When People are the Means: Negotiating with Respect

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When People are the Means: Negotiating with Respect

JONATHAN R. COHEN*

ABSTRACT

Most scholarship on negotiation ethics has focused on the topics of deception and disclosure. In this Article, I argue for considering a related, but distinct, ethical domain within negotiation ethics. That domain is the ethics of orientation. In contrast to most forms of human interaction, a clear purpose of negotiation is to get the other party to take an action on one's behalf, or at least to explore that possibility. This gives rise to a core ethical tension in negotiation that I call the object-subject tension: how does one reconcile the fact that the other party is a potential means to one's ends with general ethical requirements for treating people? In response, I argue that there is a general moral duty to respect other people, a duty that is not overridden by the fact of negotiation. I examine the nature of this duty and its implications for both direct principal-to-principal negotiations and legal negotiations conducted indirectly through lawyers.

OUTLINE

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This Article is written in honor of Thomas C. Schelling, whose insights into negotiation are matched by the respect, warmth and caring he has shown me as my teacher, which is to say that all are extraordinary.

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INTRODUCTION

The topic of negotiation ethics is by no means new. Negotiation has long been a hallmark of social development, and from ancient times writers have been concerned with how negotiation should be practiced. Were the Biblical characters Rebecca and Jacob wrong to deceive Isaac, by masquerading and outright lying, so as to ensure that Isaac's blessing passed to Jacob rather than Esau?1 If a merchant porting grain by ship from Alexandria to famine-stricken Rhodes overtakes at sea several other vessels also porting grain to Rhodes, should he, upon arriving in Rhodes, reveal the imminent arrival of those other vessels, or should he bargain without revealing that information?2 To this day the puzzles of deception and disclosure have remained at the heart of most discussions of negotiation ethics within the American legal community, with occasional attention paid to the topic of fairness.3 Yet there is a fundamental domain within

1. See Genesis 27. For references to rabbinic literature discussing these events, see Thomas L. Shaffer, On Lying for Clients, 1 J. INST. FOR STUDY LEGAL ETHICS 155, 162 (1996) ("It is important, too, with regard to these stories from Jewish Scripture, to notice how strong the [rabbinic] tradition is against falsehood, without much respect for the distinction between false statements and deceptive statements."). See also Michael H. Rubin, The Ethics of Negotiations: Are There Any?, 56 ARK. L. REV. 447, 458-59 n.35 (1995) (describing the high, maximalist requirements of honesty in negotiation in Biblical and rabbinic literature); 2 NEHAMA LEIBOWITZ, STUDIES IN SHEMOR 437 (1976) (Jewish law requires, "not only the negotiation avoidance of actual falsehood, but also meticulous care in refraining from anything which might conceivably savour of untruth, even though it was not obviously dishonest.").


3. Current codes of professional ethics require little more than that a lawyer refrain from committing fraud. See generally infra Part III. ABA Model Rule 4.1 even explicitly permits puffery in negotiation by lawyers. While Model Rule 4.1 ("Truthfulness in Statements to Others") provides, "[A] lawyer shall not knowingly make a false statement of material fact or law to a third person," the Comment to that Rule states, "Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category." One commentator quipped, "Rule 4.1 says more about what deceit is permitted ... than it says about what deceit is not permitted." Walter W. Steele, Jr., Deceptive Negotiating and High-Toned Morality, 39 VAND. L. REV. 1387, 1395 (1986). Accordingly, there has been much debate over whether a greater duty of candor in negotiation should be placed upon lawyers than the minimalistic duties that currently exist.

negotiation ethics that relates to, but is distinct from, these topics that has been largely unaddressed. I call this the ethics of orientation. The purpose of this Article is to explore that domain.

To introduce this domain, consider the following question: What distinguishes negotiation from interpersonal interactions generally? A basic difference is that in negotiation, each party attempts to get the other party to do something, or at least explores that possibility. Put differently, in negotiation the other party is a potential means towards one’s ends. If two people are chatting about the weather, rarely will their conversation end with an exchange of promises. If they are negotiating the sale of a car, it very well may.

This basic difference between negotiation and most social interactions points to a core question, or tension, lying within the domain of orientation ethics.


The matter of fairness in legal negotiations has also received some scholarly attention. The basic issue is whether canons of legal profession ethics, which are essentially silent on the matter of fairness, should require lawyers to act with some degree of fairness when negotiating. Those generally supportive of fairness standards include Alvin B. Rubin, supra, at 580, 592; Schwartz, supra, at 679 (suggesting a rule that, “When acting in a nonadvocate capacity ... a lawyer must ... [refrain from] unfair, unconscionable, or unjust, though not unlawful, means ... [or pursuing] unfair, unconscionable, or unjust, though not unlawful, ends[,]”); Rubin, supra note 1, at 463-75; Steele, supra, at 1396-1404; Gordon, supra, at 526, 530; Scott S. Dahl, Ethics on the Table: Stretching the Truth in Negotiations, 8 REV. LITIG. 173, 176-77 (1988). Those opposing such standards include Hazard, The Lawyer’s Obligation to be Trustworthy, supra, at 193 (arguing fairness is too vague to be incorporated into professional ethics codes) and Rosenberger, supra, at 638 (similar).

