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Beginning With Yes: A Review Essay on Michael Wheeler's The Art Of Negotiation: How To Improvise Agreement In A Chaotic World

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BOOK REVIEW

BEGINNING WITH YES: A REVIEW ESSAY ON MICHAEL WHEELER'S THE ART OF NEGOTIATION: HOW TO IMPROVISE AGREEMENT IN A CHAOTIC WORLD

THE ART OF NEGOTIATION: HOW TO IMPROVISE AGREEMENTS
IN A CHAOTIC WORLD. By Michael Wheeler. New York, N.Y.:
Simon & Schuster. 2013. \$26.00.

*Reviewed by Leonard L. Riskin**

Michael Wheeler's *The Art of Negotiation: How to Improvise Agreement in a Chaotic World*¹ stands on the shoulders of a number of previous books on negotiation by Wheeler's colleagues in the Program on Negotiation at Harvard Law School (PON), and others, but not because it needs their support. Instead, *The Art of Negotiation* illuminates the principal models in such books, by showing why, when, and how to improvise in relation to them. Some standard models of negotiation seem static, Wheeler tells us, whereas negotiation mastery requires dealing with the "inherent uncertainty" of almost any negotiation, and that calls for improvisation, which often means taking leave, at least briefly, from a particular model of negotiation, combining elements of more than one model, or reconsidering your objectives or your plan for reaching them. He makes a compelling case and provides engaging and edifying examples, along with guidelines not only from negotiation but also from social science, improvisational jazz, and military training. *The Art of Negotiation* is crystal clear and suffused with insight, grace, and humor. It makes a grand contribution to the ne-

* Copyright © 2014, Leonard L. Riskin. Leonard L. Riskin is Chesterfield Smith Professor of Law at the University of Florida Levin College of Law and Visiting Professor of Law at Northwestern University School of Law. Huge thanks to Katie Marie Zouhary of Proskauer, LLP, for showing me how to use improv to teach mindfulness, conflict resolution, and Internal Family Systems and commenting on a draft; to Howard Bellman for his pioneering work linking improvisational jazz and mediation; to Lisle Baker, Catherine Damme, Art Hinshaw, and John Lande for insightful comments on a draft of this Essay Review; and to my recent teaching partners—Alyson Carrel, Lynn Cohn, Daniel Gandert, Jennifer Morrow, Daniel Shapiro, Rachel Wohl, and Katie Marie Zouhary—for more contributions than I can remember.

¹ MICHAEL WHEELER, *THE ART OF NEGOTIATION: HOW TO IMPROVISE AGREEMENT IN A CHAOTIC WORLD* (2013).

gotiation literature.² I expect and hope that it will influence negotiation teaching, training and scholarship.

This Review Essay describes the book, introduces a new system for understanding models of negotiation, and uses it to explain and expand upon some of the ideas in *The Art of Negotiation*. Then it suggests a different title for Wheeler's book, and describes recent efforts to connect improv with negotiation and mediation training and practice. I mean to honor Wheeler's important work by extending it.

I. THE BOOK: A QUICK OVERVIEW

Wheeler shows the great value of improvisation in negotiation by setting forth and analyzing a series of real negotiations. He commences with the tale of Jay Sheldon³, who purchased a cable television network for \$8 million, and, a few years later, tried to buy a slightly bigger network in a neighboring city. The owner wanted at least \$15 million, but Sheldon would not pay more than \$12 million. The price gap, which they were unable to close, resulted from an optimism gap: the potential seller was much more bullish about the industry than was Sheldon. And that difference of opinion prompted Sheldon's stroke of insight: since the potential seller had so much confidence in the industry, perhaps he should buy Sheldon's business. The seller agreed, and became the buyer.⁴

Other stories illustrate how the failure to improvise can forfeit good opportunities. One involved a young man whom Wheeler calls "Arvind Gupta."⁵ Arvind had been very close with an elderly couple that considered him something like a son. The couple offered to sell him one of their upscale apartment buildings for \$2.5 million, which they said was well below market price. (They had

² We should not be surprised at this. Wheeler, Class of 1952 Professor at Harvard Business School, editor of the *Negotiation Journal*, and member of the Steering Committee of the Program on Negotiation, has long played a leading and creative role as an innovative scholar, teacher and trainer in negotiation. He also has pioneered and prompted the development of academic attention to the interplay between between improvisation and conflict resolution. He has previously written on the topic (*E.g.*, Lakshmi Balachandra & Michael Wheeler, *What Negotiators Can Learn from Improv Comedy*, 9 NEGOTIATION NEWSLETTER, Aug. 2006, at 1.), and organized live and print symposia on "Improvisation in Negotiation." Symposium, *Improvisation in Negotiation*, 21 NEGOT. J. 415 (2005).

³ Wheeler, *supra* note 1, at 1–2.

⁴ *Id.* at 2.

⁵ *Id.* at 21–22.

two motives: 1. To avoid paying accumulated property taxes for which they had never been billed and which they had not paid; and, 2. To benefit Arvind by giving him an opportunity to make a great deal of money.) Unable to finance a deal such as this on his own, Arvind invited a prosperous friend to join him as a silent partner. He was not completely silent, however, as he insisted that they should offer less than \$2.5 million. “There is always room to bargain,” he said.⁶ When the owners received the offer for \$2.25 million, they were very hurt—and withdrew their own offer. A year later, they sold the property, through a broker, for \$11 million.

