ARTICLES

A Positive Theory of Legal Negotiation

RUSSELL KOROBKIN*

INTRODUCTION

Scholarly and popular literature often describes the discipline of negotiation at the level of tactical choices. Would-be negotiators are counseled to concern themselves with questions as diverse as whether to make the opening offer and whether to hold negotiating sessions at their own offices. While understanding the implications of these and countless other tactical choices is important to achieving successful outcomes, the laundry-list character of most analyses fails to provide legal negotiators with a structure necessary to systematically organize the way they think about the process. When the wide range of tactical issues negotiators must confront is presented without a sound theoretical structure, the negotiating process appears overwhelmingly complicated. The impression created, more often than not, is that the negotiating arena is an almost Byzantine maze that the lawyer can only hope to stumble through, one turn at a time, relying as much on instinct and guile as on analysis and logic—an overview of the terrain impossible to glimpse.

In recent years, scholars have made two attempts to categorize more systematically the wide range of negotiation tactics, providing a theoretical overlay to the nuts-and-bolts, tactical view of the negotiating process. The first classifies

---

* Associate Professor, University of Illinois College of Law and University of Illinois Institute of Government and Public Affairs. Visiting Professor, University of California, Los Angeles School of Law, 2000-01. B.A., Stanford University, 1989; J.D., Stanford University Law School, 1994. Janet Cooper Alexander, Ian Ayres, Richard Birke, Jennifer Brown, Chris Guthrie, Janice Nadler, Alan Rau, and Andrea Schneider provided helpful advice and comments on earlier drafts, as did participants in faculty workshops at UCLA and the University of North Carolina, and the Quinnipiac-Yale Dispute Resolution Workshop. Jill Sazama provided able research assistance. The financial support of the University of Illinois College of Law and the assistance of the University of Richmond School of Law in preparing this article are gratefully acknowledged.

1. See, e.g., HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 127-28 (1982) (addressing the question “who should make the first concrete offer?”).
4. Most negotiation texts, in fact, explicitly decline to provide a theory of the negotiating process. See, e.g., CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 3-4 (2d ed. 1993) (“This book does not attempt to define a specific negotiating style . . . . Given the diverse personalities possessed by lawyers, it would be impossible to provide a generally-applicable framework.”).
negotiating tactics as either "cooperative" or "competitive" in style. For example, a competitive negotiator makes extreme opening demands, asking for far more than she actually hopes to receive. A cooperative negotiator, in contrast, makes more modest and realistic opening demands. The competitive/cooperative dichotomy can be useful to the negotiator because it helps him to identify different options whenever tactical choices present themselves. To use the same example, when a negotiator is called on to make an opening demand, keeping the competitive/cooperative dichotomy in mind might help him to generate more aggressive and more friendly options than would otherwise come to mind.

The utility of the dichotomy is limited, however, because it does not imply any descriptive theory of negotiators' goals—what negotiators actually use competitive or cooperative tactics for. Neither competition nor cooperation is a goal in itself, and most scholars who employ this dichotomy even claim that neither approach is intrinsically more useful in helping the negotiator to achieve the ultimate—if unhelpfully vague—holy grail of negotiating "success." The cooperative/competitive dichotomy can help negotiators identify options when they come to a choice-point in the maze of the negotiation, but the dichotomy cannot help them better judge which direction to choose.

Contemporary negotiation theory more often relies on a second dichotomy between "distributive" and "integrative" negotiating approaches. According to this categorization, negotiators use distributive tactics to "claim value"—that is, to capture the fixed gains in trade created by the agreement for himself or for his client. In contrast, negotiators use integrative tactics to "create value"—that is, identify tradeoffs and options that will simultaneously make both parties better off. The distributive/integrative dichotomy is a far more useful heuristic


7. See, e.g., Goodpaster, supra note 3, at 346; Williams, supra note 6, at 48.

8. See, e.g., Williams, supra note 6, at 21.

9. See Menkel-Meadow, supra note 5, at 922-23 (criticizing competitive/cooperative dichotomy because it focuses on tactics or behaviors without providing any broader view of goals).

10. See, e.g., Williams, supra note 6, at 41, 47 (concluding that "a negotiator's effectiveness is NOT determined by the pattern [cooperative or competitive] he follows, but rather by what he does with that pattern") (emphasis in original).


12. See, e.g., Max H. Bazerman & Margaret A. Neale, Negotiating Rationally 16 (1993) (contrasting distributive and integrative negotiation); David A. Lax & James K. Sebenius, The Manager as Negotiator 33 (1986) ("An essential tension in negotiation exists between cooperative moves to create value and competitive moves to claim it.").
than the competitive/cooperative dichotomy because the former describes goals to which negotiators gear their tactical choices. Although useful, this categorization is not the only way to view the tactics of negotiation systematically—the cathedral, of course, appears differently in different light—and it may not be the most useful.

One problem with this categorization is that all negotiated agreements "create value" in the sense that both parties are made better off than they would be if they failed to reach agreement. Because even distributive bargaining thus leads to "integrative" agreements, the distinction between the two categories is tenuous. Integrative techniques may be differentiated from distributive ones as allowing negotiators to create even more efficient agreements than would otherwise be possible by redefining the subject matter of the negotiation. For example, if a new car dealer is willing to offer a buyer a larger "trade-in" credit than the buyer's used car is worth to him, the parties can create value by changing the negotiation from one for a "new car" to one for a "new car plus trade-in." But this value-added definition leads to a second problem with the integrative/distributive dichotomy: integrative bargaining merely combines two or more opportunities for distributive bargaining—buyer and seller now negotiate the price of the new car and the trade-in simultaneously. While this technique is useful, elevating integrative bargaining to the same theoretical plane as distributive bargaining oversells the importance of the former. Finally, opportunities for such value-added integrative bargaining are probably fewer in legal negotiation than in other contexts because the subject matter of legal negotiations is often clear to both parties and money is often of substantial concern to both.

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

First, negotiators attempt to define the bargaining zone—the distance between the reservation points (or "walkaway" points) of the two parties—in the

15. See supra Part I.E for a more complete discussion.
16. See infra Part I.E for a more complete discussion.
17. The example is borrowed from Gerald Wetlaufer. See Wetlaufer, supra note 11, at 379.
18. See id.
19. Undoubtedly, though, such opportunities often do exist in legal negotiation. See infra Part I.E.
manner most advantageous to their respective clients. I call this activity "zone
definition." Exploring alternatives to agreement, questioning, persuading, mis-
leading, committing to positions, and redefining the negotiation's subject matter
are all tactical tools used in zone definition. Because transactions are economi-
cally rational—in the sense that reaching agreement is better than not reaching
agreement for both parties—only at points within the bargaining zone, zone
definition can be understood as an inherently economic activity.

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

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

I. ZONE DEFINITION

In any negotiation, the maximum amount that a buyer will pay for a good,

service, or other legal entitlement is called his "reservation point" or, if the deal

being negotiated is a monetary transaction, his "reservation price" (RP).\(^1\) The

minimum amount that a seller would accept for that item is her RP. If the

buyer's RP is higher than the seller's, the distance between the two points is
called the "bargaining zone."\(^2\) Reaching agreement for any amount that lies
within the bargaining zone is superior to not reaching an agreement for both
parties, at least if they are concerned only with the transaction in question.\(^3\)

For example, suppose Esau, looking to get into business for himself, is
willing to pay up to $200,000 for Jacob's catering business, while Jacob,
interested in retiring, is willing to sell the business for any amount over

\[^{1}\] Cf., e.g., RAFFA, supra note 1, at 37.
\[^{2}\] See infra Figure 1.
\[^{3}\] There may be reasons external to the current transaction that would cause a party to refuse to
accept an agreement at some amounts located within the bargaining zone. This problem is discussed
infra Part II.
$150,000. This difference between Esau's and Jacob's RPs creates a $50,000 bargaining zone. At any price between $150,000 and $200,000, both parties are better off agreeing to the sale of the business than they are reaching no agreement and going their separate ways.

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

In contrast, if the seller's RP is higher than the buyer's RP, there is no bargaining zone. In this circumstance, there is no sale price that would make both parties better off than they would be by not reaching a negotiated agreement. Put another way, the parties would be better off not reaching a negotiated agreement. If Jacob will not part with his business for less than $150,000 and Esau will not pay more than $100,000 for it, there is no bargaining zone. If David will pay up to $50,000 to settle Goliath's claim, but Goliath will not accept any amount less than $60,000, again there is no bargaining zone. An agreement in either case would leave at least one party, and possibly both parties, worse off than if they were to decide not to make a deal.

Knowledge of the parameters of the bargaining zone, which is created by the two parties' reservation points, is the most critical information for the negotiator to possess. Those parameters tell the negotiator whether any agreement is possible and, if so, identify the range of possible deal points. At the same time, the negotiator has an interest in adjusting the parameters of the bargaining zone to his advantage. A buyer not only wants to know his and the seller's RPs, he wishes to make both lower, or at least make both appear lower to the seller.

24. "Legal negotiation," of course, generally is described by an agent—the lawyer—negotiating on behalf of a principal—the client. For simplicity's sake, this article treats each lawyer-client dyad as a unitary entity, thus implicitly assuming that lawyers have the capacity and the commitment to act as perfect agents for their principals. When this assumption is relaxed, the analysis provided here does not change appreciably.
This shifts the zone of possible deal points lower, increasing the chances that
the seller will ultimately agree to a relatively low price.  
Experimental evidence in fact confirms that negotiators with more favorable RPs (that is, lower
for buyers, higher for sellers) reach more profitable agreements than negotiators
with less favorable RPs.

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

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

A. PREPARATION

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

1. Internal Preparation: Alternatives and BATNAs

A negotiator cannot determine his RP without first understanding his substi-
tutes for and the opportunity costs of reaching a negotiated agreement. This, of
course, requires research. Esau cannot determine how much he is willing to

25. The process of agreeing on a specific deal point is considered infra Part II.
26. See, e.g., Vandra L. Huber & Margaret A. Neale, Effects of Cognitive Heuristics and Goals on
Negotiator Performance and Subsequent Goal Setting, 38 ORGANIZATIONAL BEHAV. & HUM. DECISION
PROCESSES 342, 349, 354 (1986) (finding that experimental subjects given high minimum profit
requirements for transactions achieved more profitable deal points than subjects given low minimum
profit requirements).
27. Cf. Goodpaster, supra note 3, at 338 (observing that parties who fail to gather information that is
needed to specify their alternatives weaken their bargaining position).
pay for Jacob's business without investigating his other options. Most obviously, Esau will want to investigate what other catering companies are for sale in his area, their asking prices, and how they compare in quality and earning potential to Jacob's. He also might consider other types of businesses that are for sale. And he will likely consider the possibility of investing his money passively and working for someone else, rather than investing in a business.

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

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

If the negotiator's BATNA and the subject of the negotiation are perfectly interchangeable, determining the reservation price is quite simple: the reservation price is merely the value of the BATNA. For example, if Esau's BATNA is buying another catering business for $190,000 that is identical to Jacob's in terms of quality, earnings potential, and all other factors that are important to Esau, then his RP is $190,000. If Jacob will sell for some amount less than that, Esau will be better off buying Jacob's company than he would be pursuing his best alternative. If Jacob demands more than $190,000, Esau is better off buying the alternative company and not reaching an agreement with Jacob.

In most circumstances, however, the subject of a negotiation and the negotiator's BATNA are not perfect substitutes. If Jacob's business is of higher quality, has a higher earnings potential, or is located closer to Esau's home, he would probably be willing to pay a premium for it over what he would pay for the alternative choice. For example, if the alternative business is selling for $190,000, Esau might determine he would be willing to pay up to a $10,000 premium over the alternative for Jacob's business and thus set his RP at $200,000. On the other hand, if Esau's BATNA is more desirable to him than Jacob's business, Esau will discount the value of his BATNA by the amount necessary to make the two alternatives equally desirable values for the money; perhaps he will set his RP at $180,000 in recognition that his BATNA is $10,000 more desirable than Jacob's business, and Jacob's business would be equally desirable only at a $10,000 discount.

