the party rejects a settlement offer by the adversary and then at trial receives an award smaller than the offer. The Proposed Amendment requires the party to pay the adversary's attorneys' fees as well as costs, thus increasing the pressure to accept the settlement—especially if the adversary is using expensive counsel and the party has little money. See Victoria C. Choy, "Note: The Impact of Proposed Rule 68 on Civil Rights Litigation," *Columbia Law Review* 84: 719–43, and *Owen Fiss, "Against Settlement," *Yale Law Journal* 93 (1984): 1074–75.

35. Auerbach, *Justice Without Law*? argues this point historically; but the most important

deserves.[36] The litigation explosion, moreover, may in any event be a myth, and, even if it is not, it begs the question to view a high litigation rate as a problem, since the vigorous battle for legal rights may instead be the growing pains of a healthy society.[37] Litigation, writes Marc Galanter, "provides a forum for moving issues from the realm of unilateral power into a realm of public accountability."[38] Similarly, Owen Fiss argues that "The social function of contemporary litigation is not to resolve disputes, but rather to give concrete meaning to . . . public morality within the context of the bureaucratic state";[39] for this reason, "when the parties settle, society gets less than what appears, and for a price it does not know it is paying. Parties might settle while leaving justice undone."[40]

The objection that alternative dispute-resolution denies the weak their entitlements amounts to saying that pushing weak would-be litigants into

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articulation of this criticism is Abel's two-volume collection, *The Politics of Informal Justice* (vol. 1 *The American Experience*, *vol. 2 *Comparative Studies*).

36. Thus, for example, a stewardess sued her employer for racial discrimination, asking $20,000 in back pay. The airline offered to settle for $450; she refused the offer but lost the case at trial. At that point the airline tried to recover costs under Rule 68 (see note 34 above). The Supreme Court reasoned that to permit recovery in such a case would allow defendants to use Rule 68 tactically, to force weak plaintiffs to accept ridiculous settlements for fear of losing and being forced to absorb the defendants' costs. *Delta Airlines v. August*, 450 U.S. 346 (1980). The Court, however, was compelled to employ a rather unusual construction of Rule 68—narrowing it to apply only to plaintiffs who win small settlements and not to those who lose their cases—to arrive at the equitable result. As Justice Rehnquist pointed out in his dissent, this places plaintiffs with better cases in a worse position than those with cases bad enough that they will lose; the Court evaded the uncomfortable fact that Rule 68 was apparently designed to pressure settlements regardless of the equity of the pressure.

37. Thanks to the University of Wisconsin's Dispute Processing Research Program and Civil Litigation Research Program, we are at last getting some real information on this topic, which has generally been abandoned to pontificating judges, outraged newspaper columnists and other pundits similarly situated. See the *Special Issue on Dispute Processing and Civil Litigation, Law and Society Review* 15 (1980–81); and, on the myth of the litigation explosion: Lawrence M. Friedman, "The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America," *Maryland Law Review* 39 (1980): 661–77; David M. Trubek, Austin Sarat, William F. Felstiner, Herbert M. Kritzer, and Joel B. Grossman, "The Costs of Ordinary Litigation," *UCLA Law Review* 31 (1983): 72–127; and especially *Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About our Allegedly Contentious and Litigious Society," *UCLA Law Review* 31 (1983): 4–71.

38. Galanter, p. 70.

39. Owen Fiss, "The Social and Political Foundations of Adjudication," *Law and Human Behavior* 6 (1982): 124.

40. Fiss, "Against Settlement," p. 1085.

alternatives to court violates one or both of the fairness conditions of adjudication. Bargains are struck that are not genuine compromises, because one side concedes nothing while the other concedes all. This by itself does not mean that genuine compromise is *wrong*: it means that, right or wrong, it is not attained.

Galanter's and Fiss's demand for a forum and for public accountability, on the other hand, concerns the requirement of voice, and implies that compromise can often be wrong. The worry is that compromises, which are worked out in private and do not "degenerate" to conflicts of principle, leave important principles unvoiced.[41] Better that they be litigated, for then they enter the public realm.

Litigation, however, is a risky, all-or-nothing business: and that is why litigants feel pressure to settle, even when their cases concern matters of principle and not simply financial interest. Precisely *because* an environmentalist organization is committed to preserving wilderness, it may accept a settlement offer that only partly preserves an area from development. To hold out for victory in court is to risk all. In this way, would-be litigants find themselves enmeshed in the moral ambiguity of compromise.[42] Their principles have gotten their best achievable expression in practice. The question is whether that is good enough: Is the voice of compromise merely a compromised voice?

VI. The Paradox of Compromise

This problem transcends the special case of *legal* negotiation. It is a general problem in political bargaining, and might be called the *paradox of compromise*: commitment to a principle means commitment to seeing

41. A Maryland state legislator is supposed to have chided his colleagues by saying "Ladies and gentlemen, this debate is degenerating to a matter of principle."

42. It may be thought that the PPP Paradigm with its "principled bargaining" based on "objective criteria" offers hope of solving the problem of voice. However, the objective criterion must not itself be one of the principles about which the parties are contesting, else agreement is hardly possible. Thus "principled" bargaining actually evades principles rather than voicing them.