As the book continues, it offers many examples of improvisation in negotiation-like situations and provides a series of methods to foster a negotiator’s ability to improvise.

II. CONFLICT MANAGEMENT PROCESSES, MODELS, AND ELEMENTS

Some established models of negotiation often seem static, Wheeler writes, but dynamism is necessary for good negotiation processes, especially in challenging situations. Wheeler may have assumed that typical readers will know a good deal about the basic ideas in negotiation theory. For purposes of this Essay Review, however, I will explain four important models of negotiation. Three of these models arose in foundational negotiation books associated with the Program on Negotiation that have had a profound influence on many conflict resolution practitioners and students: Interest-based negotiation, in Fisher, Ury and Patton’s *Getting to Yes: Negotiating Agreement without Giving In* (“*GTY*”);⁷ the Core Concerns, in Fisher and Shapiro’s *Beyond Reason: Using Emotions as You Negotiate* (“*Beyond Reason*”);⁸ and the Three Conversations, in Stone, Patton, and Heen’s *Difficult Conversations: How to Talk About What Matters Most* (“*Difficult Conversations*”).⁹ Each of these books¹⁰—explicitly or implicitly—offers a

⁶ *Id.* at 22.

⁷ ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

⁸ ROGER FISHER & DANIEL SHAPIRO, *BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE* (2005).

⁹ DOUG STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO TALK ABOUT WHAT MATTERS MOST* (2002).

¹⁰ I do not mean to imply that these are the most important or best of the PON negotiation books, or that they are not. I am working with these three because I have found them particu-

corrective to position-based negotiation, the most commonly practiced model of negotiation. In order to explain the models and extend some of the ideas in *The Art of Negotiation*, I propose below a new system for understanding models of negotiation.

A. *The Systematic Table of Conflict Resolution Models and Elements*

I am developing what I call the Systematic Table of Conflict Management Models,¹¹ which includes four categories:

1. *Processes* of conflict management, such as such as adjudication, negotiation, and mediation.
2. *Models* for Understanding and Addressing Conflict. Generally these are particular ways to carry out a specific process.
3. *Elements for Understanding* conflict. These are components of a particular model (or free-standing elements) that carry out what Fisher and Shapiro call the “lens” function.¹²
4. *Elements for Addressing Conflict*. These are components of a particular model (or free-standing elements) that that carry out what Fisher and Shapiro call the “lever” function.¹³

In describing and applying the various models, I will show the portion of this Table that applies to negotiation. Note that the three PON-associated models are prescriptive (rather than descriptive) and overlap.

larly useful in trying to understand and deal with conflict and in teaching such skills to law students, lawyers, mediators, and others who deal with conflict in their work. Other commentators share my appreciation for these particular books. In commenting on a draft of this Essay Review, for instance, Professor Lisle Baker referred to them as “the Grand Triad” (Email message from Professor Lisle Baker, Suffolk University School of Law to Leonard Riskin (March 3, 2014) and Professor Art called them “the Mount Rushmore of PON books” (although he would have added ROBERT MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000) [hereinafter MNOOKIN ET AL.]. Email message from Professor Art Hinshaw, Arizona State University College of Law (June 17, 2014) (on file with author).

¹¹ For a fuller explanation of this system, see LEONARD L. RISKIN, *DON’T BELIEVE EVERYTHING YOU THINK: MANAGING INNER AND OUTER CONFLICT THROUGH MINDFULNESS* (forthcoming, 2015/16).

¹² See FISHER & SHAPIRO, *supra* note 8, at 18–20.

¹³ *Id.* at 20–21.

1. Getting to Yes: Interest-Based and Position-Based Models

a. Interest-Based Negotiation

The first and most influential of the three books, *Getting to Yes*¹⁴, puts forth the model for “principled negotiation,” which currently also carries other labels, such as “interest-based” (the label I will use in this Essay Review); “collaborative,” “integrative,” “problem-solving,” “value-creating,” and “win/win.”¹⁵ The most important concept in this model, and in conflict resolution theory and practice, is the distinction between “positions” (what you say you want) and “interests” (the needs or goals that underlie positions).¹⁶ Wheeler identifies the most significant elements of this model, as follows:

1. Focus on interests, not positions.
2. Separate the people from the problem.
3. Invent options for mutual gain.
4. Insist on objective criteria.
5. Develop your best alternative to a negotiated agreement, or BATNA (your walkaway if there is no deal).¹⁷

In my Systematic Table,¹⁸ elements 1 and 2 can help a negotiator both understand and address the conflict, dispute, or problem. Elements 3, 4, and 5 relate mainly to addressing the problem.

Wheeler asserts that the *Getting to Yes* model, notwithstanding its enormous contribution in offering a clear alternative to the dominant win/lose approach, “rests implicitly on static assumptions about interests, options, circumstances and relationships, when these factors tend to be fluid and ambiguous. Just as military strategists acknowledge the fog of war, negotiators must confront the haze that obscures the territory that they explore.”¹⁹ In other words interests, objectives, and opportunities can change during a

¹⁴ FISHER ET AL., *supra* note 7.

¹⁵ See LEONARD L. RISKIN ET AL., *DISPUTE RESOLUTION AND LAWYERS* 169 (5th ed. 2014). The models associated with the various labels are not identical, but, for our purposes, they are close enough.

¹⁶ FISHER ET AL., *supra* note 7, at 40–55.