Assume Goliath determines that his BATNA is proceeding to trial. He will

28. ROGER FISHER ET AL., GETTING TO YES 100 (2d ed. 1991).
attempt to place a value on his BATNA by researching the facts of the case, the relevant legal precedent, and jury awards in similar cases, all as a means of estimating the expected value of litigating to a jury verdict. If Goliath's research leads to an estimate that he has a 75% chance of winning a jury verdict, and the likely verdict if he does prevail is $100,000, then using a simple expected value calculation ($100,000 × .75) would lead him to value his BATNA at $75,000.29

For most plaintiffs, however, a settlement of a specified amount is preferable to a jury verdict with the same expected value, both because litigation entails additional costs and because most individuals are risk averse and therefore prefer a certain payment to a risky probability of payment with the same expected value. Goliath might determine, for example, that a $50,000 settlement would have the equivalent value to him of a jury verdict with an expected value of $75,000, because pursuing a jury verdict would entail greater tangible and intangible costs such as attorneys' fees, emotional strain, inconvenience, and the risk of losing the case altogether. If so, Goliath would set his RP at $50,000. On the other hand, it is possible that Goliath would find a $75,000 verdict more desirable than a $75,000 pretrial settlement. For example, perhaps Goliath would find additional value in having a jury of his peers publicly recognize the validity of his grievance against David. If Goliath believes that such psychic benefits of a jury verdict would make a verdict worth $10,000 more to him than a settlement of the same amount (after taking into account the added risks and costs of litigation), he would set his RP at $85,000.

The relationship between a party's BATNA and his RP can be generalized in the following way. A party's RP has two components: (1) the market value of his BATNA; and (2) the difference to him between the value of his BATNA and the value of the subject of the negotiation.30 A seller sets his RP by calculating (1) and either subtracting (2) if the subject of the negotiation is more valuable than his BATNA (and therefore he is willing to accept less to reach an agreement) or adding (2) if the BATNA is more valuable than the subject of the


30. I differentiate the concepts of BATNA and RP by focusing on the market (or objective) value of the BATNA and the difference between this and the negotiator's RP. If Esau's BATNA is trial, and trial has an expected value of $75,000, Esau's BATNA has an objective value of $75,000, but Esau's RP will be $50,000 if the costs, risk, and emotional strain of trial make reaching a negotiated settlement of $25,000 more desirable than litigating. Others have described the relationship between RPs and BATNAs in a somewhat different way, pointing out that the subjective value of the negotiator's BATNA is equivalent to his RP. See, e.g., Ian Ayres & Barry Nalebuff, Common Knowledge as a Barrier to Negotiation, 44 UCLA L. REV. 1631, 1642 (1997) (equating BATNAs and RPs); Richard Birke & Craig R. Fox, Psychological Principles in Negotiating Civil Settlements, 4 HARV. NEG. L. REV. 15 n.62 (1999) (observing that reservation price is often used synonymously with BATNA). These authors might describe the same situation this way: because of the costs, risks, and strain of trial, the subjective value to Esau of going to trial is only $50,000, and thus, the value of Esau's BATNA and his RP are both $50,000. Nothing in my analysis turns on which linguistic approach is employed. Either way, Esau ultimately sets his RP at $50,000, and this establishes the lower bound of the bargaining zone.
negotiation (and therefore, he would demand more to reach an agreement and give up his BATNA). A buyer sets his RP by calculating (1) and either adding (2) if the subject of the negotiation is more valuable than his BATNA (and therefore he would pay a premium to reach an agreement) or subtracting (2) if his BATNA is more valuable than the subject of the negotiation (and therefore he would demand a discount to give up the BATNA).  

Internal preparation serves two related purposes. By considering the value of obvious alternatives to reaching a negotiated agreement, the negotiator can accurately estimate his RP. This is of critical importance because without a precise and accurate estimation of his RP the negotiator cannot be sure to avoid the most basic negotiating mistake—agreeing to a deal when he would have been better off walking away from the table with no agreement. By investigating an even wider range of alternatives to reaching agreement, and by more thoroughly investigating the value of obvious alternatives, the negotiator can alter his RP in a way that will shift the bargaining zone to his advantage. Rather than just considering the asking price of other catering companies listed for sale in his town, Esau might contact catering companies that are not for sale to find out if their owners might consider selling under the right conditions. This could lead to the identification of a company similar to Jacob’s that could be purchased for $175,000, which would have the effect of reducing Esau’s RP to $175,000 and therefore shifting the bargaining zone lower. Goliath’s attorney might conduct additional legal research, perhaps exploring other, more novel, theories of liability. If he determines that one or more alternative legal theories has a reasonable chance of success in court, Goliath might adjust upward his estimate of prevailing at trial—and therefore the value of his BATNA of trial—allowing him to adjust upward his RP.

2. External Preparation: The Opponent’s Alternatives and BATNA

Internal preparation enables the negotiator to estimate his RP accurately and favorably. Of course, the bargaining zone is fixed by both parties’ RPs. External preparation allows the negotiator to estimate his opponent’s RP. If Esau is

---

31. Precisely how negotiators determine the difference in value between the subject of the negotiation and their BATNAs is inherently subjective and varies from individual to individual. What factors are most important in this decisionmaking exercise is the subject of a debate between those commentators who assume that negotiators are rational actors who maximize expected utility, see generally Robert D. Cooter & Daniel L. Rubinfeld, Economic Analysis of Legal Disputes and Their Resolution, 27 J. ECON. LITIG. 1067 (1989); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. LEGAL STUD. 1 (1984), and those who believe psychological and emotional factors play an important role, see generally Birke & Fox supra note 30; Chris Guthrie, Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior, 1999 U. ILL. L. REV. 43; Russell Korobkin, Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms, 51 VAND. L. REV. 1583 (1998); Russell Korobkin & Chris Guthrie, Psychological Barriers to Litigation Settlement: An Experimental Approach, 93 MICH. L. REV. 107 (1994) [hereinafter Korobkin & Guthrie, Psychological Barriers]; Russell Korobkin & Chris Guthrie, Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer, 76 TEX. L. REV. 77 (1997); Jeffrey J. Rachlinski, Gains, Losses, and the Psychology of Litigation, 70 S. CAL. L. REV. 113 (1996).
savvy, he will attempt to research Jacob’s alternatives to a negotiated agreement as well as his own alternatives. For example, other caterers might know whether Jacob has had other offers for his business, how much the business might bring on the open market, or how anxious Jacob is to sell—all factors that will help Esau to accurately predict Jacob’s RP and therefore pinpoint the low end of the bargaining zone. This information will also prepare Esau to attempt to persuade Jacob during the course of negotiations to lower his RP, a point discussed in detail below.32

It is worth noting that in the litigation context both parties often have the same alternatives and the same BATNA. If plaintiff Goliath determines that his BATNA is going to trial, then defendant David’s only alternative—and therefore his BATNA by default—is going to trial as well. In this circumstance, internal preparation and external preparation merge. For example, when Goliath’s lawyer conducts legal research, he is attempting to simultaneously estimate the value of both parties’ BATNAs. Of course, just because the parties have the same BATNA, they will not necessarily estimate the market value of it identically, much less arrive at identical RPs. Research suggests that an “egocentric bias” is likely to cause litigants to interpret material facts in a light favorable to their legal position, thus causing them to overestimate the expected value of an adjudicated outcome.33 Consequently, it is likely that, examining the same operative facts and legal precedent, plaintiff Goliath will place a higher value on the BATNA of trial than defendant David. This difference in perception often will be offset, however, by the fact that plaintiff Goliath is likely to set his RP, or the minimum settlement he will accept, below his perceived expected value of trial to account for the higher costs and higher risk associated with trial, while defendant David is likely to set his RP, or the maximum settlement he will agree to pay, above the expected value of trial for the same reasons.34 As long as the parties’ preference for settlement rather than trial outweighs their egocentric biases, a bargaining zone will still exist, although it will be smaller than it would be if the parties agreed on the expected value of trial.35 Research also suggests that both parties are likely to be more risk averse when they are less confident in their prediction of the expected value of trial.36 In other words, the

32. See infra Part I.A.
33. See George Loewenstein et al., Self-Serving Assessments of Fairness and Pretrial Bargaining, 22 J. LEGAL STUD. 135, 150 (1993) (finding that subjects playing the role of plaintiffs in a fact-intensive case predicted on average a verdict more than 50% larger than subjects playing the role of the defendant); see also Linda Babcock et al., Biased Judgments of Fairness in Bargaining, 85 AM. ECON. REV. 1337, 1340 tbl.2 (1995) (indicating the differences between what subjects playing the role of plaintiffs and subjects playing the role of defendants found to be fair awards).
34. See generally Cooter & Rubinfeld, supra note 31, at 1075-76.
35. See infra Figure 2.
I. LESS CONFIDENT THE PARTIES ARE IN THE VALUE THAT THEY PLACE ON THE BATNA OF TRIAL, THE LARGER THE BARGAINING ZONE BETWEEN THEIR RPS IS LIKELY TO BE.

B. PERSUASION

Perhaps the most common activity negotiators engage in at the bargaining table is attempting to persuade their opponent of the value of the negotiation’s subject matter or of other alternatives. The arguments advanced often appear remarkably similar to those that litigating parties might make to a judge or jury. David is likely to present a detailed argument for why he is not liable for battery, claiming that the facts of his conflict with Goliath are analogous to the facts of precedential cases in which courts found no liability. Goliath will likely respond by disputing David’s characterization of the facts of the dispute and/or claiming that other precedent is more “on point.” Both parties’ arguments superficially seem difficult to understand, given that there is little possibility that either will suddenly concede the superiority of the other’s position.

Similarly, Esau would be likely to claim that Jacob’s business is worth substantially less than $150,000, citing facts and figures in support of his position. Jacob would most likely respond with an argument that the business is worth substantially more than $150,000, citing different facts and figures or citing different interpretations of the same facts and figures; neither party is likely to concede or compromise on the value.

Efforts at persuasion in negotiation are best understood as attempts to satisfy one or both of two goals: (1) to shift the bargaining zone to the advantage of the negotiator, either by convincing the opponent that his RP is worse than he believed before beginning negotiations or that the negotiator’s RP is better than previously believed; and (2) to establish an objective—and therefore “fair”—method of agreeing on a sale price that falls within the bargaining zone. The first point is considered here; the second is discussed in Part II. In either case, the importance of persuasion demonstrates that both zone definition and surplus allocation are dynamic activities, dependent not only on negotiators’ individual prebargaining analysis but also on their interaction.37

---

37. See generally Joan F. Brett et al., Stairways to Heaven: An Interlocking Self-Regulation Model of
1. Reducing the Opponent's RP

When Esau argues that Jacob’s catering business is worth only $120,000, he hopes to persuade Jacob that other buyers are unlikely to offer more than this amount. That is, Esau’s true goal is to convince Jacob that Jacob has overestimated the value of an alternative likely to be Jacob’s BATNA—in this case, waiting for another suitor’s offer.\(^3\)

If Jacob’s BATNA is to wait for another potential purchaser to make an offer, he might have estimated the value of that BATNA at $160,000 and set his RP at $150,000 (based on a $10,000 value of selling the business sooner rather than later). If Esau’s argument reduces Jacob’s confidence in Jacob’s initial estimate, Esau’s efforts will have succeeded. Esau’s arguments might, for example, cause Jacob to reduce his estimate of his BATNA’s value to $140,000, and consequently his RP to $130,000, thus shifting the bargaining zone to Esau’s advantage.\(^3\(^9\) Of course, if waiting for another offer is not Jacob’s BATNA, Esau’s attempts at persuasion are likely to fail. For example, Jacob might have another offer in hand for $150,000, in which case Esau’s arguments for the low market value of the business will have no impact on Jacob’s RP and no impact on the bargaining zone.