Other noteworthy works on negotiation ethics for lawyers not fitting squarely in the above categories include Rex R. Perschbacher, Regulating Lawyers’ Negotiations, 27 ARIZ. L. REV. 75 (1985) (describing parts of agency law, contract law, and legal ethics that govern negotiations conducted by lawyers); Dahl, supra (interviewing practicing attorneys on how they handle negotiation ethics dilemmas); Eleanor Norton Holmes, Bargaining and the Ethic of Process, 64 N.Y.U. L. REV. 3, 493 (1989) (describing and critiquing four common approaches to negotiation ethics — universalist, traditionalist, relativist, and pragmatist — and offering a fifth alternative labeled functionalism); Robert J. Conlin, Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role, 51 Md. L. REV. 1 (1992) (exposing short-run versus long-run tensions for lawyers under the ethics codes); Reed Elizabeth Loder, Moral Truthseeking and the Virtuous Negotiator, 8 GEO. J. LEGAL ETHICS 45 (1994) (a philosophical discourse on the moral virtues both toward self and others of non-deceptive negotiation); Mary Jo Eyster, Clinical Teaching, Ethical Negotiation, and Moral Judgment, 75 NEB. L. REV 752 (1996) (arguing clinical teaching of negotiation in law schools should pay more attention to matters of ethics and suggesting how such teaching can fit within Kohlberg’s framework of moral development); Charles B. Craver, Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive, 38 S. TEX. L. REV. 713 (1997) (suggesting how lawyers can maintain their personal integrity in negotiation within the existing rules); Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution, infra note 86 (arguing professional ethics standards for lawyers inherited from the adversarial model are ill-suited to ADR processes and suggesting revisions).
Usually we think of other people as, well, people. Yet negotiation may pull us towards seeing others as mere instruments for achieving our purposes. To borrow from the language of Martin Buber, in negotiation we are drawn towards reducing the other person from a “Thou” to an “It.”\(^4\) Negotiation thus presents an apparent ethical tension that I call the object-subject tension: when negotiating, how is one to reconcile the impulse to treat the other person as a mere means towards one’s ends with general ethical requirements for treating people? In response, I argue that in negotiation one should see the other party both as a means towards one’s ends and as a person deserving respect. More specifically, the act of negotiation does not relieve one of the moral duty to respect others. This duty of respect implicates both the traditional negotiation ethics topics of deception, disclosure and fairness and also topics such as manipulation, coercion, listening, and autonomy.

Part I, Direct Negotiations, begins with the case of direct principal-to-principal negotiations. I introduce the concept of “stance”, i.e., one’s internal psychological orientation towards the other party when negotiating, and argue that stance is relevant to negotiation ethics. More specifically, in negotiation one should assume a respectful stance towards the other person, for that other person is a being with fundamental dignity who merits respect. I conceive of this duty of respecting the other person primarily in internal terms, that is, of seeing the other person not merely as an instrument or object but also as a person. However, this duty also has both negative implications (e.g., refraining from deception, coercion, threats, incivility, and psychological assaults) and positive implications (e.g., treating others fairly, listening to them, and respecting their autonomy) for one’s actions. I explore the nature of respect (e.g., whether respect is primarily a matter of action or of attitude) and conceptualize respect, at root, as a chosen orientation whereby one tries to see, and hence treat, the other person as a person with fundamental dignity. I also discuss the effect that respecting others has on one’s own self-definition, both as an individual and as a member of a community.

Part II, Critiques and Responses, raises and then rebuts criticisms of the position articulated in Part I that one is morally obliged to respect others in negotiation. The criticisms are based upon arguments from reciprocity, prior harm, custom, self-protection and free-market economics, viz.: (i) “As the other side hasn’t treated me with respect, I’m not obliged to treat them with respect;” (ii) “Given the harm that the other side has done to me, I am not obliged to treat them with respect;” (iii) “That’s just how the game of negotiation is played;” (iv) “If I try to treat them with respect, I’ll get ‘eaten alive,’ for they won’t be trying to respect me and thus I will be disadvantaged in the negotiation;” and (v) “In negotiation, each side should see the other side solely as a means, because social wealth will be maximized when each person eagerly pursues his/her own

self-interest.” My basic response to these criticisms is that there is little reason to think that respecting the other party generally will be to one’s material disadvantage, but rather the opposite: that respecting the other party will facilitate his or her cooperation which, if it affects the outcome at all, will usually be to one’s benefit. Such strategic efficacy does not provide the moral grounding for the duty to respect others in negotiation (viz., because they are persons) but it helps refute some arguments that might be advanced against that duty on their own terms. I also address two deep roots in Western culture that inhibit seeing negotiation counterparts as people deserving of respect: the history of human objectification for material advancement and, relatedly, the over-reliance on materialism, especially comparative materialism, in the human search for psychological and spiritual meaning.

Negotiations are often conducted through agents, and Part III, Lawyers and Other Agents, examines the position of lawyers and other agents who negotiate on behalf of clients. I begin by arguing that the fact of agency does not excuse the agent from the moral duty to respect the other party. I then consider the specific case of lawyers, who are not only agents but also members of a distinct profession regulated by codes of professional ethics. For example, if it is wrong to manipulate the other party in negotiation, how is a lawyer to reconcile such an external duty of non-manipulation towards the other party with what is commonly called the (internal) duty of zealous advocacy that she owes her client? Here, I argue that under existing codes lawyers are permitted, but not required, to view the other party to the negotiation as a person deserving respect rather than as a mere object. However, in the rare case where the lawyer believes that this stance may harm her client’s interests, she should discuss this in advance with her client. I also briefly discuss revising professional ethics codes to include a duty to respect the other party in negotiation. Part IV, Promoting Orientation Ethics, addresses two other ways of promoting orientation ethics, namely via reputational effects and education.

Some may see questions of negotiation ethics as esoteric. They are not. As deal-making negotiation is indispensable to commerce, and as dispute-resolving negotiation is necessary for social peace, negotiation is a basic process of social ordering. Far more legal disputes are resolved through negotiation than through adjudication. Further, unlike litigation, where an external judge can ultimately enforce rules, negotiations typically occur in private settings that cannot be

5. See, e.g., Donald McIntyre & David Lippman, Prosecutors and Early Disposition of Felony Cases, 56 A.B.A. J. 1154 (1970) (in most American jurisdictions, plea bargaining accounts for 80-90% of the dispositions of criminal cases); William M. Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61, 62 (1971) (in a sample of state county courts, 81% of felony cases were resolved without trial, and in U.S. District Court criminal cases, 87%); Marc Galanter, Reading the Landscape of Disputes: What We Know and Don't Know About Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 44 (1983) (surveying studies of civil cases and finding settlement rates of approximately 80-95%).
readily monitored or controlled externally, heightening the need for ethical sensitivity.