¹⁷ WHEELER, *supra* note 1, at 21–22 (Wheeler describes the original model as including five principal elements, the fifth being to develop your “best alternative to a negotiated agreement” (BATNA)). See also FISHER & SHAPIRO, *supra* note, 8 at 207 (Fisher and Shapiro extended the list to seven elements: relationship, communication, interests, options, legitimacy, BATNA, and commitments).

¹⁸ See notes 11–13 and accompanying text.

¹⁹ WHEELER, *supra* note 1, at 10.

negotiation, and we must be aware of such changes and willing and able to deal with them.²⁰

b. Position-Based Negotiation

The authors of *Getting to Yes* propose interest-based negotiation as the corrective to deficiencies that they associate with the most commonly used model of negotiation, which they call “positional,”²¹ and which also is known as “adversarial,” “competitive,” “distributive,” “position-based,” “value-distributing” and “win/lose.”²² Positional negotiation, they say, “produces unwise agreements,”²³ is “inefficient,”²⁴ and “endangers an ongoing relationship.”²⁵ The positions of the parties inform both the elements for understanding and the elements for addressing conflict. This focus can lead to, or derive from, the belief—conscious or subconscious—that the problem to be addressed is narrow, e.g., to distribute a fixed a fixed resource—such as money or land or kidney beans. So whatever one party gains, the other loses. And each wants to get or keep as much as they can. The widespread use of this model also results from custom and habit.

As Professor John Lande recently made clear, there are many definitions of position-based negotiation, and no widespread agreement about its components.²⁶ However, for purposes of this article, I will simplify by suggesting that negotiators following this model often employ the elements listed below. I have divided these elements into those primarily meant to foster understanding of the problem and those primarily meant to address the problem; in this model, more than in interest-based negotiation, most of the elements could appear in either or both categories.

Elements to Understand the Conflict

Any gain for one means loss for the other

Focus on positions

Narrow problem-definition

²⁰ *Id.*

²¹ FISHER ET AL., *supra* note 7, at 7.

²² See RISKIN ET AL., *supra* note 15, at 165.

²³ FISHER ET AL., *supra* note 7, at 4.

²⁴ *Id.* at 5.

²⁵ *Id.* at 6.

²⁶ See John Lande, *A Framework for Advancing Negotiation Theory*, 16 *CARDOZO J. CONFL. RESOL.* 1, 18–26 (2014).

Elements to Address the Conflict

Mislead other side and learn other sides' secrets.

Use anchoring through extreme offers.

Assert positions; undermine other's positions.

Make few and small concessions.

Compromise

Persuade other side to compromise or to agree with your position.

Walk away.²⁷

2. The Core Concerns Model of Negotiation: Beyond Reason

*Beyond Reason*²⁸ proffers the core concerns model for understanding and dealing with the emotional dimension in negotiation. It rests on the foundational idea that emotions, especially negative ones, can get in the way of effective or wise negotiation.²⁹ According to this model, every person, in every culture, has five “core concerns”: appreciation, autonomy, affiliation, status and role.³⁰ If any of these concerns are relevant to a person in a specific situation and are not satisfied, the person will experience negative emotions.³¹ If these concerns are satisfied, the person will experience positive emotions,³² and positive emotions foster better (interest-based) negotiation. The “lens” or “understanding” elements of the core concerns model include ideas about how to understand the presence and impact of specific core concerns.³³ The elements for addressing conflict (or carrying out the “lever” function) include ideas for creating positive emotions, such as expressing appreciation, building affiliation, fostering autonomy, and building meaningful roles.³⁴

²⁷ See RISKIN ET AL., *supra* note 15, at 171–93.

²⁸ FISHER & SHAPIRO, *supra* note 8, at 207.

²⁹ *Id.* at 5–6.

³⁰ *Id.* at 15–18.

³¹ *Id.* at 18–20.

³² *Id.* at 20.

³³ *Id.* at 18–20.

³⁴ FISHER & SHAPIRO, *supra* note 8 at 25–145. Fisher and Shapiro use the terms “lens” and “lever” as I use “elements for understanding conflict” and “elements for addressing conflict. *See id.* at 15–20.

3. The Three Conversations Model of Negotiation: Difficult Conversations

The third exemplar, *Difficult Conversations*,³⁵ articulates a model that is more complex than those described above, so my presentation of it will be even less comprehensive. This model suggests viewing every difficult conversation (which includes many potential or actual negotiations) as if it were three conversations—one dealing with the facts, another with the emotions, and the third with the parties' felt sense of identity.³⁶ Elements for understanding the situation include walking through the three conversations of both sides; listening and learning more than persuading; and separating "intent from impact." Some of these elements will also contribute to addressing the conflict.

Elements designed principally for addressing conflict include problem-solving, reframing, developing options to meet interests and concerns. Note that these elements derive from the interest-based model set forth in *Getting to Yes*. In fact, both *Difficult Conversations* and *Beyond Reason*, are advanced versions of *Getting to Yes*, and expressly designed to foster and enhance the use of that model.

Figure 1 summarizes what I have said about the four models covered above. It also lists the models in order of their depth. Positions are the most superficial, followed by interests, core concerns and the three conversations, though one could argue about reversing the order of the last two models.

³⁵ STONE ET AL., *supra* note 9.

³⁶ *Id.* at 1–20.

Figure 1. Position-Based, Interest-Based, Core Concern, & Three Conversations Models of Negotiation & Their Elements.