David’s legal arguments offered to Goliath can be understood in the same way. Assume that Goliath has determined that his BATNA is pursuing a jury verdict and has estimated that he stands a 75% chance of winning a $100,000

---

Negotiation, 24 ACAD. MGMT. REV. 435, 441-42 (1999) (observing that when there is discrepancy between what negotiator desires and what his opponent offers, negotiator often adjusts his goals to fit his environment).

38. Cf. RAIFFA, supra note 1, at 129 (noting that negotiator’s RP might shift during negotiations if the opponent provides information that helps reassess other opportunities or the value of negotiation’s subject matter).

39. See infra Figure 3.
verdict if settlement negotiations fail. Although David's arguments are unlikely to convince Goliath and cause him to apologize for bringing suit, they might cause Goliath to reassess his estimate of a 75% chance of victory. If Goliath downgrades his success estimate from 75% to 50%, his BATNA valuation will drop from $75,000 to $50,000, causing him to reduce his RP accordingly. David will have succeeded in shifting the bargaining zone to his advantage.40

Jacob and Goliath are unlikely to sit idly while their negotiating opponents attempt to convince them to decrease their RPs. If they are typical negotiators, they will respond with rebuttal arguments of their own. Jacob will attempt to justify a higher value for his business; Goliath will muster factual and legal arguments to support his battery claim. But why should they bother? Each negotiating party determines his own RP—the setting of one party's RP is not a matter that requires a consensus of all participants in the negotiation. If Esau's or David's arguments are unpersuasive, why should Jacob and Goliath not sit quietly, content to let their opponents' arguments fall on deaf ears and have no substantive effect on the bargaining?

Rebuttal arguments can serve three purposes. First, to the extent that Esau's arguments caused Jacob to question his RP, making rebuttal arguments can help Jacob to test the persuasiveness of Esau's points. In other words, Jacob might well be arguing for his own benefit, not for Esau's. Second, by rebutting, Jacob tries to convince Esau that Esau's efforts at reducing Jacob's RP have failed and, consequently, the bargaining zone has not been shifted to Esau's advantage. Finally, a rebuttal gives Jacob an opportunity to turn the tables on Esau: that is, he attempts to shift Esau's RP. If Jacob can convince Esau that the latter's valuation of the business is too low, purchasing Jacob's business will look better relative to Esau's BATNA—perhaps of purchasing a competing business—causing Esau to raise his RP. Success in this endeavor, of course, may be necessary to create a bargaining zone (if Esau's RP would otherwise be below Jacob's), and at the very least it will shift the bargaining zone to Jacob's advantage.

2. Improving the Negotiator's Own "Apparent" RP

Negotiators often attempt to shift the bargaining zone advantageously by making their RPs appear to their opponents to be better than they actually are. Assume that Goliath's RP for a litigation settlement is $60,000, based on an estimate of a $75,000 expected value of a jury verdict (a 75% chance of prevailing at trial, and an estimated verdict of $100,000) discounted by $15,000 to account for risk aversion and costs of litigation that will be saved if the case is settled out of court. Assume also that Goliath estimates David's RP to be $90,000, based on the same estimates of the value of a jury verdict and the costs

40. Cf. MNOOKIN ET AL., supra note 11 ("Because of the importance of evaluating the litigation alternative, each party is constantly trying to shape the other party's perceptions of the expected value of proceeding with litigation.") (italics in original).
of litigation (David has a 75% chance of losing a $100,000 verdict, and would pay a $15,000 premium at settlement to avoid the risks and costs of litigation). If David can convince Goliath that David has set his RP lower than $90,000, he can shift the bargaining zone in his favor.

Two types of arguments might serve this purpose. Recall that there are two components to David’s RP: the value of his BATNA (in this case, a trial) and the difference in value between his BATNA and the subject of the negotiation (in this case, settlement). Consequently, David might try to convince his adversary either that he believes his BATNA is more valuable than Goliath estimates or that the difference in value to him between trial and settlement is smaller than Goliath estimates.

First, David is likely to present a detailed legal argument to Goliath documenting why he believes he has, for example, a 50% chance of prevailing at trial. If Goliath does not accept David’s analysis and still believes that he has a 75% chance of prevailing, Goliath will not reduce his own RP of $60,000. But David need not be so convincing to gain an upper hand in the negotiation—he need only convince Goliath that he (David) believes the argument he is advancing. If David does this, Goliath will adjust downward his estimate of David’s RP to $65,000.41 By convincing Goliath of his own subjective belief in the strength of his BATNA, David can shift the range of possible settlements from $60,000—$90,000 down to $60,000—$65,000.42

Alternately, David might tell Goliath that he is not risk averse43 and that his

41. This is based on David’s estimate that Goliath stands a 50% chance of winning a $100,000 verdict (50% x $100,000 = $50,000) plus the $15,000 premium Goliath estimates David would be willing to pay to avoid the risks and costs of trial.
42. See infra Figure 4.
43. Empirical research shows that in litigation individual plaintiffs bringing a single suit often oppose organizational defendants that defend many suits. See KRITZER, supra note 20, at 75-76. A
brother-in-law will be representing him in court at no charge. The purpose of these statements would be to reduce Goliath's estimate of his RP by convincing Goliath that David values trial and settlement equivalently. If David convinces Goliath that he speaks the truth, Goliath will reduce his estimate of David's RP by $15,000, from $90,000 to $75,000, even if David agrees with Goliath's estimates concerning his likelihood of prevailing at trial and the likely size of a jury verdict.44

In the two preceding examples, nothing depends on whether David actually believes the arguments he makes—all that matters is David's ability to persuade Goliath that he believes the arguments he advances and, thus, has set his RP accordingly. In the first example, if David actually believes that Goliath has only a 50% chance of prevailing at trial, his RP is $65,000. If David secretly believes that Goliath has a 75% chance of prevailing at trial, his RP is $90,000, but his RP appears to Goliath to be $65,000. In either case, Goliath believes that the possible points of settlement lie between $60,000 and $65,000, which improves David's strategic position substantially compared to what it was when Goliath believed a settlement up to $90,000 was possible. The same analysis holds for the second example.

Changing the facts slightly, however, demonstrates the significance of David's state of mind. Suppose that David convinces Goliath that he (David) believes Goliath has only a 50% chance of prevailing at trial and that David values a trial and a settlement equivalently. This would cause Goliath to estimate David's RP at $50,000 (50% x $100,000 + $0), placing it below Goliath's RP of $60,000. Goliath would then conclude that no agreement is possible. If David accurately represented his position to Goliath, then his RP is $50,000 and there is no bargaining zone. The parties are best served by ending negotiations and preparing for trial. But if David misrepresented his position—perhaps estimating that Goliath's RP is somewhat lower than $50,000—and has an actual RP of $90,000, his persuasiveness is likely to backfire. Goliath might end negotiations because he thinks no agreement is possible when, in fact, there is a $30,000 bargaining zone between the parties' RPs. An opportunity for an agreement superior to both party's BATNAs—and significantly so—will be lost.

This insight accounts for two observable features of negotiating behavior: parties do not always misrepresent their valuations, and when they do misrepresent they often leave a path over which they can later retreat if necessary. If misrepresenting one's BATNA could never make an actual bargaining zone apparently disappear, negotiating parties would have no reason not to always attempt to misrepresent—and grossly so—save personal ethical principles and,

---

perhaps, the fear of developing a reputation as an overreacher should the misrepresentations not be believed. However, misrepresentations of the value the negotiator places on the subject of the negotiation or his BATNA, while commonplace, are not universal. With misrepresentation comes risk. The negotiator must balance the possible benefits of improving his bargaining position by misrepresenting his valuations against the possible cost of causing impasse when a beneficial transaction was possible.

The fear of creating the perception that no bargaining zone exists when one actually does can cause negotiators to assert misrepresentations of value softly or hesitantly. For example, David might attempt to give the impression that he tentatively has concluded that Goliath is only 50% likely to prevail at trial, rather than that he is firm in this belief. This tactic can give him latitude to backtrack—perhaps conceding that Goliath’s chances are closer to 60% or even higher—should he sense from the course of the bargaining that Goliath’s RP is higher than what David has implied about his own.

C. INFORMATION SEEKING

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

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

1. Discovering Private Information and Perceptions

Jacob might ask Esau how long he has been investigating purchase opportunities in the catering industry or whether he has had negotiations with owners of other businesses. He might also inquire as to whether Esau has considered purchasing a different kind of business or what kind of job he currently has and


46. This is the fundamental insight offered in Robert Cooter et al., Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, 11 J. LEGAL STUD. 225, 231 (1982).
how he enjoys it. Esau might ask Jacob what has kept him interested in catering for so many years, whether he still enjoys preparing a good bowl of pottage, or what he plans to do after he retires. All of these questions solicit information that is relevant to the opponent’s BATNA and is known only to him. Although it is possible that such apparently benign questions are merely small talk designed to establish rapport, it is likely that they are asked in hopes that the answers will help with zone definition.

If Esau is committed to the catering business, or if he detests his current job, his RP is likely to be higher than if he is exploring the option of purchasing a company in another industry or is happy with his current employment. If Esau has thoroughly investigated other catering operations, his RP is probably set close to the market price for a company such as Jacob’s; if Esau is just beginning to investigate opportunities, he probably has a less clearly defined BATNA and might be willing to pay more. If Jacob has grown tired of cooking and is a passionate fisherman, he might place a lower value on his BATNA of waiting for another offer—and therefore have a lower RP—than if he has less clear retirement plans.

In other situations, the information that goes into determining a negotiator’s BATNA is public, but the negotiator’s evaluation of that information is not. David and Goliath both have access to published court opinions on the subject of battery and reports of jury verdicts and awards in such cases. If the lawsuit has progressed to the point of discovery, they also have relatively equal access to all of the relevant facts of their dispute. But Goliath’s RP will depend on how he interprets these items—which constitute the value of his BATNA of going to trial—and this interpretation is private information. Consequently, David is likely to ask Goliath for the latter’s evaluation of his chances of prevailing. The response David receives will aid his efforts at zone definition.

Finally, questioning can even help the negotiator establish his own RP when the opponent has private information concerning the subject of the negotiation. Esau’s RP depends on how Jacob’s business compares in quality to other potential purchases, but Jacob has more information relevant to this determination than does Esau. Esau will certainly ask Jacob for historic revenue figures, how many longterm contracts are in force, when the business’s accounts were last audited, and so on. He might also ask more indirect questions, such as why Jacob wishes to sell at all, in an effort to determine whether Jacob is concealing undesirable information; Esau will likely place a higher value on the business if Jacob is elderly and wishes to retire than if Jacob is tired of fighting with his suppliers. Although sellers are most likely to have private information concerning the subject of the negotiation, buyers might have private information relevant to sellers’ RPs as well. Jacob is likely to ask Esau, for example, to

47. In this case, such questions serve the purpose of building a relationship. The value of this for surplus allocation is considered infra Part II.D.

48. See supra Part I.B.2; cf. MNOOKIN ET AL., supra note 11 (describing “lemons problem” caused by asymmetric information).
demonstrate a responsible credit history, because a deal with Esau at any given price would be less desirable if Esau presented a credit risk.

2. Answers

Information-seeking questions are sometimes met with candid responses and sometimes with less-than-candid responses. Both response strategies have different consequences for parties engaged in zone definition.

From one perspective, information-seeking questions give the respondent an opening to adopt the persuasive tactic of increasing the value of his apparent RP, described above. Goliath, believing his chances of prevailing at trial are 75%, might claim that he believes his chances are closer to 100%, hoping to convince his adversary that he believes his BATNA is more valuable than he actually believes it is, and that his (Goliath's) RP for a settlement is correspondingly high. If Esau despises his current employment and has always dreamt of owning a catering company, he might nonetheless tell Jacob that he is quite content with his current job and is exploring purchase opportunities in a range of industries, hoping to persuade Jacob that his (Esau's) RP is lower than it actually is. Such misrepresentations, if convincing, will alter the parameters of the bargaining zone to the advantage of the party making the statements.