If the critical test of a society's protection of free speech is how it responds to repugnant speech,\textsuperscript{6} then a critical test of a person's character is how she negotiates, for virtually all negotiations involve a distributive element. No matter how much negotiators can "expand the pie" through value-creating ideas, slices must still be cut. Roughly two millennia ago, the Jewish sage Hillel asked, "If I am not for myself, who will be for me? If I am for myself alone, what am I? And if not now, when?"\textsuperscript{7} Though not posed specifically in the context of negotiation, his questions reflect the relevance of negotiation ethics to one's self-definition — both then and now. How we see those with whom we negotiate — whether as mere objects or as people — is critical to how we define ourselves. This is especially true for lawyers who negotiate day in and day out. If we neglect these matters, we do so at our moral, and hence psychological, peril.

I. DIRECT NEGOTIATIONS

A. STANCE

Two years after we were married, my wife and I began shopping for our first house. I had been offered a teaching position at the University of Florida, and, before accepting, we visited Gainesville, in part to explore the real estate market. After years of renting, the prospect of buying a house was both exciting and daunting. The law school's dean had put us in contact with a local realtor named "Bev." We made plans to meet at her office one Sunday morning and spend the day house hunting.

When we arrived at her office, Bev was gracious and friendly. Our senior by some twenty years, she had also moved to Gainesville from the north many years ago. We had spoken with her earlier about our tastes in a home, and at ten o'clock we all left in her car to see some houses. By one o'clock, we were hungry. Bev drove us to a moderately-priced restaurant. We each ordered, and at the end of the meal, a bill of roughly twenty dollars arrived. My wife and I offered to divide the bill with Bev according to what we had ordered. A conversation along the following lines then ensued.

"Oh no," said Bev, "I'll pay for it."

"Why don't you pay for your part, and we'll pay for ours?" I replied.

"No," said Bev, "Let me pay the whole check."

"You don't have to pay for us," I said. "We should at least pay for ourselves."

\textsuperscript{6}See Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

\textsuperscript{7}PIRKE AVOT (1:14), as quoted in SIDDUR SIM SHALOM 607 (Jules Harlow trans., 1985). For a further discussion, see infra note 115.
“Don’t be silly,” said Bev. “You’re new in town. Once you move into your new house, you can have my husband and me over for dinner.”

“Okay, then,” I said.

What was going on? Was Bev simply demonstrating Southern hospitality by insisting on paying for our lunch, or did she want to make us feel beholden and increase the chances that we would stay with her as our realtor? As I consented to let Bev pay, both possibilities ran through my mind, as did the thought that if Bev was insisting on paying in order to make us feel indebted, then we should not feel indebted by her act.

When assessing this negotiation, it is useful to look at the concept of stance. By stance, I mean a person’s *internal psychological orientation* towards something or someone, typically the other party. While one could define stance in other terms, such as one’s external behavior (e.g., what stance did the Senator take on the abortion vote?), I will use stance to refer to a person’s inner state. Framed in this language, in our negotiation over who was going to pay for lunch, I was concerned about Bev’s stance. Was Bev being gracious or manipulative (or both)? At the time, either inference seemed plausible.

Before addressing the ethical significance of stance in negotiation, several descriptive observations are in order.

A person’s stance can profoundly influence a negotiation. Sometimes this is obvious. Entering a negotiation with the view that the other party is one’s partner in problem solving rather than an adversary can help produce mutually beneficial results. Yet frequently the influence of stance is quite subtle but still highly significant. Often how one acts is just as important, if not more important, than what one says. Was he really listening to me or was he just going through the motions? Was he really sorry, or just pretending to be? As most people cannot fully mask their motivations, even when a person tries to hide it, his stance will often influence the negotiation. From an analytical perspective, the specific statements and “moves” people make in negotiations may often be arbitrary or epiphenomenal, and the stance(s) they take ultimately causal.

People may be either unaware or aware of the stances they take in negotiations, that is, one’s stance can be either subconscious or conscious. In reflecting on the above events, I now believe that my stance towards Bev was defensiveness. At the time I was unaware of this. For this reason, I use the term “stance” rather than

8. There are other possibilities too. The norm among realtors in the community may have been to pay for such lunches. I focus upon the two possibilities above for expository simplicity.

9. Several months later, we bought a house with Bev as our realtor. Over time, we came to appreciate that Bev was a sincerely helpful and gracious person. For example, once my wife and I moved to Gainesville (and long after the sale of our house was completed), Bev repeatedly invited us to her home for parties.

"intent," as "intent" usually connotes conscious awareness. Intent also reflects a sense of purposiveness that stance need not.

While this Article focuses on one's stance towards one's negotiation counterpart, the object of one's orientation need not be one's negotiation counterpart. Does one see one's child as a blessing or as a burden? Does the attorney see the law as a way to make money or as a way to bring about a more just society? As such questions reflect, orientation ethics are of broad ethical relevance.

A person's stance can be multifaceted. The parent may see the child both as a blessing and as a burden, and the attorney may see legal practice both as a way to bring about a more just world and as a way to earn a living. We often comprehend the world in binary terms: it's one or the other, but not both. Occam's razor notwithstanding, we should be wary of reductionism that inaccurately simplifies the complex.

As stance can be multifaceted, and as people can either be aware or unaware of the stances they assume, sometimes parties are conscious of certain aspects of their stance but unconscious of other aspects. For example, if one asked Bev why she offered to pay for our meal, she may well have attributed it sincerely to a blend of hospitality, courtesy and graciousness. But if one asks why Bev really offered to pay for our meal, perhaps her driving subconscious motivation was the less benign one of seeking to make us feel indebted. Like a ship steered by a rudder but powered by a propeller, often our minds unreflectingly garb our hostile motivations in noble clothes, for we prefer to see ourselves as noble, rather than ignoble.

Consider some examples from the political realm. Does the religious group support legislation forbidding homosexual marriage because the Bible calls male homosexuality "an abomination" or does the group, which does not call for legislation to enact other Biblical prohibitions, use that Biblical verse as the garment for clothing its underlying homophobia? When a majority of citizens, most of whom are white, passes legislation prohibiting state-sponsored affirmative action programs, thereby decreasing minority enrollment in universities, thereby decreasing minority enrollment in universities,

11. Developing an awareness of one's stance can be critical to becoming a more effective and ethical negotiator. See infra Part IV.

12. As such questions indicate, stance refers to a fairly broad set of inner phenomena: feelings, attitudes, motivations, opinions, etc. What unites these interwoven inner phenomena is the common external referent. See also infra Part IV.