DR Process: Negotiation	Models of Negotiation	Elements for Understanding Conflict	Elements for Addressing Conflict
Level 1	Position-Based Negotiation	<ul style="list-style-type: none"> - Any gain for one means loss for other - Narrow problem-definition - Focus on positions 	<ul style="list-style-type: none"> - Mislead other side and learn other sides' secrets - Use anchoring through extreme offers - Assert positions; undermine other's positions - Make few and small concessions - Compromise - Persuade other side to compromise or to agree with your position - Walk away
Level 2	Interest-Based Negotiation	<ul style="list-style-type: none"> - Focus on interests rather than positions - Be soft on the people but hard on the problem - Understand conflict along three dimensions: behavioral, cognitive & emotional (B. Mayer.) - Map the problem: Understand "the problem" broadly 	<ul style="list-style-type: none"> - Be soft on people and hard on problem - Generate options before deciding - Use objective standards - Use BATNA
Level 3	Core Concerns	<p>Many emotions are stimulated by core concerns: appreciation, affiliation, autonomy, status & role</p>	<ul style="list-style-type: none"> - Positive emotions foster better use of position-based and interest-based negotiation - Create positive emotions by expressing appreciation, building affiliation, fostering autonomy, acknowledging status & creating fulfilling roles
Level 4	Three Conversations	<ul style="list-style-type: none"> - Understand the three conversations: Facts, Emotions & Identity - Have "learning conversation" 	<ul style="list-style-type: none"> - Problem-solve: Reframe, develop options to meet interests & concerns; use objective standards

B. *Negotiation Models, their Elements, and Improvisation*

I am sure that the authors of these three books (which Professor Lisle Baker has called the “Grand Triad”³⁷ and Professor Art Hinshaw has called the “Mount Rushmore of PON negotiation books”³⁸) improvise in practice and would not adhere woodenly to the models that they developed—though at least some of them would assertively defend the utility of their models (or elements of them) in a wide range of circumstances.³⁹ And improvisation is implicit, to varying degrees, in all three of these models, properly understood. But none of them explicitly emphasizes the necessity to maintain continuous awareness of change and a commitment to respond to it, if and as appropriate.

Yet many negotiators demonstrate a rigid loyalty to a model or element, *as they understand it*. Of course, studying, teaching and training initially require a certain sustained engagement with a model in order for students to understand it. The *GTY* model, in particular, engenders a good deal of passion, and many students embrace it with fervor.⁴⁰ Sometimes they do so without enough discernment; thus, for instance, they may fail to recognize “the negotiator’s dilemma,” which arises because interest-based and position-based moves can interfere with one another.⁴¹ Interest-based negotiation generally requires some openness about one’s motivations and, accordingly, presents a risk of exploitation by a counterpart’s adversarial moves. Likewise, conduct that is too adversarial cuts off opportunities for addressing interests. Managing the negotiator’s dilemma requires that the negotiator be aware of this dilemma moment to moment and maintain an appropriate balance.

³⁷ Attachment to Email from Professor Lisle Baker, Suffolk University School of Law, to Leonard Riskin (Oct. 5, 2014) (on file with author).

³⁸ Email from Professor Art Hinshaw, Arizona State University College of Law to Leonard Riskin (Oct. 7, 2014) (on file with author).

³⁹ See e.g., Roger Fisher, Comment, 34 J. LEGAL EDUC. 120 (1984).

⁴⁰ Some also criticize aspects of the *GYT* model it as unrealistic. See James J. White, *The Pros and Cons of “Getting to Yes”*, 34 J. LEGAL EDUC. 115 (1984). But see, Fisher *supra* note 39.

⁴¹ This idea, which I consider the second most important in the conflict resolution literature (after the difference between interests and positions), was explicated in at least two other PON-related books. See DAVID LAX & JAMES SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 29–35 (1987); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 11–43 (2000). Professor Lawrence Susskind recently presented a skillful way to integrate position-based and interest-based elements. See LAWRENCE SUSSKIND, *GOOD FOR YOU, GREAT FOR ME: FINDING THE TRADING ZONE AND WINNING AT WIN-WIN NEGOTIATION* (2014).

This makes improvisation essential. And I believe that most skillful negotiators do improvise in this sense.

Although the “grand triad” models are more prescriptive than descriptive—i.e., they focus more on the *ought* than the *is*—none of the books press users to adhere rigidly to their prescriptions; however, as a teacher, mediator, and person, I have observed a tendency in that direction.⁴² A model can give us a sense of confidence and order. By following the steps in a model, we are less likely to forget an important element.⁴³ On the other hand, models and their elements can blind us to other ways of understanding and behaving.

Wheeler’s provides an excellent example of stuckness in a positional model in the story of Arvind Gupta, to whom an elderly couple offered to sell a luxury high rise building well below the market value—partially in order to benefit him. Recall that Arvind’s silent partner, who was to provide the financing, insisted on responding to the sellers’ below-market offer with a counter offer that was 10% lower. The partner was accustomed to position-based bargaining, and making a low (or at least lower) offer is a revered element of that model. He appears to have been stuck in this model and this element. This prevented him from appreciating that this was not an ordinary real estate negotiation, and that the sellers specifically wanted to benefit Arvind and gave him a far-below-market offer for that purpose. The partner assumed that the older couple would be comfortable with adversarial negotiation and behave like typical real estate sellers: interpret the buyers’ lower offer as an indication of a serious intent and an invitation to respond. The silent partner probably ignored the unique features of this proposed deal. And, apparently, Arvind succumbed to his partner’s insistence, even though he probably was aware of the seller’s unusual interests and core concerns.