With obfuscation, however, comes the risk of implying that there is no bargaining zone, thereby causing an impasse. A secondary risk is that negotiations will take longer to complete, increasing transaction costs and postponing a mutually advantageous exchange. Because of these risks, it is sensible to predict that negotiators who mislead or obfuscate when posed information-seeking questions are likely to believe a large bargaining zone exists between their actual RP and their estimate of their opponent's RP, which would both enhance the benefits to be gained by that approach and minimize its attendant risks.

Research suggests that, on average, negotiators become more accurate in their perceptions of their opponents' interests during the course of negotiations, so many negotiators must respond truthfully to information-seeking questions. Truthful information revelation exchanges the pitfalls associated with misrepresentation for different drawbacks. If Esau candidly admits his love of the catering business—implying that noncatering alternatives are unattractive and, consequently, that his RP for buying Jacob's business is relatively high—his truthfulness helps to maximize the size of the bargaining zone, minimizing the possibility that the parties will fail to complete a mutually beneficial transaction. But permitting Jacob to infer that Esau's RP is relatively high allows Jacob to use tactics designed to raise his (Jacob's) apparent RP, thus shifting the bargaining zone in a direction that benefits Jacob. For example, by admitting his strong desire to be a caterer, Esau might enable Jacob to estimate

49. See supra Part I.B.2.

that Esau's RP is at least $200,000. This information could allow Jacob to claim (falsely) that he has had other generous offers for the business or that he is in no hurry to sell soon, and that his RP is consequently $200,000.

This description explains the underlying intuition of the many authors who warn negotiators that revealing information can enable an opponent to take advantage.\textsuperscript{51} Thus, it is likely that a negotiator who candidly provides information believes that there is a relatively small bargaining zone or that the inquiring party underestimates his actual RP.

Consider two examples: (1) Suppose Esau estimates that Jacob's RP approaches $200,000. Esau will probably be unconcerned with the consequences of admitting that his RP is $200,000. He knows that Jacob cannot respond by attempting to misrepresent his actual RP—at least by very much—without risking an impasse. (2) Regardless of his estimate of Jacob's RP, suppose Esau fears Jacob has estimated that Esau's RP is $250,000. Esau is likely to reveal eagerly that his RP is actually $200,000 in order to prevent Jacob from insisting on more than that amount.

Negotiators can also respond to information-seeking questions by refusing to answer. Esau might say, for instance, that he would rather limit the conversation to the value of Jacob's company and not discuss his own plans. Goliath might tell David that he is confident in the strength of his case but does not wish to predict the outcome of a trial that both parties hope to avoid. The effect of this approach on the bargaining zone falls between providing a truthful and an untruthful response.

A truthful response would permit David to better estimate Goliath's RP. An untruthful response would, if believed, cause David to estimate that Goliath's RP is higher than it actually is. \textit{No} response forces David to rely on his prior estimate of Goliath's RP, which was based on incomplete information. Depending on David's preparation, skill, and luck, this prior estimate might be accurate or it might be wildly inaccurate. If the prior estimate is inaccurate on the high side (that is, David thinks Goliath has a higher RP than he actually does), Goliath will find himself in a stronger negotiating position than he would have enjoyed had he revealed truthful information, although he faces a risk that David will believe there is no bargaining zone and end negotiations. If David's prior estimate is inaccurate on the low side, Goliath will find himself in a weaker negotiating position than he could have established by revealing information, and he also faces a risk of negotiation collapse if David insists on a settlement that is below Goliath's actual RP.

D. STRATEGICALLY TRUNCATING THE BARGAINING ZONE

1. Commitments

Negotiators often threaten to break off negotiations if the other side will not offer a specified minimum value. Jacob might warn, for example, that he will

\textsuperscript{51} See, e.g., MNOOKIN ET AL., supra note 11.
Shifting the Bargaining Zone with a Commitment

Original Bargaining Zone

Post-Commitment Bargaining Zone

$0  $150K  $175K  $200K
Jacob’s RP  Jacob’s CP  Esau’s RP

accept no less than $175,000 for his business. He may, as discussed above, attempt to convince Esau that this number is his RP.\textsuperscript{52} Such a representation may be truthful—perhaps he has received another offer of $174,000, thus improving his BATNA—or it may not—he might imply that he received such an offer, although he did not. Alternatively, Jacob may threaten not to accept less than $175,000 even if Esau knows or strongly suspects Jacob’s RP is only $150,000. With this tactic, Jacob attempts to gain an advantage in zone definition by replacing his RP with a “commitment point” (CP), thus truncating the bargaining zone.\textsuperscript{53} By threatening to accept no less than $175,000 without claiming that that number is his RP, Jacob tries to cut off the portion of the bargaining zone most beneficial to Esau and define a bargaining zone that extends only from $175,000 to $200,000.\textsuperscript{54}

Making a commitment is the equivalent of threatening to cut off one’s nose to spite one’s face. Jacob threatens to choose his BATNA—in this example, perhaps it is selling to another purchaser for $150,000—if Esau refuses to pay him $175,000, even if that means turning down an offer from Esau that would leave him better off than no agreement, possibly by as much as $24,999.

Success in making a commitment depends on the negotiator’s ability to convince his opponent that his resolve will not weaken if he is presented with an offer that is superior to his original RP but below his CP. Put another way, commitments work only if the negotiator’s threat to turn down an offer below his CP, even if accepting it would make him better off, is credible.\textsuperscript{55} Conse-

\textsuperscript{52} See supra Part I.B.

\textsuperscript{53} Alternatively, a commitment can also be understood as an attempt by one negotiator to unilaterally change his RP, not because he has sought out alternatives that change the underlying fundamentals that should dictate his RP, but by pure force of will. See Schelling, supra note 11, at 27 (“[C]ommitments permanently change, for all practical purposes, the ‘true’ reservation prices.”).

\textsuperscript{54} See infra Figure 5.

\textsuperscript{55} Cf. Schelling, supra note 11, at 36 (posing fundamental question, “[H]ow can one commit himself in advance to an act that he would in fact prefer not to carry out . . .?”).
sequently, negotiators making a commitment will focus their efforts on bolstering its credibility.

Two affirmative approaches to achieving this goal are available. First, the negotiator can attempt to demonstrate that he is irrational or unstable enough to walk away from a deal that would be superior to what he can obtain from his BATNA. Becoming noticeably emotional about the subject matter of the negotiation or losing his temper can be a way to accomplish this. In legal negotiation, where the negotiator often is an agent for a principal who is not present at the bargaining table, the lawyer has the tactical option of maintaining his appearance of rationality while claiming the client is committed to an apparently irrational course of action.

Second, the negotiator can take actions that increase the costs to him of accepting a deal at any point below his CP, making it impossible for him to accept a less favorable deal and still be better off reaching an agreement with his opponent than pursuing his BATNA. For example, Jacob might promise his staff bonuses totaling $25,000 if the business is sold to Esau. With this promise in place, Jacob would only be better off selling to Esau than he would be in accepting $150,000 from another offeror if Esau offers at least $175,000.

A more common tactic in legal negotiation is for the negotiator to create a reputational cost, rather than a financial one, to accepting a deal at any point below his CP. Assume, for example, that Goliath’s RP is $60,000 and Goliath estimates David’s RP to be approximately $90,000. Assume also that Goliath’s complaint requests $100,000: $75,000 for compensatory damages and $25,000 for punitive damages. Goliath might publicly vow to accept no settlement for less than his full compensatory damages. If the loss of pride or credibility that Goliath would associate with accepting a settlement amount between $60,000 and $75,000 after taking such a vow is sufficiently great, he will have used his reputation as collateral for his commitment to a CP of $75,000.

Increasing the costs of agreement in order to bolster the credibility of a commitment is a risky tactic for at least three reasons. First, if the opponent does not believe the commitment is credible, he might demand a price below the committing party’s CP, which would then be outside of the bargaining zone. Even worse, the opponent may make a counter-commitment, establishing his own CP below the first party’s CP and thus eliminating any bargaining zone.

56. Cf. id. at 22 ("If a man knocks at a door and says that he will stab himself on the porch unless given $10, he is more likely to get the $10 if his eyes are bloodshot.").
57. Cf. id. at 24 (suggesting buyer can convincingly pledge to pay no more than $16,000 for house he values at $20,000 if he makes enforceable bet with third party to forfeit $5000 if he pays more than $16,000 for house).
58. Manufacturers often use “most-favored-nation” clauses as a commitment technique. Entering a transaction below a certain price then requires them to give rebates to other clients, raising the costs of transacting at what would otherwise be a beneficial price. See MNOOKIN ET AL., supra note 11.
59. See SCHELLING, supra note 11, at 29 ("A potent means of commitment . . . is the pledge of one’s reputation.").
60. Notice that, if the second party believes the first party’s threat is credible, it would be irrational
Second, if the negotiator making the commitment has misjudged his opponent's RP, he might establish a CP so high that there is no longer a bargaining zone, guaranteeing impasse. Assume, for example, that Goliath, with an RP of $60,000, uses reputational costs to establish a CP of $75,000, but David's RP was only $70,000. No agreement will be possible in this case, although a bargaining zone between $60,000 and $70,000 originally existed.

Third, the commitment may have a dynamic effect on the opponent's RP, thus eliminating the bargaining zone. If David's RP is $70,000, Goliath might use a commitment to raise his RP to $65,000, which David would agree to if his RP were static. But if David believes that giving in to a commitment tactic will earn him the reputation as an easily bullied negotiator, he might reduce his RP (say, hypothetically, to $60,000) to compensate for this new reputational cost that will accompany an agreement. In this hypothetical, Goliath's commitment indirectly, rather than directly, eliminates the bargaining zone.

A negotiator might succeed in replacing his RP with a CP without creating additional costs of agreeing to a deal point above his CP if his opponent is more impatient about reaching an agreement or, alternatively, suffers from higher bargaining costs. Suppose, for example, that Jacob wishes to sell his business in order to use the cash for other investment opportunities, but the quality of these opportunities will decline with time. Consequently, Jacob's RP is $150,000 today, but his RP will increase over time. If Esau knows that the value Jacob will receive by reaching agreement will decrease rapidly, the former might commit to pay no more than $160,000, forcing the latter to accede to the truncated bargaining zone to avoid watching the zone disappear entirely.

Similarly, assume that Goliath's RP is $60,000, while David's is $90,000, but that Goliath pays his lawyer twice as much money per hour to negotiate as David pays his. David might use knowledge of this disparity to commit to pay no more than $70,000. The credibility of the commitment arises not from any claim that David would be worse off paying between $70,000 and $90,000 than he would be if the parties failed to reach agreement, but from the fact that he will suffer less from extended negotiations than will Goliath.

---

61. Cf. Avinash Dixit & Susan Skeath, Games of Strategy 532 (1999) (claiming that bargainers will make concessions to avoid "decay" (i.e., shrinking of the bargaining zone) or "impatience" (i.e., opportunity costs of haggling)); Ian Ayres, Further Evidence of Discrimination in New Care Negotiations and Estimates of Its Cause, 94 Mich. L. Rev. 109, 124 (1995) Peter C. Cramton, Dynamic Bargaining with Transaction Costs, 37 Mgmt. Sci. 1221, 1221 (1991) (constructing a model of bargaining behavior that assumes both that negotiators discount future payoffs and that bargaining has transaction costs).

62. Game theorists have demonstrated that given these facts and certain restrictive conditions, it would be rational for Goliath to accept a $70,000 offer from David rather than bargain further. For a nontechnical description of the "Rubinstein bargaining solution," see Avinash K. Dixit & Barry J.
2. Responding to Commitments

When a negotiator attempts to replace his RP with a CP, and thus to shift the bargaining zone to his advantage, his opponent will often respond with attempts to undo the commitment, reduce its force, or refocus the negotiation from the activity of zone definition to the activity of surplus allocation and its attendant norms.