13. Although many people commit harmful, evil acts, few arise in the morning and say to themselves, "Today, I want to do some harm and evil." Rather most of us say to ourselves things like, "Today I want to do some good thing." As Rabbi Israel ben Eliezar, founder of Hassidic Judaism and more commonly known as the Baal Shem Tov, expressed several centuries ago: "The chief joy of the Satan ... is when he succeeds in persuading a man that an evil deed is a mitzvah [a deed commanded by God]. For when a man is weak and commits an offense, knowing it to be a sin, he is likely to repent of it. But when he believes it to be a good deed, does it stand to reason that he will repent of performing a mitzvah?" Louis I. Newman, The Baal Shem Tov, in Creators of the Jewish Experience in Ancient and Medieval Times 286, 302 (Simon Noveck ed., 1985).

which is the real motivation, promoting a race-blind society or maintaining white power? Of what relevance is political history in making that assessment? I do not mean to suggest that all those opposed to legalizing homosexual marriage or affirmative action have at root homophobic or racist motives. No doubt many such opponents are at root motivated by the respectable goals of effectuating a Biblically-guided society and a race-blind society. Nor do I mean to suggest that I have some magical way of perfectly discerning a person’s or an organization’s true motives. Rather the point is that a person’s perception of his or her own motivations can be quite different from the reality of what his or her underlying motivations actually are. With these descriptive observations in mind, let me now turn to the normative realm of ethics.

The first point to observe is that, in assessing negotiation ethics, the internal variable of stance is relevant. In our lunch, if Bev insisted on paying so as to make my wife and me feel obligated to continue with her as our realtor, most would judge her insistence with contempt. In contrast, if her intent had been to welcome us warmly to a new community, most would call that very same act commendable. Bev’s behavior alone is an insufficient informational basis for ethical judgment. Our ethical judgement depends not only upon Bev’s actions, but also upon our assessment of her intent.

Consider an example common within negotiation — active listening. Active

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16. Some, especially those schooled in neoclassical economics, might argue that in analyzing negotiations we should look only at a person’s external behavior and not at his internal stance. Two claims they might advance are: (1) what affects the other party is one’s behavior, not one’s feelings, and (2) we can never know with certainty a person’s stance, so we should not speculate about it. Claim (1) is addressed in the text above. Claim (2) should also be rejected. Negotiation scholars, many of whom come from the field of psychology, have long used internal psychological states to explain behavior. More fundamentally, the fact that we cannot determine the internal variable of stance perfectly does not mean we cannot assess it at all, nor does it imply that we should not consider it. What variable, after all, can we measure perfectly? In the spirit of Heisenberg’s uncertainty principal, note that external behavior too is subject to inherent errors in observation. Further, internal facts are sometimes more easily observed than external ones. You may not know how the teenager got the money to buy the concert ticket, but you may know why: he was desperate to see a certain pop star. For a discussion of the methodological debate on considering both external behavior and internal states, see AMARTYA SEN, Behavior and the Concept of Preference, in Choice, Welfare and Measurement 54 (1982).

17. The potential unawareness of a person of his underlying hostile motivations raises an interesting question of moral assessment. If a person is unaware of his underlying hostile motivations, should we judge his act less harshly than when a person is aware his act is motivated by hostile feelings? Just as we are more lenient toward unintentional torts than intentional torts, so too I think we should be more lenient in judging those who do not understand why they do what they do. This does not, however, ultimately excuse a wrongful act. It is small consolation to say to the job applicant who is denied employment because of prejudice, “At least the employer was subconsciously, rather than consciously, prejudiced.”
Negotiating with Respect

Listening is a technique whereby the listener reflects to the speaker that he or she has grasped what the speaker says, either by paraphrasing the speaker’s comments (“If I understand you correctly, what you’re saying is…”) or otherwise demonstrating an understanding of the speaker’s comments (“If what you say is right, then it must follow that…”). This technique is used in many disciplines, and is commonly taught in negotiation courses. Yet little attention is typically paid to the ethics of active listening. If I am a psychologist with the goal of making a patient feel heard, then using the technique of active listening is morally sound, for the patient implicitly agrees with that goal. The same is true if I am a lawyer trying to learn about my client’s experiences. However, if in negotiation I use such techniques simply for my strategic advantage, so that having “felt heard” you will become less adversarial and I will be able to push the negotiation to my advantage, then the propriety of using active listening becomes suspect. Parallel concerns arise in the organizational setting. It is laudable for an organization to have an ombudsperson or a customer service department that actually helps to solve problems. It is problematic for an organization to use such mechanisms simply to make workers and customers “feel heard” without ever addressing underlying issues.

B. STANCE TOWARDS OTHERS

What orientation should one take towards the other party in a negotiation?

A hard-nosed “realist” might claim that, in a negotiation, the other party is a possible means to one’s ends, an instrument towards one’s goals. This is undoubtedly true and relevant. However, it is only a partial picture. One’s stance towards the other party in negotiation should recognize more than just that...
person’s instrumentality.  

Sometimes one’s relationship with the other party affects what orientation one should take when negotiating. If a parent and child are negotiating over the child’s bedtime, one would hope that they see themselves not as adversaries but rather as members of a loving family. A good parent should ask both “What will work for me?” and “What will be best for my child?” Athletes in team sports often face similar situations. “If I pass the ball, my individual scoring ‘stats’ may be lower, but it might help the team to win. What should I do?” Implicitly, the issue faced is whether the athlete sees her teammates as rivals or as partners, or as a combination of both.

Even if one does not have a prior relationship with the other party, the other party is still a human being, and it is morally relevant to see the other party as such. Skeptics might argue, “What difference does it make what orientation I take towards the other party? That’s just a matter of my internal beliefs.” Yet beliefs affect actions. Is it wrong to lie to another? Then prima facie it should be wrong to lie to another in a negotiation. Is it wrong to treat a person unfairly? Then prima facie it should be wrong to treat a person unfairly in a negotiation. Is it wrong to intimidate another person? Then prima facie it should be wrong to intimidate that other person in negotiation. The same applies to deception, coercion, threats, incivility, psychological assaults, manipulation, and so on. If it is wrong to treat people in these ways, then, unless compelling justification is given (e.g., few would say that it was wrong for the Allies to deceive the Nazis about where the Normandy invasion would occur), it remains wrong to do so in negotiation. A fundamental moral challenge in negotiation is seeing the fundamental dignity of people despite their instrumentality.