Equally unhelpful are economic, or interest-based, theories of bargaining such as Nash's. These are concerned only with the question of finding a mutually agreeable price in money or "utility," and then the problem of compromised principles does not even arise.

The only discussion of the paradox of compromise of which I am aware—in the only collection of philosophical writing on compromise of which I am aware—is *Arthur Kuflik, "Morality and Compromise," in J. Roland Pennock and John W. Chapman, eds., *Compromise in Ethics, Law, and Politics* (New York: New York University Press, 1979).

it realized. But in practice this means compromising the principle (since all-or-nothing politics is usually doomed to defeat)—and compromise is partial abandonment of the principle. Conversely, refusal to compromise one's principles means in practice abandoning entirely the hope of seeing them realized. Morality and its abandonment seem to implicate one another—that is the paradox of compromise.

An example, couched in contractarian terms, may clarify this. Suppose half the people in a nation believe—with arguments—"To each according to his need," while the other half believe "To each according to his work." (The latter too have arguments.) Each finds the other's principle unacceptable; eventually they compromise on "To each according to his work, unless his work does not suffice to meet his most basic needs: then we keep him afloat with transfer payments." The compromise principle is wrong, even *morally* wrong, if either side is right, for it violates distributive justice. It is, moreover, a principle believed by no one in the society. Nevertheless, it is now *their* principle of justice—the best achievable expression of their moral concerns, to which all have therefore assented *with good reason*. Contractarians believe that moral principles to which all have good reason to assent *are* justified principles; our example, however, suggests that matters are much more ambiguous than this.

The source of the difficulty is this. We usually assume that the parties negotiate each issue of concern independently of other issues, resulting in a portfolio of separate agreements, all of which are acceptable to all parties. But in our example, the parties bargained differently: they split a single issue (distributive justice) into two subissues (the cases of those who can support themselves and those who cannot), and then logrolled between the subissues, making mutual concessions that would be separately unacceptable. Bargaining theory in fact suggests that this is the most rational procedure for reaching agreement.[43]

43. See, e.g., Raiffa, *The Art and Science of Negotiation*, pp. 131–32, 217; or Zartman and Berman, *The Practical Negotiator*, pp. 13–14 referring to "Homans's Theorem," which states that the more issues can be subdivided and logrolled, the better the chance of reaching agreement.

Empirical bargaining theory is not relevant to a contractarian theory such as Rawls's in which the social contract is a purely ideal construction—Rawls, after all, has noted that his results could be gotten even if only a single agent were choosing the principles of justice.

Some contractarian theories, however, treat the contract not as an ideal construction but as a *counterfactual actual* agreement. The latter, unlike the former, investigates the agreement at which agents in the actual world would arrive if they were to negotiate under certain contrary-to-fact constraints. Here bargaining concepts such as logrolling are relevant. T. M. Scanlon, for example, abandons the veil of ignorance device in seeking principles

The resulting composite principle, or portfolio of principles, has the curious property of all compromises: though it is accepted by all the parties, none of its *components* is acceptable to all parties—only the entire package is. Because the package is the most attractive one attainable, no one desiring to reach agreement with others motivated by the same desire could reasonably reject it[44]—but no single item in it would win the assent of all. This raises the question of whether moral beliefs (and not just social rules) could arise from bargaining—as, e.g., Gilbert Harman thinks they do[45]—for, though everyone would accept them all, no one would believe them all. And so no one would believe the composite principle, their conjunction.

Hence the paradox of compromise. Moral principles are practical principles. For this reason we recognize the moral imperative to bargain about principles, and thus to compromise them: it is how we put them into practice (albeit in watered-down form). And we see intrinsic moral value in agreement with our fellows: thus the contractarian insight that moral principles are the product of bargaining.

On the other hand, we think that moral principles should be justified—and it is an odd theory of moral justification that admits propositions no one will ever be prepared to believe. Practicality and consensus part company with justification and belief. The paradox of compromise is just our half-suspicion that moral truth is too good for the world.

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agreeable to agents moved by the desire to agree with each other "in this world" (sic). It is hard to see why one would drop the veil of ignorance, thus admitting a variety of perspectives, unless a counterfactual actual agreement was intended. Scanlon, "Contractualism and Utilitarianism," in Amartya Sen and Bernard Williams, eds., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), pp. 104, 111. And it seems to me that such a theory must admit compromises such as our example—see note 44 and the text accompanying it. Note that compromise through logrolling is the most *rational* strategy for obtaining agreement: thus the compromise package is one at which rational agents would arrive in the counterfactual bargaining situation Scanlon describes.

44. This language is Scanlon's: "The only relevant pressure for agreement comes from the desire to find and agree on principles which no one who had this desire could reasonably reject." Ibid., p. 111.

45. See Gilbert Harman, "Human Flourishing, Ethics, and Liberty," *Philosophy & Public Affairs* 12, no. 4 (Fall 1983): 321: "The basic protections of morality have arisen as a result of bargaining and compromise, sometimes after serious conflict and even war."

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