As an example of the first type of response, if Jacob establishes a $175,000 CP by promising his employees a $25,000 bonus if Esau buys the company, Esau might attempt to convince the employees to promise to waive their claim to the bonus—perhaps by promising good treatment in the future should he become their employer. If successful, Esau will have eliminated Jacob’s CP and restored Jacob’s original $150,000 RP as the lower boundary of the bargaining zone.

Reducing the force of the commitment often involves creating ways for the committing party to renege on the commitment while still “saving face” with his constituents. William Ury calls this tactic “building a golden bridge.” This tactic is most useful when the committing party attempts to use reputational collateral to make the commitment credible. By publicly vowing to accept no settlement for less than his compensatory damages, Goliath can create a reputational cost to accepting anything less, even if it is more than his original RP. Suppose that of the $75,000 Goliath seeks in compensatory damages, $30,000 are out-of-pocket costs for medical expenses and lost wages, while $45,000 are for pain and suffering. David might offer a $65,000 settlement ($5,000 more than Goliath’s original RP) and argue that this is actually $35,000 more than the amount needed to compensate Goliath for his incurred costs. In this example, David reinterprets Goliath’s commitment in a way that would permit Goliath to accept a settlement offer that is superior to his RP while saving face. By building such a face-saving “golden bridge,” David effectively parries Goliath’s attempt to establish a CP, thus reestablishing the original bargaining zone.

As is discussed below, entrenched social norms require that settling on a specific deal point within the bargaining zone—surplus allocation—be accomplished by reference to substantive or procedural norms of fairness. When a negotiator makes a commitment to a position superior to his RP, he ignores these norms and instead tries to coerce a specific agreement on the basis of force. Fisher and his coauthors advise that when an opponent seeks to get what he wants through a stubborn and intransigent commitment to a position, the negotiator should counter by “insisting that [the opponent’s] say-so is not enough and that the agreement must reflect some fair standard independent of

---


63. WILLIAM URY, GETTING PAST NO 105-29 (rev. ed. 1993).

64. See infra Part II.

65. Cf. MNOOKIN ET AL., supra note 11 (observing that “commitments may offend some bargainers’ notions of process legitimacy” and thus “damage relationships”).
the naked will of either side."66 This type of response effectively denies the legitimacy of attempting to replace one's RP with a CP. If the noncommitting negotiator can credibly claim that he would rather forego a beneficial transaction than accept an illegitimate agreement, he can eliminate his opponent's CP.

E. EXPANDING THE BARGAINING ZONE

By seeking to improve their BATNAs, misrepresenting their RPs, and making commitments, negotiators attempt to create advantage by truncating the bargaining zone—specifically, by eliminating from the zone possible deal points relatively close to their RPs. Expanding the bargaining zone, however, can also benefit the negotiator by increasing the distance between his RP and the bulk of the possible deal points within the zone. This is because the greater the distance between the eventual deal point and the negotiator's RP, the greater the benefit he derives from reaching a negotiated agreement rather than opting for his BATNA. Tactics that enable negotiators to define a larger bargaining zone than would otherwise exist are collectively termed "integrative" bargaining.67

1. Integrative Bargaining

Also called "creating value" or "expanding the pie,"68 integrative bargaining requires the parties to redefine the negotiation's subject matter in a way that benefits one party more than it costs the other. When Esau and Jacob sit down for their first negotiating session, the subject matter of the negotiation is Jacob's business, which is worth $200,000 to Esau and $150,000 to Jacob. Suppose, however, that Esau would value Jacob's consulting services for one year after the sale at $50,000, but Jacob, interested in staying involved with the business, would be willing to provide those services for as little as $10,000. By redefining the subject matter of the negotiation as "Jacob's business + consulting," Esau's RP will increase $50,000 to $250,000, while Jacob's will increase only $10,000, to $160,000.69 Consequently, the bargaining zone will be $90,000 ($250,000 - $160,000) — $40,000 larger than it would have been had they merely negotiated a price for the business. Assuming for the moment that the parties will ultimately select a deal point midway between their RPs, the use of such integrative bargaining techniques translates into $20,000 worth of additional benefit for each.70

As this example illustrates, the most common integrative bargaining tech-

66. FISHER ET AL., supra note 28, at 12.
67. See supra notes 11-20 and accompanying text.
68. See, e.g., MNOOKIN ET AL., supra note 11.
69. See infra Figure 6.
70. It is possible, depending entirely on context, that expanding the bargaining zone will have the collateral effect of helping one party to negotiate a more favorable deal point than he would have otherwise. Thus, while expanding the bargaining zone increases both parties' expected value of an agreement, it will not necessarily result in both parties obtaining more actual value in a particular circumstance.
nique is adding issues to the negotiation. By adding the issue of "consulting" to the existing issue of the price of the business itself, the parties are able to define a larger bargaining zone. The original issue for David and Goliath is the price at which Goliath will dismiss his lawsuit. If David fears that paying a substantial settlement would encourage others whom he has injured by his slingshot to sue him, he might value the addition of a nondisclosure agreement to any settlement price. If the value of a nondisclosure agreement to David exceeds the cost of such a term to Goliath, the two can create a larger bargaining zone by adding a nondisclosure agreement to the basic settlement terms. If, by coincidence, Goliath also desires a nondisclosure term, so that the parties' interests on this point are aligned, David's RP would increase (because he would be willing to pay more for a settlement with a nondisclosure term) and Goliath's RP would decrease (because he would be willing to accept a lower settlement figure if the nondisclosure term was included in the bargain), expanding the bargaining zone on both ends. In the event that a nondisclosure term is undesirable to Goliath—but less costly to him than beneficial to David—David's RP would increase, and Goliath's RP would increase but by less than David's, resulting in a larger bargaining zone than the parties would have without the additional issue.

"Logrolling"—that is, when each party gives up something that the other party values more—is a special case of adding issues. Assume again that Esau values Jacob's consulting services at $50,000, but Jacob would be willing to provide them for $10,000. Assume also that the sale of a business in Esau's and Jacob's town is usually done on credit, but Jacob would value a cash deal at $50,000 and Esau would be willing to pay cash for a discount of only $10,000. The parties can create value through the tactic of logrolling if Jacob agrees to consult for a year in return for Esau agreeing to pay cash.

The trade creates value by adding two issues to the negotiation and, in so doing, expands the bargaining zone. The subject of the negotiation changes from "Jacob's business" to "Jacob's business + consulting + cash." Jacob's RP for such a deal would be $40,000 lower than his RP for the business alone, because he would be gaining $50,000 worth of value by receiving cash while giving up $10,000 in value by agreeing to provide consulting services. Esau's RP would be $40,000 higher than for the purchase of the business alone, because paying cash has a negative value to him of only $10,000 while gaining consulting services has a positive value of $50,000. If a bargaining zone existed when the subject of the negotiation was Jacob's business alone, logrolling expands that zone and makes a deal even more desirable than it otherwise would have been. If there was not a bargaining zone for Jacob's business standing alone—that is, Jacob's RP was higher than Esau's—logrolling might create a bargaining zone and thus facilitate a transaction that otherwise would not have occurred by pushing Esau's RP up and Jacob's down.

Negotiators can expand the bargaining zone in much the same way by subtracting issues rather than by adding them when the seller values a portion of the negotiation's subject matter more highly than the buyer. Suppose, for example, that Jacob loves to eat pottage, and that he wants to continue to supply that delicacy to some of his oldest customers even after he sells the catering business. He values his pottage machine plus the pottage customers at $20,000. Esau, on the other hand, hates pottage and does not believe there is much of a market for that item. He believes the pottage machine and the few pottage customers that Jacob has are worth only $1,000. Consequently, Esau and Jacob can create value by unbundling the pottage machine and customers from the rest of the catering business. This added value can be characterized as resulting from a movement of the parties' RPs in a way that permits them to define a larger bargaining zone. Jacob's RP for "catering business minus pottage" is $130,000 ($150,000 - $20,000), while Esau's RP for the same package is $199,000. Subtracting the issue enables the parties to expand what was a $50,000 bargaining zone to a $69,000 bargaining zone.

Prescriptive literature on negotiation firmly counsels that negotiators should focus attention on their and their opponents' underlying interests rather than on positions. The soundness of this conventional wisdom can be easily understood by observing the effect that focusing on interests has on zone definition. Concentrating on interests allows negotiators to redefine the negotiation's subject matter when doing so produces a larger bargaining zone. If David and Goliath focus single-mindedly on the price of settlement, they might never realize that their joint interests could be better served if they discuss the price of settlement plus a nondisclosure agreement. But if David realizes that his interests include not only money but also his reputation and the possibility of future litigation, and if Goliath realizes that his interests include money and

72. See, e.g., FISHER ET AL., supra note 28, at 10; LAX & SEBENIUS, supra note 12, at 63-70.
closure but not publicity, the parties may be able to craft an agreement that has the potential—contingent on surplus allocation—of making both better off. This potential for improvement exists precisely because reconceptualizing the negotiation’s subject matter can result in a larger bargaining zone.

As the examples in this section demonstrate, integrative bargaining not only allows the parties to create a larger bargaining zone than would otherwise be possible, but also has the effect of repositioning the bargaining zone. For example, when Esau and Jacob redefine the subject of their negotiation by adding consulting services to the mix, the bargaining zone not only gets larger, it also moves to the right, because both Esau’s and Jacob’s RPs get larger. Although at first glance it might appear that shifting the bargaining zone to the right would be undesirable for buyers—and, likewise, shifting the bargaining zone to the left would be undesirable for sellers—the shift actually has no distributive consequences. The benefits or costs of the shift are precisely canceled out by the change in value of a negotiated agreement relative to each party’s BATNAs.

If Esau and Jacob redefine the subject of their negotiation from “Jacob’s business” to “Jacob’s business + consulting,” Esau’s RP increases by $50,000, expanding the number of possible deal points at which Esau will have to pay Jacob a relatively high price. This is acceptable to Esau, however, because he will purchase a more desirable product—“business + consulting” vs. “business” alone. Jacob’s RP increases by $10,000, meaning that the number of relatively low possible deal points is decreased. This is a benefit to him, but one that is offset by the fact that a deal would now be $10,000 less desirable to him, because he would have to provide consulting services in addition to parting with his business. The shifts in the endpoints of the bargaining zone, therefore, exactly offset the increased or reduced value that an agreement with consulting would have to the respective parties relative to an agreement without consulting. The increase in the total size of the bargaining zone, however, is beneficial to both parties.

2. Candor in Negotiations Revisited

Parts I.B and I.C explained that by convincingly misrepresenting the value of their alternatives to a negotiated agreement and/or the value of an agreement, negotiators can improve their apparent RPs and thus shift the bargaining zone advantageously. Nonetheless, those parts also explained that candor has its benefits: candor reduces the risk that no agreement will be reached despite the existence of a bargaining zone.

Understanding the benefits that can be gained from the use of integrative tactics also helps to explain why many negotiators truthfully represent their positions and preferences and respond candidly to information-seeking questions: the value that can be created by integrative bargaining requires a truthful
exchange of information. Suppose that Jacob’s RP is $150,000 and that he has a slight preference for selling the business effective in one year than effective immediately. Esau, for his part, hates his current job, and therefore strongly prefers to take possession immediately. Jacob asks Esau whether he would prefer immediate or deferred possession. Esau might be tempted to misrepresent his preference—perhaps by telling Jacob that he is indifferent—because he fears that if Jacob knows about Esau’s desperate desire to get out of his current employment situation, Jacob might (correctly) assume that Esau has a high RP. This might encourage Jacob to misrepresent his RP as being higher than it actually is, in an effort to redefine the bargaining zone to his advantage.