Note the linkage here between orientation ethics and more traditional topics within negotiation ethics, such as lying, failing to disclose material information, or substantive unfairness in bargaining outcomes. Seeing the other party as a person with fundamental dignity provides a moral basis for refraining from acts such as treating him unfairly, deceiving him, and so on. Derived from the concept of fundamental human dignity, a very high level of care should attach to our interactions with one another. It is no excuse for a hard-nosed person to say, “I treat people as objects, and that is how I expect them to treat me.” There may well

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20. The same reality can be understood from multiple perspectives. For a philosophical discussion, see THOMAS NAGEL, THE VIEW FROM NOWHERE 6 (1986).


22. As Eleanor Norton Holmes expressed, “Truthfulness and fairness are part of the respect for others that ethical standards are meant to encourage.” Holmes, supra note 3, at 507.

be other possible moral bases for refraining from such immoral acts (e.g., religious beliefs that God will punish you if you lie), but seeing the other party as a person deserving of respect provides a solid one.  

Some may ask why people deserve respect in the first place. There are many responses to such questions. Those within Biblically-derived religious traditions may say that human beings, created in the Divine Image, are sacred entities who merit respect. Philosophers may give accounts of why failing to respect people should be rejected. Kantians might conclude that a rational being could not will such steps to be universal laws, for she herself would want to be treated as an end in herself whose will should be respected and not as a means. Utilitarians might argue that failing to respect others destroys social capital. Communitarians might suggest that respect among persons is essential for maintaining our collective identity. Feminists might argue that our relationships with one another are fundamental to our existence, and that those relationships should be grounded in respect. I do not expect that all readers will agree with each of these positions. However, I suspect most readers accept some basis for the fundamental dignity of each person. As the psychologist Jean Piaget wrote, "[A]uthors of the most diverse inspirations find themselves in agreement on one point ... the sentiment most characteristic of moral life is the feeling of respect." By respecting others, I mean adopting an orientation that reflects this fundamental dignity.

Consider an example from the medical setting. My father-in-law is a primary

24. Some may wonder whether this argument which is rooted in personhood applies to the case of an organizational negotiating partner. It does. See infra Part III.
29. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).
care physician who also serves as the medical director of a nursing home. As part of staff education, several times a year he interviews one of the home’s residents in front of the entire staff. In particular, he asks if the resident would be willing to share parts of her life history, and not just medical history, with the staff. The answers, he tells me, are often quite incredible:

Recently, I interviewed a delightful 88-year-old woman. Mrs. J. was a very upbeat happy lady who was always trying to help other residents of the nursing home.

I started by asking Mrs. J. where she was born. She answered that she was born in a nearby town, the fourth of five children. When she was a year old and her oldest sister was 6, her mother walked away with a tradesman. The children were left at home. When her father returned home that evening, he read the note his wife had left, locked the door and returned to his birthplace in Canada. When the children were found a week later, the 3-month-old baby had died. The children were then separated and placed in foster homes. Mrs. J. spent the next 17 years in a home with a physically abusive stepmother.

When she was 18, Mrs. J. ran away. Taken in by a minister in her church, she soon met a man at a church function and married. With the help of her church and her husband, she lived a long and happy life married only by a year-long episode of depression, 2 bouts of cancer and the deaths of her husband and only child within a few months of each other. After more than a decade of living alone as a widow, she came to live at the nursing home when spinal stenosis led to paraplegia and an inability to walk.

The staff and I were stunned to hear this grim story from a woman who seemed so happy, helpful and outgoing. We talked about the recent work on resilience which sought to understand how some people can flourish in spite of a disastrous childhood.32

Why did my father-in-law institute this practice? “My goal,” he writes, “is to show the staff that residents had rich and varied lives prior to their admission to the nursing home.”33 In other words, he wanted the nursing home employees, including himself, to see the residents as people and not merely as combinations of medical ailments.

Some may ask, precisely how far does this duty to respect the other party in negotiation extend? “If party A is under the misimpression, which B did not create, that B already has an offer in his pocket, must B rectify A’s misimpression?” “Is it acceptable to politely make a ‘low-ball’ offer and then stubbornly defend it for a period, hoping that the other party will ‘cave?’” “Is stalling in a negotiation acceptable?” “How do we know the difference between what some

33. Id. See similarly LAWRENCE-LIGHTFOOT, supra note 21, at 161 (describing Harvard Law School professor David Wilkin’s practice of meeting with students in small groups and asking them to share non-apparent parts of their lives, and reciprocating himself, as a means of fostering connectedness).
would call 'unethical, manipulative behavior' and what others would call 'legitimate, strategic behavior?'"

Accepting that there is a duty to respect the other party does not settle important and interesting questions concerning the limits to that duty. While I will offer some observations on this duty of respecting the other party, I will not attempt to delineate the precise limits of this duty here. This arises in part from inherent complexities of the subject. As I will argue below, the respecter's mental state is critical for determining whether a seemingly respectful act is a genuinely respectful act. Thus, specifying the duty to respect others in negotiation by delineating a particular set of acts is itself problematic, for the critical issue is whether such acts are done with a proper mental state. Further, as we discuss the duty of respect, there may well be some vagueness as to the boundary issues of how far this duty reaches, and different people will undoubtedly see different limits. Yet the fact that its boundaries can be disputed does not mean that the duty does not exist. As Amartya Sen expressed, "[B]oundary questions are sometimes taken to be more important than they are. Intellectual interest in these issues may distract attention from the fact the imprecision of boundaries can still leave vast regions without ambiguity. It is indeed possible to say a good deal about China and India without asserting that there are no ambiguities as to where the boundary between the two countries lies."34 The same applies to the duty to respect others in negotiation. Even before we reach the boundary disputes, much can be said about the intramarginal domain.