Improvising might have led them to use elements of other models. Had they attended to the sellers’ core concerns of appreciation and affiliation as well as Arvind’s reciprocal core concerns, they might have saved both the relationship and the deal. Similarly, if they had used the Three Conversations model to understand the situation, they would have realized that a low offer from

⁴² See Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 HARV. NEGOT. L. REV. 1 (2013).

⁴³ Studies and arguments supporting the value of following checklist recently have appeared. See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 222–44 (2011); ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2010).

them would have led the sellers to experience strong—“identity” and “feelings” conversations.⁴⁴ Such insights might have led Arvind and his partner to accept the initial price.⁴⁵

I have seen many law students become so attached to the interest-based negotiation model without fully understanding the risks, that they, or their role-play clients, might suffer from exploitation by adversarial counterparts. A painful illustration arose almost thirty years ago in a first-year law school Torts class that I was teaching. I introduced the students to both position-based and interest-based negotiation. I randomly assigned the students to plaintiff and defense lawyer pairs and asked them to negotiate to settle a hypothetical personal injury case. After they finished negotiating, I compiled their agreements. On the money aspect, the settlements ranged roughly from \$3,000 to \$105,000. When I asked for reports from the teams with the most extreme outcomes, I learned that the plaintiffs’ lawyer in the \$105,000 settlement had used adversarial, positional bargaining, while the defense lawyer had used interest-based bargaining all along. The student who played the defense lawyer was angry and embarrassed. She told me that she had “learned her lesson” and would never again use interest-based bargaining.

Still others understandably adhered strongly to a particular negotiation model or element for different reasons: force of habit; or expectations or preferences—real or assumed—about their role, their clients, or their negotiation counterparts.⁴⁶

Models or specific elements also can become part of one’s professional or personal identity. For instance, Professor James J. White, who has long taught negotiation at the University of Michigan Law School, traditionally grades students’ performance in negotiation exercises based on how well they do in individual negotiation role-plays. In 2003, he told me that all but one of the

⁴⁴ See STONE ET AL., *supra* note 9, at 85–108, 109–28.

⁴⁵ They also might have initiated a “learning conversation” with the sellers. *Id.* at 129–84.

⁴⁶ Everything I have said about attachment to negotiation models applies equally to mediation models. The predominant model employed in the mediation of “ordinary” court-oriented civil cases includes on a narrow problem-definition, positional bargaining, no explicit attention to the underlying interests of the parties, and little or no party participation in joint sessions. See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: “The Problem” in Court-Oriented Mediation*, 15 GEO. MASON L. REV. 863, 875–77 (2008). This is so mainly because of the expectations, habits and perspectives of the professionals—usually the mediator, the lawyers, and representatives of institutional clients—not the individual parties. Adherence to this model does not typically result from a deliberate decision among these participants, but seems to arise almost automatically. It is quite consistent with what most lawyers have experienced in negotiations to settle civil cases and in judicial settlement conferences.

role-plays in his course required the students to focus on a win/lose issue, such as an amount of money or land or produce. So an individual student's score depended upon how well he or she did with respect to the division of a scarce resource; a gain for one student in a pair meant a loss for the other. "I could not do that," I said. "Why not?" White asked. "Are you too nice a guy?" "Yes," I replied,⁴⁷ but there was more to it—teaching about interests is my most fundamental goal in nearly every course I teach. I believe strongly that lawyers who understand and attend to interests will serve their clients better. So this focus on interests is a crucial part of my professional and even my personal identity.⁴⁸

⁴⁷ Conversation with Professor James J. White, University of Michigan Law School, Ann Arbor, MI (Jan. 2003). There was a time, while Roger Fisher was the head of the PON, when negotiation courses at Harvard Law School did not include how to do traditional positional negotiation, even though that was the predominant method used in the vast bulk of legal negotiations. Some former PON negotiation teachers told me that they did not feel comfortable teaching about positional negotiation, even several years after they had moved to other law schools. This attitude is no longer pervasive at PON or among its teachers.

The sense of identification with and adherence to models or their elements is even more prominent in mediation than in negotiation. For instance, the Transformative Mediation model, tends to induce strong passions. (The transformative model of mediation is most fully described in ROBERT A. BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. 2005)). See also Robert A. Bush & Joseph Folger, *Transformative Mediation and Third Party Intervention: Ten Hallmarks of a Transformative Practitioner*, 13 *MEDIATION Q.* 263 (1996)). When the passion has a negative valence, it can lead to attacks. See e.g., Carrie J. Menkel, *The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Practices and Paradigms*, 11 *NEGOT. J.* 217, 235–39 (1995); Robert J. Condlin, *The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype*, 14 *CARDOZO J. CONFLICT RESOL.* 621 (2013). When the passion has a positive valence, it can foster a rigid adherence and defensiveness.