An equally strong motivation exists, however, for Esau to be candid. If Esau claims to be indifferent on the timing issue, the parties might define the negotiation’s subject matter as “business with deferred possession.” If Esau is truthful, the parties will recognize that Esau values the issue of timing more than Jacob does, and they will be able to create a larger bargaining zone by defining the negotiation’s subject matter as “business with immediate possession.”

Candor, then, can help the negotiators to find ways to expand the bargaining zone to the benefit of both parties, but at the same time, it can enable an opportunistic negotiator to redefine the bargaining zone to his personal advantage. Because of the benefits and risks, how much candor to exhibit—sometimes termed the “negotiator’s dilemma”—is one of the most difficult normative questions with which negotiators wrestle. From a descriptive perspective, this difficulty renders most negotiators torn: sometimes leaning toward candor, sometimes not.

II. SURPLUS ALLOCATION

Through zone definition, negotiators establish a bounded set of possible negotiated outcomes, or “deal points.” If the bargaining zone consists of only a single point, it is the only possible deal point. Unless the parties mistakenly believe that there is no bargaining zone at all, they should reach a deal at precisely that point. But in many, and perhaps most, cases in which a bargaining zone exists, the zone will include a range of potential deal points. In this situation, agreement at each possible deal point is superior for both parties to not reaching agreement, or, put in economic terms, every deal point is Pareto
superior to no deal. The problem is that, in this situation, no potential deal point is obviously superior to any other. If Esau is willing to pay $200,000 for Jacob’s business, and Jacob is willing to accept $150,000, a sale clearly should take place, but it is unclear whether the price should be $150,000, $200,000, or any amount in between.

How do negotiators solve this dilemma and agree on a single deal point? This part argues that bargainers usually rely on socially constructed norms of reaching agreement that are based implicitly on notions of fair dealing. Failure to agree on how to fairly allocate the cooperative surplus can, perversely, cause negotiators to fail to consummate a deal even when both would be better off striking a deal than pursuing their BATNAs. This is because negotiators often will refuse to agree to a distribution of assets they consider unfair even if the proposed deal point exceeds their RP.

This part first describes the importance negotiators place on fairness concerns. It then explores some of the ways they use fairness principles in surplus allocation.

A. THE IMPORTANCE OF FAIRNESS

Social scientists long have recognized that the desire to be treated fairly is a strong motivator of many human activities. Two frameworks, drawn from different social science branches, present useful ways to think about the central importance of fairness to the negotiation process. Social psychologists have theorized that the comparisons individuals make between themselves and others are an important component of emotional well-being. Inequitable relationships create distress, and individuals who find themselves in such relationships focus on restoring equity to the relationship as a means of eliminating that stress. Behavioral economist Richard Thaler makes a similar argument when he claims that consumers obtain “acquisition utility” from a purchase equal to its value less its cost and also “transaction utility” based on the relationship

---


79. Admittedly, the “commitment” tactics described infra Part I.D.1, could be described as tactics that use economic leverage in pursuit of surplus allocation, rather than as tactics that seek to unilaterally redefine the bargaining zone. That commitment tactics plausibly could be classified in either category demonstrates that the categories are not clearly distinct at the margins. Classifying such tactics under “zone definition” is preferable, because this maintains the useful dichotomy between tactics that rely on economic rationality (zone definition) and those that rely on conformity with social norms (surplus allocation).

80. Cf. Richard H. Thaler, Anomalies: The Ultimatum Game, J. Econ. Persp. 203, 203 (Fall 1988) (concluding that “in general, consumers may be unwilling to participate in an exchange in which the other party gets too large a share of the surplus”); Sally Blount White & Margaret A. Neale, The Role of Negotiator Aspirations and Settlement Expectancies in Bargaining Outcomes, 57 Organizational Behav. & Hum. Decision Processes 303, 307 (1994) (predicting that “when excessive perceived inequity exists, individuals who place especially large amounts of disutility on inequity may choose impasse over a positive outcome”).


82. See id. at 18. Perhaps, for the purposes of this analysis, the most relevant way an individual can restore equity is by “altering his own or his partner’s relative gains.” Id.
between the price paid and their perceptions of a fair price. The consequence of either framework is that negotiators will demand fair deal points and might reject unfair deal points, even when this means turning down a proposed agreement that falls within the bargaining zone. As a result, the surplus allocation activity requires negotiators to emphasize fairness norms.

An anecdote provided by Steven Lubet nicely demonstrates the effect that the desire for fairness can have in bargaining situations. Visiting Petra, Jordan, with his family, Lubet learned that a camel ride into the center of the bazaar was priced at seven Jordanian dinars, while tourists who wished to walk to the bazaar could bargain with camel drivers for a one-way ride out of the bazaar at the end of the day. Lubet chose to walk to the bazaar in the morning and, to his dismay, was unable to convince a single camel driver to transport him out of the bazaar for less than four dinars at the end of the day, regardless of how many drivers sat idly by or how few tourists remained. A confused Lubet reasoned that because the variable cost of providing a ride was low and negotiations were conducted in secret—so no driver could be persecuted by his colleagues for undercutting them on price—the drivers must have RPs below four dinars. It took his young son to point out that the drivers were refusing lower offers because their pride would not permit them to accept a fee they thought was unfairly low.

Experimental results robustly demonstrate the same principle. Consider the widely replicated "ultimatum game," in which one player, known as the "allocator," suggests a division between himself and the other player, known as the "recipient," of a monetary stake provided by the experimenter. The recipient may either accept the division, in which case each player pockets his portion, or reject the division, in which case the stake reverts to the experimenter and both players receive nothing. If maintaining equity in a relationship were not important, recipients would accept any division of the stake that provided them with a non-zero amount, on the grounds that even a small portion of the stake is better than the $0 they would receive if they rejected the proposed division. But recipients, it turns out, reject a significant percentage of the proposals, and divisions more lopsided than 80%/20% are usually turned down.

84. Steven Lubet, Notes on the Bedouin Horse Trade or "Why Won't the Market Clear, Daddy?", 74 Tex. L. Rev. 1039, 1039-42 (1996).
85. See id. at 1042-49.
86. See id. at 1050.
Testing the desire for relationship equity in the context of litigation bargaining, Guthrie and I found that student subjects playing the role of plaintiff in a landlord-tenant dispute were more likely to accept a given settlement offer than demand a trial in small claims court if they had been treated well by the landlord, even holding legal rights constant. In another set of experiments, Loewenstein and his coauthors found that negotiators were more concerned with the comparison of their outcomes to those of their opponents than to the absolute value of their outcomes.

Not only do people strongly desire fair treatment, evidence also shows that they place a positive value on treating others fairly. In the ultimatum game, even a selfish allocator would be ill-advised to offer the recipient only a penny, because he would run the risk of having the offer rejected. But even when the rules are changed to require the recipient to accept whatever is offered—thus turning the ultimatum game into the “dictator” game—allocators still, on average, give a significant percentage of the stake to the recipient, and as many split the stake equally as keep it all for themselves. In a slightly different experimental context, Hoffman and Spitzer told experimental subjects that the winner of a coin toss could choose to receive $12 and leave the loser with $0 or the two could agree to split $14 in any way that they wished. All of the pairs agreed to split the $14 equally, meaning that the winner of the flip gave up $5—the difference between $12 and $7—for the sake of treating the loser fairly. It would be naïve to think legal negotiators would sacrifice an infinite amount of personal benefits to treat others fairly. Many sacrifice some benefits, however, to avoid exploiting their opponents, whether this results from social conditioning, reputational concerns, or both.

Given that a wide bargaining zone provides for a range of possible deal points and that fairness in surplus allocation is a dominant norm, adherence to the fairness norm could theoretically substitute for negotiating: parties would simply agree to transact at the deal point dictated by fairness, so long as the

---

89. See Korobkin & Guthrie, Psychological Barriers, supra note 31, at 144-47.
91. See Elizabeth Hoffman et al., Preferences, Property Rights, and Anonymity in Bargaining Games, 7 GAMES & ECON. BEHAV. 346, 370 (1994).
92. See generally id. at 348-50.
93. Experimental design affects the generosity of dictators, but regardless of design a significant number always offer non-zero distributions to the powerless recipient. See, e.g., Camerer & Thaler, supra note 87, at 213-14; Robert Forsythe et al., Fairness in Simple Bargaining Experiments, 6 GAMES & ECON. BEHAV. 347 (1992); Hoffman et al., supra note 91, at 362-66; Roth, supra note 87, at 298-302.
95. Cf. Walster ET AL., supra note 81, at 17-18 (claiming that people participating in inequitable relationships become distressed, whether they are victims or beneficiaries of inequity, and try to eliminate the distress by restoring equity).
point fell within the bargaining zone. This would require parties to agree, however, on what deal point was fair in a particular context. There are two principle reasons why such unanimity is rare. First, although the principle of fairness is widely accepted in the abstract, there are a variety of fairness norms that often conflict in particular situations. There are no clear standards for determining which are most relevant in any particular context, nor is there even consensus on whether a single norm should be applied or a compromise forged between competing norms.

Second, evidence suggests that negotiators’ judgments of fairness depend on where they sit and the identity of their constituencies. For example, Roth and Malouf found that when experimental subjects were asked to divide chips worth $20 to one and $5 to the other, the first was likely to favor an equal split of the chips while the second was likely to argue for 80% of the chips to equalize dollar values. Lamm and Kayser found that experimental subjects judged a distribution based on inputs to production as substantially more “just” if they were told they personally had a “high” input.

In a set of studies modeled on litigation, Babcock and her coauthors found that experimental subjects playing the roles of plaintiff and defendant in litigation developed systematically different assessments of what a fair verdict would be based on their role (just as their role biased their predictions about the likely verdict), even though all subjects were given the same factual material on which to base their judgments. The difference affected the negotiator’s ability to select a deal point. These subjects were less likely to reach an out-of-court settlement in a negotiation simulation than subjects who were given the same information but asked to make their fairness judgments before learning which role they were to play in the simulation. The authors concluded that when there are multiple arguments on each side of a dispute, disputants are likely to weigh more heavily those arguments that favor their position, thus reducing the
A POSITIVE THEORY OF LEGAL NEGOTIATION

prospects for reaching agreement. This problem is further exacerbated by the fact that some negotiators use fairness arguments as a screen to mask consciously self-interested positions, and the common fear that the others’ fairness arguments will be biased in their self-interest.

For these reasons, broad adherence to the fairness principle fails to eliminate the need for bargaining, and surplus allocation is as often about persuasion as it is about replacing hard bargaining with social norms. Not only do negotiators argue the merits of their position to convince their opponent that their RP is higher or the opponent’s RP is lower than the opponent might otherwise believe, they also attempt to persuade their opponents of the legitimacy of one or more manifestations of the fairness principle.

The methods negotiators use to attempt to establish a fair deal point can be divided into two categories. The first, referred to here as “procedural fairness,” is whatever substantive deal point emerges from a negotiation in which both parties follow norms of fairness in the bargaining process. The second, referred to as “substantive fairness,” calls for an agreement between the parties about which specific deal point is objectively equitable in a particular negotiating context.

B. PROCEDURAL FAIRNESS: THE NORMS OF BARGAINING

Many common negotiating tactics are best understood as attempts to establish a procedure that the other party will view as “fair” for agreeing on a deal point within the bargaining zone. In employing such tactics, the negotiator may have either of two motives. He might believe that the procedure is equitable to both parties, and the resulting deal point will thus create a mutually beneficial transaction in which neither side gets the better of the other. Alternatively, he might attempt to establish a procedure that will lead to an agreement that benefits him or his client substantially more than it benefits the other negotiator. Whether the negotiator’s motives are communitarian or individualistic, however, the procedures must have the appearance of equity in order to win acceptance.

1. The Reciprocity Norm: Exchanging Concessions

Perhaps the most common behavioral norm invoked in the negotiation process is reciprocity. When one person takes some action on behalf of another, it...
is assumed that the favor will be returned. The person who fails to reciprocate commits a social faux pas, which can lead to social ostracism and derision.