C. RESPECT

Respect is commonly understood in two ways. One focuses on a person's internal feelings, and the other upon his external actions. The Oxford English Dictionary defines respect, inter alia, both as, "[d]eferential regard or esteem felt . . . towards a person or thing" and as, "[d]eferential or courteous attentions . . . polities, courteousnesse."35 Note that the former type of respect, which is rooted in one's internal feelings, can have much broader external manifestations than the matters of social etiquette covered by the latter definition.36 A child who respects her parents may not only treat them with courtesy but may also try to emulate their behavior.37

Rather than labeling "[d]eferential or courteous attentions . . . polities, courtesies,

34. AMARTYA SEN, DESCRIPTION AS CHOICE, IN CHOICE, WELFARE AND MEASUREMENT 432 (1982).
36. For an exposition of respect through narrative accounts, see LAWRENCE-LIGHTFOOT, supra note 21. Lawrence-Lightfoot presents a brief annotated bibliography of readings from various fields concerning respect. Id. at 231-39.
37. The Oxford English Dictionary also defines respect as "actions expressive of respect for a person." OXFORD ENGLISH DICTIONARY 732-34 (2d ed. 1989). This somewhat-circular definition covers respectful actions not rooted in social etiquette.
courtesies” or other acts that express respect as respect, it is more helpful to call such acts *signs of respect* and initially conceive of respect primarily in internal terms, for now, say as a feeling.  

(Later I will argue that respect is best understood as a chosen orientation; however, it is easiest to begin by conceiving of respect as a feeling.) No doubt some will dislike this terminology and prefer to focus on external demonstrations. They might argue, “What really matters is how you treat others — whether you show respect. Since the other party experiences one’s actions and not one’s feelings, our analysis of respect should focus on actions.” While I embrace the idea that how one treats the other party is vital, let me explain why I locate respect for others primarily in internal terms.

Imagine two baseball players standing erect with their caps removed and their hands over their hearts as the national anthem is played. The first player focuses his eyes keenly on the flag and thinks about how fortunate he is to live in a free country. The second player gazes in the general direction of the flag but rolls his eyes minutely. He ponders whether he will win the league’s most valuable player award this year, and, knowing that he needs to project a good public image to win

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38. See, e.g., PIAGET, supra note 31, at 172 (“[R]espect is a sentiment of one individual toward another.”). Piaget distinguishes between unilateral respect (“attributed by a person who feels inferior to a person that he judges superior”) and mutual respect (“attributed reciprocally by one person to another”). Id. For Piaget, the paradigm of unilateral respect is the respect of a young child for a parent, while mutual respect is, or should be, exemplified in relationships among adults. Id. at 119. For Piaget, mutual respect is a more mature practice than unilateral respect, and is achieved through the moral development of recognizing the value of other persons and the importance of respectful dialogue with them. This fits well with Piaget’s theory of children’s moral development, with children progressing from the obedience to norms and authority to engaging in constructing the norms. See JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (Marjorie Gabain, trans., 1948). For a fine summary and analysis of Piaget’s view of respect, see Cynthia Lightfoot, *On Respect*, 18 NEW IDEAS IN PSYCHOL. 177 (2000). My analysis of respect has parallels to the maturation process described by Piaget. However, my vision of respect is not rooted in reciprocal behavior by the other party but simply in their humanity. (To the best of my knowledge, Piaget does not specifically address the matter of unreciprocated, but mature respect.).

39. Psychological studies of the effects of respect commonly focus on external demonstrations of respect, for such are most easily measured. For references from the literature on procedural justice, see Larry Heuer et al., *A Deservingness Approach to Respect as Relationally Based Fairness Judgment*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 1279 (1999) and Tom R. Tyler, *Psychological Models of Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. OF PERSONALITY & SOC. PSYCHOL. 850 (1994). Many fine examples come from Jerald Greenberg’s research. See, e.g., Jerald Greenberg, *Using Socially Fair Treatment to Promote Acceptance of a Work Site Smoking Ban*, 79 J. OF APPLIED PSYCHOL. 288, 288 (1994) (“[I]t has been found that subordinates perceive superiors as being fair when those superiors provided adequate explanations of decisions affecting them and when the superiors treat them with respect and dignity.”); Jerald Greenberg, *Employee Theft as a Reaction to Underpayment Inequity: The Hidden Cost of Pay Cuts*, 75 J. OF APPLIED PSYCHOL. 561, 567 (1990) (“The evidence confirms that employee theft is a predictable response to underpayment inequity and reveals that such reactions can be substantially reduced by the inexpensive tactic of explaining the basis for the inequity in clear, honest, and sensitive terms.”).

40. On the methodological question of examining both internal states and external actions, see generally supra note 16. There are many reasons to care about a person’s internal orientation beyond how that state influences how he will act in the instant case. For example, we may care about his character (e.g., Will he be sad if he has such an attitude? Will he go to heaven?) or we may care about his future actions, which can also be influenced by that internal orientation.
the award, he looks in the flag's general direction. Though their external actions are quite similar when the anthem is played, the first ballplayer possesses much more respect for flag and country than the second ballplayer. The first ballplayer's actions sincerely or genuinely reflect his feelings, while the second ballplayer's actions do not.

As suggested above, subtle differences in action can be deeply indicative of whether an external action is motivated by respect. It is one thing to peer intently at a flag, and another thing to gaze in a flag's general direction. At a school with a dress code, it is one thing to wear a tie; it is another to wear it slightly askew. It is one thing to offer someone a greeting; it is another thing to offer someone the same greeting in an ever-so-slightly condescending tone. The line between a respectful and a disrespectful act is often quite thin, and a slight modification can turn the former into the latter. As many rebellious teenagers know, one of the greatest signs of disrespect is to transform a respectful act into a disrespectful one, for that transformed act implicitly carries two statements that join powerfully: "I know how to treat you with respect" and "I choose not to."

The thin line between a respectful and a disrespectful act applies not only when a party intends to be disrespectful (as with a rebellious teenager), but also in the more common case where a party feels disrespectful towards another party but does not intend to show it. If one does not feel respectful internally, one's externally-respectful actions often will be negated by the attitude with which one conducts the actions. Small, subconscious cues will give one away. Hence, in order to act respectfully, it is often requisite that one possess a respectful attitude.