Proponents of some other models, however, are comfortable with mediators borrowing specific elements from their models and combining them with elements associated with other models. Gary Friedman and Jack Himmelstein, the developers of Understanding-Based Mediation, exemplify this approach. See generally GARY J. FRIEDMAN & JACK HIMMELSTEIN, *CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING* (2009). On the other hand, many mediators are natural improvisers. One of these, a friend whom I will call Jim, because that is his name, has a large and varied mediation practice that includes cases in the USPS REDRESS mediation program, which requires the use of transformative mediation. I asked him to what extent he *actually* uses transformative mediation, which includes a number of elements that sharply distinguishes it from most other models, in the REDRESS cases. "Oh, I don't know," Jim said. "I just do whatever I think will help the people in the room." For extensive illustrations of how to manifest this idea as a mediator, see JEFFREY KRIVIS, *IMPROVISATIONAL NEGOTIATION: A MEDIATOR'S STORIES ABOUT LOVE, MONEY, ANGER - AND THE STRATEGIES THAT RESOLVED THEM* (2006).

⁴⁸ But see Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 *HARV. NEGOT. L. REV.* 1, 30–33 (2013) (although focusing on interests has been part of my personal and professional identities for a long time, I sometimes forget to do it).

In addition, the established models make logical sense. Unfortunately, they frequently do not work out so well in real-life. Unlike the characters in demonstrations and descriptions, actual people often fail to play along. They are much more complex and differentiated and influenced by countless factors that cannot reasonably appear in demonstrations and descriptions.

So, how to stay alert to and behave deliberately about the models and elements you are using or might use? Wheeler offers a procedural device designed to foster such awareness and appropriate improvisation: “learn, adapt, and influence”⁴⁹—repeatedly. This makes good sense. In learning, reacting, and influencing, you might consider any of a range of models and elements. To use this device skillfully” however, it helps if the negotiator can maintain certain states of mind, as discussed in the next Part.⁵⁰

III. BEGINNING WITH YES

If I could have selected the title for this book, it would have included “Beginning with Yes.”

In the pantheon of PON-related books, “Yes” holds a special place of honor and a distinctive meaning. In *Getting to Yes*, the “yes” is synonymous with reaching an agreement to resolve the dispute or conflict. In Ury’s *Getting Past No*,⁵¹ the reason to get past no is to get to yes, i.e., to reach agreement. One major purpose of the *Difficult Conversations* and *Beyond Reason* models is to enable negotiators to use the *Getting to Yes* model, or at least to work with underlying interests.

Wheeler adds another way to see and use “yes,” which he borrows from improvisational acting. Improv actors, especially doing comedy, must say, “Yes, and”—at least figuratively—to whatever their fellow actors do or say on stage (which is called an “offer”). “Yes” means to accept the reality of what the other says or does, for purposes of the scene; “and” means to build upon it.⁵²

Jazz improvisers make a similar distinction—between “soloing” and “comping” (short for “complementing”). They can expe-

⁴⁹ WHEELER, *supra* note 1, at 4–6, *passim*.

⁵⁰ For related states of mind that Wheeler recommends, see *infra* notes 67–70 and accompanying text.

⁵¹ WILLIAM URY, *GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION* (rev. ed., 1993).

⁵² See Balachandra & Wheeler, *supra* note 2, at 1–2.

rience a tension between soloing and comping that resembles the tension between position-based and interest-based negotiation moves that gives rise to the “negotiator’s dilemma.”⁵³ For instance, when improvisational comedic actors audition for a role, they are typically competing with other actors who are on stage with them. At the same time, they must jointly create a good scene and they must “yes and” their fellow actors.⁵⁴ The tension inherent in this situation also is quite comparable to the “negotiator’s dilemma.” In interest-based (or interest-inclusive) negotiation, the negotiator attempts to say “yes and,” in the sense of acknowledging the reality of their negotiation counterpart and trying to build on it. In positional negotiation, on the other hand, negotiators often denigrate offers from the other side and refuse to acknowledge any possible merit in the underlying reasoning. *The Art of Negotiation* proposes saying “yes” to the situation and then saying “and,” i.e., building upon what you have acknowledged.

In a negotiation, saying “Yes and” could mean acknowledging that your counterpart just demanded \$200,000 (on, say, a claim that you think is worth less than \$2,000), and then adding something that will keep the conversation going—rather than announcing that your counterpart is not serious, making a \$1,500 counter offer, or walking out.⁵⁵ Thus, you might ask about how she arrived at that figure and try hard to follow the reasoning. And you might acknowledge the size of the disparity and that you face a joint challenge in figuring out how to deal with it. Of course many good negotiators would do this routinely. But many others are so attached—consciously or subconsciously—to an adversarial negotiation model or some of its elements that they would not even consider such behavior.⁵⁶

This notion of “Yes, and” infuses Wheeler’s book. Chapter 1 is entitled “Embracing the Chaos,” and the book closes with an appendix that provides twenty-five reasons, as well as strategies, for doing so.⁵⁷ In between, nearly every example suggests ways of saying “yes to the mess” or having an “appreciative mindset.”⁵⁸

⁵³ See MNOOKIN ET AL., *supra* note 10, at 11–43.

⁵⁴ See Michael Wheeler & Lakshmi Balachandra, *What Negotiators Can Learn from Improv Comedy*, 9 NEGOT. 1 (2006).

⁵⁵ I am grateful to K. M. Zouhary for explaining this to me.

⁵⁶ I have done that myself, quite inappropriately. See Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 HARV. NEGOT. L. REV. 1 (2013).

⁵⁷ WHEELER, *supra* note 1, at 257.

⁵⁸ Wheeler attributes both of these expressions to Frank Barrett. See *id.* 104, 212.