As a consequence, the person who wants another to give something to him will often pursue that goal by making an initial gift. Marketers and fundraisers employ this tactic routinely. Religious groups give "free" flowers to people at airports, hoping to use the reciprocity norm then to solicit a financial contribution. Fundraisers send sets of attractive return-address labels to potential donors, hoping the targets will then feel obligated to make a donation. Supermarkets offer free samples of food products, hoping not only that customers will like the product enough to buy it, but also that they might reciprocate the supermarket's generosity by buying the product even if they do not particularly like it.

The reciprocity norm is a fundamental element of the negotiation process as well. When one party makes a concession, the other finds himself under a social obligation to do likewise. If Esau offers $150,000 for Jacob's catering business, and Jacob counters with $200,000, Esau might increase his offer to $160,000 for the primary purpose of obligating Jacob to make a reciprocal concession. Even if Jacob believes that his original $200,000 demand is below Esau's RP, meaning that Esau could pay that amount and still be made better off by completing the transaction, Jacob will find himself under immense pressure to lower his demand in the interest of fairness. Should Jacob reduce his demand, Esau will then find himself socially obligated to make the next concession.

A common negotiating tactic is to make an extreme opening offer, perhaps one that is far outside of the bargaining zone, in the hopes of then invoking the reciprocity norm to reach an advantageous deal point. For example, suppose Goliath is willing to accept a settlement offer of $60,000 from David, and he correctly estimates David's RP at $90,000. Goliath may make an initial demand of $150,000. If David responds by offering $30,000, reciprocal and equal concessions would lead to a deal point of $90,000—extremely advantageous to Goliath under the circumstances. Goliath will hope that, even if he has to make relatively large concessions to evoke relatively small reciprocal concessions from David, the strong norm of reciprocity will force David to make significant enough concessions for the parties to converge on a deal point much

109. The reciprocity norm has been observed in a wide range of cultural settings, although its precise content is probably socially contingent. See, e.g., Alvin W. Gouldner, The Norm of Reciprocity: A Preliminary Statement, 25 AM. SOC. REV. 161, 171 (1960).
111. See id. at 23-25 (describing practices of Hare Krishna Society).
112. See id. at 29.
113. See id. at 26-28 (describing the "not-so-free" sample).
115. Cf. RAFFA, supra note 1, at 48 (advising that midpoint between two opening offers is most likely deal point if it falls within bargaining zone).
closer to David’s RP of $90,000 than Goliath’s RP of $60,000.116

Alternatively, Goliath might attempt to use the reciprocity norm to his advantage by matching David concession for concession—thus exhibiting fair negotiating practices—but making each one of his concessions smaller than each of David’s concessions and smaller than his (Goliath’s) previous concessions.117 This tactic could potentially help Goliath to garner the lion’s share of the bargaining zone while adhering to norms of procedural fairness, perhaps because it is not always clear whether the reciprocity norm requires equivalent concessions.118

The failure of negotiators to reciprocate in some fashion when an opponent makes a concession will almost certainly increase the likelihood that bargaining will end in impasse.119 The reciprocity norm is so strong that most commentators strongly warn against negotiators making single, take-it-or-leave-it offers, often called “Boulwarism” after a famous negotiator known for this tactic.120 Boulwarism can be successful, but only if the offeror is able to justify her offer as consistent with another procedural or substantive fairness norm.


Absent situation-specific reasons to think that a particular substantive division of the bargaining zone is the most fair, negotiators often assume that an equal division, or “parity,”121 is consistent with fairness norms.122 Consequently, splitting the difference between the parties’ RPs is often perceived as a fair procedure for reaching a deal point.123 If Jacob knows that Esau’s RP is

116. Guthrie and I found experimentally that, holding both the facts and a defendant’s final settlement offer constant, a defendant who makes an extreme opening offer is more likely to have his final offer accepted than one who makes a more moderate opening offer. See Russell Korobkin & Chris Guthrie, Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way, 10 OHIO ST. J. DISP. RESOL. 1 (1994). One hypothesis for this outcome is that when the defendant makes a larger concession to get from his initial offer to his final offer, the plaintiff feels an obligation to reciprocate by making a significant concession from whatever his initial demand might have been.

117. See, e.g., Goodpaster, supra note 3, at 347 (describing this tactic).

118. Cf. Gouldner, supra note 109, at 171-72 (discussing disagreement among sociologists about precise requirements for compliance with reciprocity norm).

119. See, e.g., White & Neale, supra note 80, at 313-14 (finding impasse occurred more often when one negotiator had to make larger concessions than other to reach deal points within bargaining zone than when symmetric concessions were necessary, and concluding that “simply ignoring the reciprocity norm may be grounds for impasse”).

120. See, e.g., RAIFFA, supra note 1, at 48 (Boulware strategy “more often than not ... antagonizes the other party”); Goodpaster, supra note 3, at 355 (noting that “this tactic will likely create resistance and anger”).


122. See Diekmann et al., supra note 107, at 1062 (noting that “equality serves as a highly available allocation heuristic—one that generally can be used without deliberation, readily understood, and suggested with little fear of seeming self-interested or unjust”).

123. See, e.g., id. See generally David M. Messick, Equality as a Decision Heuristic, in PSYCHOLOGICAL PERSPECTIVES ON JUSTICE: THEORY AND APPLICATIONS 11 (Barbara A. Mellers & Jonathan Baron eds., 1993).
$200,000, because Esau cannot purchase a comparable business for less than that, he has a strong basis for demanding a $200,000 sale price. But if Esau knows Jacob’s RP is $150,000, because Jacob’s best offer is for just under this amount and there are no other potential buyers, Esau has an equally strong basis for demanding a sales price of $150,000. Under such circumstances, both parties are likely to agree that splitting the $50,000 cooperative surplus equally and therefore agreeing to a $175,000 deal point is a fair solution.\textsuperscript{124}

Of course, while each party can estimate the other’s RP, in most cases neither will know the other’s RP precisely. Consequently, they may invoke the norm of strict procedural equality by agreeing to split the difference between the two initial offers, two later offers (after reciprocal concessions have been made), or what each party represents to be his RP.\textsuperscript{125} One problem with each of these shortcuts, however, is that a party who presents the more extreme offer or is more dishonest about his RP will succeed in capturing the majority of the cooperative surplus.\textsuperscript{126} Esau will have an incentive to cheat by claiming his RP is lower than $200,000, and Jacob will have the same incentive to claim his RP is higher than $150,000.

In this situation, the parties are likely to challenge each other to justify their proffered RPs. If Esau claims his RP is $180,000, for instance, Jacob might demand that Esau reveal the price and quality of his BATNA, and how he uses it to calculate a $180,000 RP. Jacob will then agree to use $180,000 as one of the two starting points for a split-the-difference agreement only if he is convinced that $180,000 is not an exaggeration of Esau’s RP.

3. Focal Points

The reciprocity norm suggests that negotiating parties will perceive a deal point as procedurally fair if both parties must make concessions to reach that point. This requirement may eliminate from consideration some deal points that are within the bargaining zone, but it often does not help the parties select a single deal point. Splitting the difference between two offers has the virtue of focusing the parties on a single deal point, but this approach can advantage the party who makes a more extreme offer or who best misrepresents his RP, a fact that can reduce the perceived fairness of the approach. Deal points within the bargaining zone can be called “focal points” if they have some special salience, or prominence,\textsuperscript{127} to the negotiating parties, compared to other possible deal points. Focal points can strike negotiators as neutral deal points, and thus, their selection often meets the parties’ expectation of procedural fairness.

\textsuperscript{124} Notice that the “splitting the difference” rule can be viewed as a specific application of the reciprocity norm, as each party agrees to make a concession in exchange for an equal concession by the other.

\textsuperscript{125} Cf. Bazerman \& Neale, supra note 12, at 121 (explaining why a car salesman’s offer to “split the difference” sounds fair).

\textsuperscript{126} Cf. Goodpaster, supra note 3, at 355 (noting that whether splitting the difference is “fair” depends on where the parties begin).

When negotiations are denominated in currency, round numbers are often natural focal points. Consider the following simple empirical demonstration. J. Keith Murnighan told students that a woman found a car she wished to buy with a sticker price of either $10,650, $2,650, or $2,450, and asked what they thought the exact final sales price would be. The dominant responses were $10,000, $2,500, and $2,000 respectively—all very round numbers. Since most car dealers bargain over the price of their wares, the reciprocity norm suggests that it is fair to expect they will offer some sort of discount off the sticker price in return for concessions made by the purchaser. What price would be a fair deal point resulting from reciprocal concessions? In the absence of a good reason to choose a different deal point, one that stands out from the others often seems about as neutral—and thus fair—a point as any.

Prominent deal points might strike bargainers as procedurally fair because they seem so uncalculated. If Esau and Jacob attempt to agree on a deal point between their RPs of $150,000 and $200,000, both might be satisfied that they are receiving fair treatment if negotiations coalesce around a prominent round number within the bargaining zone, such as $170,000, $175,000, or $180,000. Suppose, for example, that after a series of offers and counteroffers, Esau proposes a price of $165,000. Jacob might respond by reducing his demand to the prominent price of $170,000. Given a pattern of reciprocal concessions, agreeing on this focal point is likely to strike Esau as a fair compromise. But if Jacob responded to Esau’s proposal with a counteroffer of $169,134.50, Esau might fear that the very precision of the proposal suggests Jacob is trying to take advantage of him somehow, perhaps by relying on some superior private information. Consequently, to protect himself from Jacob’s real or imagined machinations, Esau might counteroffer with a lower figure, even though he would have happily accepted a counteroffer of $170,000.

C. SUBSTANTIVE FAIRNESS: SEEKING NEUTRAL DEAL POINTS

Singling out a deal point requires the parties to agree on what is fair. In many negotiations, agreement is achieved by the parties acting consistently with procedural norms of bargaining behavior such as reciprocity, splitting the difference, and the selection of prominent focal points. The deal point that emerges from a procedurally fair process is accepted by the parties as itself fair, assuming it lies within the bargaining zone. In other negotiations, the parties instead negotiate over what specific deal point would be most substantively fair.

In the best-selling book, Getting to Yes, Fisher and his coauthors urge negotiators to “insist on using objective criteria,” which might include such benchmarks as market price, historic price, historic profit level, or some conception of merit. In other words, the authors present a normative case for agreeing

128. See id. at 36.
129. See id. at 38-39.
130. Fisher et al., supra note 28, at 81-94.
on a deal point via negotiations over the most substantively fair way to divide the cooperative surplus, which they can create by reaching an agreement. Calling such criteria "objective" is a misnomer because (1) any such criteria will benefit one party over the other as compared to a different criteria and (2) none can be conclusively established by logical argument to be justifiable ways to divide the cooperative surplus. Nonetheless, they are critical concepts in legal negotiation because they facilitate the parties' agreement on a single deal point that both can perceive as fair.

1. Market Standards

Negotiating parties often justify the proposal of a specific deal point within a larger bargaining zone by reference to the market price of the good in question. If Jacob has an RP of $150,000 and Esau an RP of $200,000, either might suggest that they conclude the deal for the market price of the company. This price might be determined by averaging the sales prices of similar companies sold recently, by an independent appraiser's examination, or in some other generally accepted way.

It is important to distinguish between two ways market price might be relevant to a negotiation. The first way is relevant to zone definition. If the subject of the negotiation is a commodity product and there are many buyers and sellers, the market price will equal both parties' RPs, and therefore, the bargaining zone will consist of only a single deal point. If Jacob's business were identical to many other catering businesses, all of which sell for approximately $190,000, there are many substitute businesses for sale at that price, and there are many buyers willing to purchase a like business at that price, the transaction would occur for $190,000 or not at all. Jacob's BATNA would be to sell to an equally desirable buyer for $190,000, so he would set his RP at that point; he would have no reason to accept less. Esau's BATNA would be to purchase an equally attractive business for $190,000, so he would set his RP at that point; he would have no reason to pay any more. Under these conditions, it is more descriptively informative to say that the bargaining zone includes only a single point rather than to say that the market price provides an "objective" deal point.