Consider too the question of whether an external sign of respect is motivated by esteem or by fear. Imagine a courier sent to deliver a message to a ruthless dictator. In her heart, the courier despises the dictator, yet when meeting him she bows low and addresses him as, "Your Majesty." A dictator who puts a premium on maintaining his position may care far more about the external signs of respect than the courier's attitude. However, are we to say that the courier truly respects the dictator? Putting aside for simplicity the possibility that the courier follows such courtesies out of a respect for general social conventions, likely the courier bows to the dictator and addresses him as "Your Majesty" out of fear rather than warm regard. The same applies in teaching. Some teachers are treated with external signs of respect because students fear them, while others receive such signs because students revere them. While it is possible to use the word "respect" to describe a negative attitude motivated by fear, as in "respecting a

41. Sometimes subtle differences can also be very difficult to interpret. Perhaps the second ballplayer was a veteran who, when gazing at the flag, was recalling former comrades lost in battle.
42. See supra note 10.
43. The mixed motive case, where one offers a gesture of respect both out of high regard or esteem and out of some other motive (e.g., fear of the consequences of failing to offer such a gesture) is no doubt common. For example, though the first ballplayer may genuinely feel respect for flag and country while saluting, he may also fear losing his job if he does not.
dangerous animal," such heed or care is quite different from high regard or admiration.

Volition is a key ingredient of respect. Just as religious crusaders could force external conversions upon the threat of death but not internal conversions of the heart, so too is an authority incapable of creating esteem-based respect through external force. This observation implicates a very important topic: what can an authority, such as the legal system, do to promote respect? If the goal is to promote esteem-based respect, using external force to achieve it appears futile, for esteem cannot be commanded. But what if an authority sought merely to achieve externally-respectful actions rooted in the fear of sanctions?

Even then there are challenges. As respect is found in subtleties, specifying precisely how a party must behave to act respectfully can become self-defeating. Imagine a school principal who, seeking to promote respect for teachers, tells students that their statements to teachers must include “Ma’am” or “Sir” (e.g., “Yes, Ma’am” or “No, Sir”) or they will be punished. If the students adhere to that requirement but simultaneously smirk, the respect conveyed by those words is negated. An authority seeking to command respectful acts is a bit like a government seeking to collect tax revenue: if the taxpayer’s basic orientation is to “game” the system rather than pay a fair level of taxes, collecting taxes becomes a struggle.

A savvy authority might try to command such external acts of respect in broad terms. The principal might declare to students, “Act respectfully towards the teacher or you’ll be punished.” An employer might instruct employees, “No matter what the customer does, treat the customer politely or you’ll lose your job.” This implicates a further complexity: the vagueness of the command.

When principals instruct students or when employers instruct employees, that

44. This is similar to the matter of apology. Were an external power such as a court to order an apology, the sincerity and hence meaning of the apology would be doubtful. As Justice Pomeroy reasoned in denying a request for a court-ordered apology:

An apology is a communication of the emotion of remorse for one’s past acts. To order up that particular emotion, or any other emotion, is beyond the reach of any government; to assert the contrary is to advocate tyranny. If, perchance, the Commission, in ordering a public manifestation of remorse, should be indifferent as to whether remorse in fact exists but instead should desire only the outward act, then it would be either extracting a lie from those willing to lie (“I’m sorry,” but I’m really not) or asking the courts of this State to hold in contempt those who will not lie (“I’m not sorry and I will not say that I am”). Given the choice, I would rather hold in contempt the former, not the latter. But in my view the Commission should eschew purporting to order the expression of an emotion, whether or not the emotion is in fact entertained by the one so ordered.


45. Note, however, that people often come to develop respectful attitudes by performing and practicing respectful deeds. Frequently, the moral act precedes the moral orientation. The principal’s approach may be poor pedagogy for high school students, but sound pedagogy for elementary school students.

46. See infra note 181.
vagueness may be tolerable, for we give school officials and employers much discretion in how they handle students and employees. However, when punishments must be meted out according to legal standards, such vagueness becomes more problematic.47 If the law were to require that, "Parties within negotiation must act respectfully towards one another," such a requirement would be difficult to enforce. Perhaps a court could punish cases of grossly disrespectful acts (e.g., a vulgar tirade), but that is a very limited set. Sanctioning egregious behaviors falls far short of promoting the maximalist, aspirational goal of truly respecting others. It would be a bit like having a law requiring people to act kindly, with only the ability to punish those who commit murder. Further, such sanctioning could only generate fear-based, rather than esteem-based, actions.

Recognizing that esteem cannot be externally commanded leads to another question: If one's respect cannot be commanded by others, can one even command oneself to respect others in a negotiation?48 This is a critical question, for if the answer is "no," then the picture is grim. If one cannot even command oneself to respect others, regardless of whether respect is an aspirational norm, it may be an unachievable norm. Fortunately, there are sound responses to this question. These responses blur the dichotomized reason-versus-feeling paradigm common in Western thought and lead us away from understanding respect as a feeling (esteem) and towards understanding respect as chosen orientation.

Often we think that people have much control over their actions, but little control over their feelings (e.g., "Of course you were upset when Arnold insulted you, but you didn't have to punch him!"). Under such a view, commanding oneself to respect a person one dislikes would be an impossible task, for if respect is grounded in feeling, how could one force oneself to feel a certain way? Hume once expressed what was later to become the utilitarian view that, "Reason is, and ought to be the slave of the passions, and can never pretend to any other office than to serve and obey them."49 While, in my opinion, such a view neglects many of reason's important roles in the negotiation setting,50 at its core it has a valuable

47. See infra Part III (discussing void-for-vagueness considerations in negotiation ethics codes).
50. See Cohen, supra note 49.
insight: our feelings are not things we can simply command through mental actions.\textsuperscript{51} Hence, the challenge: even if one wants to respect another, if one does not feel respect for that other person, how is one to do it?