Wheeler provides many specific and general suggestions about how and when to make room for improvisation in negotiation. And to implement these strategies and techniques, he suggests important traits for the negotiator, such as those from international mediator Lakdhar Brahimi. To deal well with conflict, he says, one must be both “arrogant and humble”⁵⁹—self-confident in the sense of feeling able to deal with whatever may arise, and modest in the sense of realizing that her beliefs, understandings, and plans may be wrong.⁶⁰ The humility aspect is based on saying yes to the reality that sometimes you, like anyone else, will be mistaken

IV. MINDFULNESS

In addition to arrogance and humility, Wheeler promotes the importance of three other sets of apparently inconsistent qualities; to improvise one must be “calm and alert, patient and provocative, and practical and creative.”⁶¹ Along with other suggestions for promoting these and similar qualities, Wheeler discusses mindfulness⁶², and I would like to extend that discussion.

As I use the term, drawing on the Eastern tradition, mindfulness means non-judgmental, moment-to-moment awareness of whatever passes through the senses and the mind.⁶³ In other words, mindfulness means essentially saying “Yes” to what is actually happening, rather than denying or suppressing or rationalizing it. Rumi’s poem, *The Guest House*, expresses this aspect of mindfulness:

The Guest House

This being human is a guest house.
Every morning a new arrival.

⁵⁹ *Id.* at 235.

⁶⁰ *Id.*

⁶¹ *Id.* at 80, 235.

⁶² *Id.* at 90–92, 191. For my general views on the relevance of mindfulness to negotiation, see Leonard L. Riskin, *Annual Saltman Lecture: Further Beyond Reason: Mindfulness, Emotions, and the Core Concerns in Negotiation*, 10 NEV. L.J. 289 (2010); Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution and Law*, 54 J. LEGAL EDUC. 79–91 (2004).

⁶³ See Leonard L. Riskin, *Two (or More) Concepts of Mindfulness in Law and Conflict Resolution*, in THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS (Amanda Ie et al., eds. 2014). I have recently distinguished three related but different meanings of mindfulness: common usage; Eastern-Derived Mindfulness; and Langer’s Mindfulness. *Id.*

A joy, a depression, a meanness,
some momentary awareness comes
as an unexpected visitor.

Welcome and entertain them all!
Even if they're a crowd of sorrows,
who violently sweep your house
empty of its furniture,
still, treat each guest honorably.
He may be clearing you out
for some new delight.

The dark thought, the shame, the malice,
meet them at the door laughing,
and invite them in. . . .⁶⁴

Psychology professor Ellen Langer uses the term mindfulness differently; to her, it typically includes actively drawing distinctions.⁶⁵ “When we are mindful,” she says, “we implicitly or explicitly (1) view a situation from several perspectives, (2) see information presented in the situation as novel, (3) attend to the context in which we are perceiving the information, and eventually (4) create new categories through which this information may be understood.”⁶⁶

That is exactly what Jay Sheldon did in the cable network purchase case discussed above: he looked at the situation from both his and the potential seller’s perspectives, saw the circumstances as novel, considered the precise context, and created new categories, reversing the labels and roles of the buyer and seller. Arvin Gupta and his silent partner did not exhibit this kind of mindful decision-making. Instead, I am tempted to say (though we do not know the details of their individual or combined thoughts and decision-making processes), that their behavior might have fit Langer’s definition of *mindlessness*:

an inactive state of mind characterized by reliance on distinctions/categories drawn in the past. Here (1) the past over determines the present; (2) we are trapped in a single perspective but oblivious to that entrapment; (3) we’re insensitive to context; and (4) rules and routines govern rather than guide our behav-

⁶⁴ RUMI, *The Guest House*, in THE ESSENTIAL RUMI 109 (Coleman Barks ed. & trans., 1997).

⁶⁵ Ellen A. Langer, *Mindfulness Forward and Back*, in THE WILEY BLACKWELL HANDBOOK OF MINDFULNESS 7, 10 (Amanda Le et al. eds., 2014).

⁶⁶ ELLEN LANGER, THE POWER OF MINDFUL LEARNING 111 (1997).

ior. Moreover, mindlessness typically comes about by default not by design. When we accept information as if unconditionally true, we become trapped by the substantive implications of the information. Even if it is to our advantage in the future to question the information, if we mindlessly processed it, it will not occur to us to do so. The same rigid relationship results from mindless repetition.⁶⁷

As mentioned above, it seems likely that Arvind's silent partner was stuck in the adversarial negotiation model or one of its elements; mindfulness might have rescued him, Arvind, and the disappointed sellers.

Mindfulness has a deeper foothold in legal and conflict resolution training⁶⁸ and education than does improvisation, and it makes great sense to combine them, as colleagues and I have done in law school and continuing education workshops.

V. IMPROVISATION IN CONFLICT RESOLUTION SCHOLARSHIP, TRAINING AND PRACTICE

Wheeler is not alone in connecting improv and conflict resolution. Mediator Howard Bellman has, for years, taught a workshop on mediation and jazz across the United States and in Europe and Asia.⁶⁹ Los Angeles lawyer-mediator Jeffrey Kravis, along with two professional improvisational actors, leads workshops on improvisation for mediators.⁷⁰ His book *Improvisational Negotiation*⁷¹ deals with his work as a mediator. At Northwestern Law, improvisation has appeared, since 2007, in a first-year, second-semester non-credit course called the Lawyer as Problem Solver.⁷² In spring 2014, the course also featured mindfulness instruction. Since 2010, I have regularly incorporated improvisation into three courses at Northwestern University Law⁷³—usually with leadership

⁶⁷ Langer, *supra* note 65, at 11.