Market price can be relevant to surplus allocation only when there is a bargaining zone larger than a single deal point. Notice that, by definition, something less than perfect competition among buyers and sellers exists in this circumstance. If Esau's RP is $200,000, Jacob's is $150,000, and the market price lies between the RPs—at $190,000 in our hypothetical situation—a bilateral monopoly situation exists.131 Esau can buy a business similar to Jacob's for $190,000, so there must be something unique to him about Jacob's particular business to justify his willingness to pay up to $200,000 for it—perhaps that Esau has a taste for pottage, and that pottage is the specialty of Jacob's catering business. This makes Jacob a monopolist of sorts vis-a-vis Esau—that is, Jacob

A POSITIVE THEORY OF LEGAL NEGOTIATION

owns the only catering operation specializing in pottage. For his part, if Jacob's RP is well below $190,000, he must not be able to find a buyer equally valuable as Esau willing to pay that amount. Perhaps, although similar catering companies have garnered sales prices of $190,000 in the recent past, Jacob wants to sell immediately and there are no other prospective buyers in the market. This makes Esau a monopsonist vis-à-vis Jacob.

In the bilateral monopoly situation, there is no economically logical basis for selecting the deal point that corresponds to the usual market price of the good in question. In fact, there is no real market price for the particular good in this particular context. Appealing to the "usual" market price, however, is often successful in such situations precisely because agreeing on a single deal point is not an economic exercise, but a social one. If the negotiators believe that referencing the usual market price is a neutral decision criteria and leaves both believing the outcome reached is a fair one, the criteria has served its purpose.

2. Other Reference Transactions

A significant amount of research suggests that individuals make fairness judgments about a particular transaction based on other "reference transactions." When past transactions are used as reference points, proposed transactions are perceived as fair to the extent that they are consistent with the reference transactions. Fairness is based on the normalcy of the proposed transaction relative to its antecedents, not on the intrinsic justice of the referent. Thus, the usual market price can be seen as a fair deal point for a proposed transaction because transacting at the market price is a common occurrence, and consequently, normal. Put another way, social judgments of fairness in bargaining are often based on the closeness of a proposed transaction to some conception of normalcy.

While the usual market price is one plausible reference point for a transaction, it is not the only one. In fact, when parties focus their surplus allocation activities on substantive rather than procedural fairness, much of the negotiation often centers around the issue of what reference point is most appropriate under the circumstances. Parties who have done business together in the past might contend that their past dealings are a natural reference point, and that a proposed transaction ought to take place on the past terms—possibly with an allowance for inflation—rather than current market prices. A seller might defend a proposed price on the ground that it provides him with a certain percentage profit, implicitly arguing the seller's cost is a fair reference point. A commercial buyer might ask a seller for terms embodied in an industry association's

132. Kahneman et al., supra note 88, at 729-31; see also Thaler, supra note 83, at 205.
133. See Kahneman et al., supra note 88, at 730.
134. See Thaler, supra note 83, at 206-07 (finding subjects were willing to pay far more for bottle of their favorite brand of beer delivered from a "fancy resort" than same beer delivered from "small, run-down grocery store"). Thaler concludes that "buyers' perceptions of a seller's costs will strongly influence their judgments about what price is fair." Id. at 206.
form contract on the grounds that trade custom is the appropriate reference point for the transaction.

None of these plausible reference points are intrinsically more appropriate than any of the others. Consequently, surplus allocation will often turn on which negotiator can best justify the normalcy of a reference point that favors his interest. Jacob might point to a usual market price of $190,000 for similar businesses, while Esau points out that average return on investment for small businesses over the years that Jacob owned the business would place its value at only $160,000. If one can convince the other that his proposal is more substantively fair, that negotiator will carry the day. If not, the parties might resort to procedural fairness norms—splitting the difference, for example—to reach a deal point.

3. Merits and Morals

When negotiating parties rely on procedural fairness norms to settle on a deal point, they implicitly agree that neither has a stronger claim to the cooperative surplus that their deal will create on the basis of merit or morality. But often times negotiators argue that fairness requires an unequal distribution of that surplus or, in other words, that to preserve equity in the relationship between the parties, one must be allocated the lion’s share of the gains from trade.

Hoffman and Spitzer found that when one subject was given a unilateral right to receive $12—leaving the other subject with nothing—unless the subjects could agree on a method to divide $14 between them, the first subject bargained for a far larger share of the $14 stake when he “earned” the dominant role by beating the other subject in a simple game than when he won the role in a coin flip. Subjects, it seems, believe that unequal divisions are fair if one party is more deserving in some way external to the experiment, but not if one party merely has the good luck of being randomly assigned the role with more power.

Those results and others similar to them suggest that individuals often equate fairness with the “contribution principle”: the allocation of the cooperative surplus proportional to contributions or “inputs” to the surplus. Jacob might argue, for example, that, while it is true he would be willing to accept as little as $150,000 for the business, he is deserving of the full $200,000 that it is worth to Esau because he (Jacob) built the company from the ground up and made it what it is. Esau, on the other hand, has no moral claim to the cooperative surplus because he did nothing to create the company, which is the source of that surplus. If Jacob had instead purchased the business only a year earlier after it had become successful, both parties would likely think that his moral claim to the majority of the surplus was decidedly less robust. Claims that fairness


136. See, e.g., Schwinger, supra note 96, at 98; see also WALSTER ET AL., supra note 81; Pruitt, supra note 121; cf. Hoffman & Spitzer, supra note 135, at 264 (describing this argument as theory of “Lockean desert”).
requires proportionate distributions can be based on unequal effort or unequal ability. Social psychologists have hypothesized, however, that claims of unequal effort will be more persuasive because effort is more individually controllable. 137

As an alternative to the contribution principle, either party might lay moral claim to the cooperative surplus by demonstrating relative poverty or need, such that an unequal division is necessary to ensure equal—or closer to equal—outcomes. 138 If Jacob is a millionaire planning his retirement in the Cayman Islands and Esau is a penniless laborer trying desperately to establish a livelihood, Esau might succeed in convincing Jacob that it would be equitable for the older man in better financial circumstances to take less than an even share of the cooperative surplus to help out the other. On the other hand, if Esau is a wealthy entrepreneur who owns dozens of companies and Jacob must retire solely on the profits made from the sale of the company, Jacob might convince Esau that a very different but still unequal division of surplus might be more fair. The principle is the same as the one that justifies inequalities in the income tax code on the basis of the perceived fairness of the rich paying more than the poor.

Particularly relevant to David and Goliath might be the sense that a litigant has a moral claim to the recovery a court would have ordered had the case been litigated to verdict. Assume that David and Goliath agree that the expected value of a verdict is a $75,000 award to Goliath. David will spend $10,000 in legal fees if the case goes to trial, but he is both risk neutral and indifferent to the emotional strains of litigation, so he sets his RP at $85,000. Goliath will also spend $10,000 in legal fees should the case go to trial, but he is risk averse and strongly desires to avoid the emotional strain of a trial, so he sets his RP at $45,000. If David knows Goliath’s proclivities, he might propose to split the difference between the two RPs and settle the case for $65,000. It is likely, however, that Goliath will counter that he is morally entitled to the $75,000 expected value of trial or, put in slightly different language, the merits of his case suggest that this is the appropriate settlement amount.

As is true of any criteria that claims substantive fairness, claims of morality or merit are only as valuable as the similarities in the negotiators’ social constructions of fairness. When negotiators share a set of social values, substantive fairness claims are most likely to lead to agreement on a deal point.

D. RELATIONSHIP BUILDING: THE LIKING PRINCIPLE

Negotiators spend a good deal of time getting to know their opponents on a personal level, whether discussing the history of mementos that decorate the host’s office, inquiring about the other’s family, or sharing a meal before talking business. 139 At the extreme, some negotiators make a point of not discussing

137. See, e.g., Lamm & Kayser, supra note 97, at 75-76.
138. Cf. id. at 65.
business at all during their first meeting. How does this extremely common activity fit within the framework of the two strategic imperatives?

This type of personal interaction serves two purposes. First, it can help negotiators establish trust and gage the trustworthiness of the opponent. When my opponent makes arguments designed to convince me to reassess my RP or my perception of his, or my perception of a fair deal point, can I believe that his representations of relevant facts and of his analysis of the situation are honest, or need I fear puffing or overreaching? The better my personal relationship with the other negotiator, the better sense I hope to have of how to answer this question.

Personal relationships play a more important role, however, than establishing trust. Social psychologists have empirically demonstrated the intuition that individuals are more likely to grant requests of people they like than of people they do not like.¹⁴⁰ And studies have also shown that frequent communication causes people playing prisoner’s dilemma games—where acting selfishly always yields a better result than acting cooperatively—to act substantially more cooperatively, even though doing so is inconsistent with their selfish best interests.¹⁴¹ In other words, positive personal relationships generally lead to more charitable conduct.

Savvy negotiators expend time and effort to build a positive personal relationship with their opponents because such relationships can pay dividends in the surplus allocation process. Evidence indicates that a positive personal relationship can prevent some negotiators from seeking agreements that are one-sided in their favor. In one interesting set of experiments, Loewenstein and his coauthors demonstrated that subjects tended to prefer equal distributions of rewards even to unequal distributions that favored themselves if they had a positive personal relationship with their negotiating opponent.¹⁴² If they had a negative personal relationship with their opponent, however, or no relationship at all, subjects preferred distributions that favored themselves to equal ones.¹⁴³ The experimenters called this effect a “selfish shift”: “As the disputant relationship shifted from positive to negative, subjects . . . became more concerned with their own payoff . . . and more tolerant of advantageous inequality.”¹⁴⁴

The importance of personal relationships likely extends to situations in which negotiators possess different and, most likely, egocentric views of what deal point would be most fair. Suppose, for example, that Esau proposes $170,000 as a fair deal point for his purchase of Jacob’s business, but Jacob believes that

¹⁴⁰. See, e.g., CLALDINI, supra note 110, at 136-70; BAZERMAN & NEALE, supra note 12, at 122 (reporting that waitresses in experiment earned better tips when they smiled at customers).
¹⁴¹. See David Sally, Conversation and Cooperation in Social Dilemmas, 7 RATIONALITY & SOC’Y 58, 78 (1995) (conducting meta-analysis of studies conducted over 35 years).
¹⁴³. See id.
¹⁴⁴. Id. at 438.
$175,000 is the fair deal point. Jacob is more likely to accede to Esau’s proposal rather than resisting and risking impasse if he has a positive relationship with Esau than if he does not. Jacob is not likely to hand Esau a blank check just because he likes him, but at the margin, negotiators’ relationships can facilitate surplus allocation.

**CONCLUSION**

At the level of tactics, negotiation is a complicated endeavor. Reaching a beneficial agreement requires not only a plethora of analytical and communication skills, but also the ability to deploy them in different ways depending on the context of the negotiation and the personality of the opposite party. But legal negotiation can appear less inscrutable when the process is systematically organized according to its critical strategic imperatives. This article has provided a new, yet simple structure for systematically thinking about negotiation. Negotiators seek the most desirable outcomes possible for themselves or their clients by pursuing only two goals: zone definition and surplus allocation. Everything negotiators do can be assimilated into this construct.

Understanding these two strategic goals will not make the novice negotiator as expert as the grizzled veteran overnight. The construct does not provide a pithy algorithm for selecting negotiating tactics in particular circumstances, nor can it substitute for experience in executing tactics. It can, however, provide a structure for developing expertise in negotiation quickly and efficiently. By understanding the two strategic imperatives, students can observe negotiations and make sense out of nearly every tactical move. And by understanding the two imperatives, negotiators can evaluate whether their prenegotiation tactical plans are properly focused on achieving the strategic objectives and whether their actual implementation of those plans successfully achieves those objectives.