⁶⁸ See Symposium, *Mindfulness in Legal Education*, 61 J. LEGAL EDUC. 634 (2012).

⁶⁹ Bellman's views appear in Howard Bellman, *Review Essay: Improvisation, Mediation, and All that Jazz*, 22 NEGOT. J. 325 (2006).

⁷⁰ They have conducted numerous workshops of this nature for the Institute for Dispute Resolution at Pepperdine University School of Law.

⁷¹ JEFFREY KRAVIS, *IMPROVISATIONAL NEGOTIATION: A MEDIATOR'S STORIES OF CONFLICT ABOUT LOVE, MONEY, ANGER—AND THE STRATEGIES THAT RESOLVED THEM* (2006).

⁷² Email message from Nancy Flowers, Program Coordinator, Northwestern University School of Law to Leonard L. Riskin (Feb. 22, 2014) (on file with author).

⁷³ Conflict Management in Legal Practice; Advanced Dispute Resolution Seminar; and Advanced Negotiation, which I co-teach with Professors Lynn Cohn, Alyson Carrel, and Daniel

from Katie Marie Zouhary—as well as two courses at the University of Florida College of Law.⁷⁴ Mediators and improvisational actors have jointly explored the relevance of improvisation to mediation.⁷⁵ Improvisational acting also appears in the continuing education courses I teach with Rachel Wohl (on conflict resolution and mindfulness) and with Daniel Shapiro (on negotiation, the core concerns, and mindfulness).

Yet *The Art of Negotiation* presents the first extensive integration of improvisation and negotiation theory and practice. I believe, and hope, that this book will inspire many other scholars, teachers, trainers, and negotiators—not to simply follow Wheeler's suggestions—but to extend them, by saying “Yes, and.”

VI. CONCLUSION

The Art of Negotiation makes a splendid contribution to the negotiation literature. It illuminates models and elements pro- pounded in other negotiation books by suggesting that negotiators, in using these tools, should not be controlled by them. It makes central an idea that might be a bit too implicit in many other books on negotiation: That to do well in negotiation, one must improvise, which often means departing, at least briefly, from a particular model, idea, or plan. The book makes a persuasive case, uses lively examples, and draws upon a number of fields in addition to negoti- ation. These include psychology, improvisational jazz, improvisa- tional acting, and military strategy and tactics. This book should deeply influence negotiation study, training, and practice. but not in ways that we can predict, of course, since it will foster improvisation.

Gandert. Typically, improv is presented by K.M. Zouhary, an associate at Proskauer, and an experienced improvisational actor. (I do it myself, though not as well, when she is not available.) In all of these courses, we use improv in part to teach other material, particularly the Internal Family Systems model of the mind. See Leonard L. Riskin, *Managing Inner and Outer Conflict: Selves, Subpersonalities, and Internal Family Systems*, 18 HARV. NEGOT. L. REV. 1 (2013).

⁷⁴ Tools of Awareness for Lawyering and other dispute resolution courses.

⁷⁵ See Lakshmi Balachandra et al., *Improvisation and Negotiation: Expecting the Unexpected*, 21 NEGOT. J. 415 (2005); Lakshmi Balachandra et al., *Improvisation and Mediation: Balancing Acts*, 21 NEGOT. J. 425 (2005) (Many mediators use improvisational techniques, which can incline parties to improvise. Mediators can improve their skill by learning improvisation techniques.); Lakshmi Balachandra et al., *Improvisation and Teaching Negotiation: Developing Three Essential Skills*, 21 NEGOT. J. 435 (2005) (suggesting ways to teach improvisation in negotiation courses); Bellman, *supra* note 69, at 325 (explaining that mediation is “an improvisational art”).

The deep message of this book—“Say yes, and”—can attract as much passion as the *Getting to Yes* model—and even become a way of life. Listen to improv comedian Stephen Colbert addressing the graduating class at Knox College in 2006:

[S]ay “yes” as often as you can. When I was starting out in Chicago, doing improvisational theatre with Second City and other places, there was really only one rule I was taught about improv. That was, “yes-and.” In this case, “yes-and” is a verb. To “yes-and.” I yes-and, you yes-and, he, she or it yes-and. And yes-anding means that when you go onstage to improvise a scene with no script, you have no idea what’s going to happen, maybe with someone you’ve never met before. To build a scene, you have to accept. To build anything onstage, you have to accept what the other improviser initiates on stage. They say you’re doctors—you’re doctors. And then, you add to that: We’re doctors and we’re trapped in an ice cave. That’s the “-and.” And then hopefully they “yes-and” you back. You have to keep your eyes open when you do this. You have to be aware of what the other performer is offering you, so that you can agree and add to it. And through these agreements, you can improvise a scene or a one-act play. And because, by following each other’s lead, neither of you are really in control. It’s more of a mutual discovery than a solo adventure. What happens in a scene is often as much a surprise to you as it is to the audience.

Well, you are about to start the greatest improvisation of all. With no script. No idea what’s going to happen, often with people and places you have never seen before. And you are not in control. So say “yes.” And if you’re lucky, you’ll find people who will say “yes” back.⁷⁶

⁷⁶ Stephen Colbert, Commencement Address at Knox College, Galesburg, IL (June 5, 2006), available at http://www.alternet.org/story/37144/stephen_colbert's_address_to_the_graduates. Thanks to K.M. Zouhary for introducing this to my students and me.