One's first recourse might be to turn to an action-based view of respect and argue that, if one cannot force oneself to possess certain feelings, then one should instead control one's actions by performing respectful actions and refraining from disrespectful ones. Yet such an approach is deficient because the importance of the respectful action is usually not the action itself but the attitude that it signifies. Just as the baseball crowd would be angered if it knew that self-advancement was the real reason for the second ballplayer's outwardly respectful acts, a counterpart who detects that one's outward demonstration of respect is feigned (and there is a good chance that she will) may well be offended. Further, even if one feigns respect with sufficient talent to fool the other party, surely such trickery cannot be morally praiseworthy.\textsuperscript{52}

A more helpful approach is to reject a dichotomized view of the human mind as strictly separated into two distinct parts, reason on the one hand and feelings (or passions, tastes or unconsidered preferences) on the other. While the historical development and entrenchment of this dichotomization are beyond the scope of this Article, reasoning and feelings cannot be tidily separated, but are better seen as in a process of dialogue.\textsuperscript{53} Suppose a person asks the moral question, "What preferences should I have?" thinks about it, and then decides to work on developing alternative preferences. Such is surely a proper role for reasoning.

\textsuperscript{51} If people could, we would live in quite a different world. Likely most people would be happy all of the time. If one could control one's feelings, why wouldn't one always choose to feel happy?

\textsuperscript{52} In the case of refraining from disrespectful acts (e.g., not interrupting one's counterpart), sincerity is less of a problem. When a person acts, one can ask whether they acted sincerely. When they refrain from acting, that question does not usually arise.

\textsuperscript{53} The study of the interplay between reason and emotions dates at least to Plato. \textit{See Phaedrus} ("Let us note that in every one of us there are two guiding and ruling principles which lead us whither they will; one is the natural desire of pleasure, the other is an acquired opinion which aspires after the best; and these two are sometimes in harmony and then again at war, and sometimes the one, sometimes the other conquers. When opinion by the help of reason leads us to the best, the conquering principle is called temperance; but when desire, which is devoid of reason, rules in us and drags us to pleasure, that power of misrule is called excess."). For an analysis of reason and emotions in ancient Greek thought, as well as other dimensions of their psychological cosmology, \textit{see} John M. Cooper, \textit{Reasons and Emotions: Essays on Ancient Moral Psychology and Ethical Theory} 449-84 (1999). \textit{See also} Philippe Nonet, \textit{Rhetoric and Skepticism: In Praise of Callicles}, 74 Iowa L. Rev. 807, 811-12 (1989). For a recent analysis of the interplay between reason and emotions, \textit{see} Jon Elster, \textit{Alchemicals of the Mind: Rationality and the Emotions} (1999). Note too the contrast between the subordinate position of reason to emotions expressed by Hume, \textit{see supra} note 49, and the potentially dominant position of reasons to emotions expressed by Plato. \textit{See} Plato, \textit{The Republic} 441C ("It will be the business of reason to rule, having the ability and foresight to act for the whole, while the spirited principal ought to act as its subordinate and ally ... When these two elements have been nurtured and trained to know their own true functions, they must be set in command over appetite, which forms the greater part of each man's soul and is by nature insatiatble. They must keep watch in case this part, by battening on bodily pleasures, grows so large and powerful that it no longer keeps to its own work, but tries to enslave the others and unrightfully usurp dominion, thus overturning the whole of man.").
Rather than seeing reasoning solely in an instrumental role — as the slave of the passions — reasoning and passions can engage in deeper dialogue, working to shape one another.  

To illustrate, imagine a discussion about a social taste, say, for football. Suppose we Americans as a society ask, “Why should we have such a strong social taste for football? It is violent, sexist in structure (men play it, and generally women only get to be cheerleaders), requires expensive equipment and often results in severe injuries due to frequent, high-impact collisions.” Soccer, on the other hand, can fulfill many of the positive purposes of football — exercise, entertainment, and building school spirit, etc. — without the drawbacks listed above, and can also help us better integrate into the international community. I concede that soccer too can be played in a violent manner, and that football preserves tradition and may help schools with fund raising, but, especially given the level of serious injuries resulting from football, are these benefits really worth it?” Such reasoning could lead us as a society to decide to cultivate a taste for soccer, say, by teaching children soccer in school.

Conversely, feelings can inform our reasoning. When one learns that African Americans are incarcerated at roughly eight times the rate of white Americans, feelings — whether outrage or compassion — may lead one to think deeply about our criminal justice system and racial stratification within our society generally.

54. Some non-Western cultures employ an integrated “heart-mind” concept in which reasons and feelings are intertwined. See, e.g., WILLIAM GESENIS, A HEBREW AND ENGLISH LEXICON OF THE OLD TESTAMENT 507-08 (Edward Robinson trans., 20th ed. 1866) (reflecting an integrated heart-mind view of the Hebrew word for heart, “Lev,” in Biblical writing) (“[W]ith the Hebrews as in Engl[i]sh, the heart is the seat of feelings, affects, and emotions . . . [yet it is also used i]n reference to the mode of thinking and acting . . . [a]s the seat of will, purpose, determination . . . [and t]o the heart is also ascribed understanding, intelligence, wisdom . . . and even [ ] the faculty of thinking”); HIS HOLINESS THE DALAI LAMA & HOWARD C. CUTLER, THE ART OF HAPPINESS: A HANDBOOK FOR LIVING 37-41 (1998) (reflecting an integrated heart-mind view in Tibetan Buddhism). I have been told that such an integrated heart-mind concept is also found in Chinese culture and language. Note that this integrated heart-mind concept is related to but distinct from mind-body integration now commonly discussed within American medicine. See, e.g., BILL MOYERS, HEALING AND THE MIND (1995).


57. See United States Punishment and Prejudice: Racial Disparities in the War on Drugs, 12 HUM. RTS WATCH REP. (Human Rights Watch, New York, NY), May 2000, at 2(G), available at (http://www.hrw.org/hrw/reports/2000/usa/Rcedrg00-01.htm#P167_28183) (last visited Sept. 27, 2000) and citations therein. Racial disparities are reflected in many other areas, including arrests (see, e.g., Robert Tillman, 25 CRIMINOLOGY 561, 567 (1987) (65.5% of black males in California between the ages of eighteen and thirty had been arrested)) and voting, for some state laws strip convicted felons of voting rights. See Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States, THE SENTENCING PROJECT POL. REP. (The Sentencing Project, Washington, DC), 1998, at 9080, available at http://www.sentencingproject.org/policy/9080.html (last visited Sept. 27, 2000) (“1.4 million African American men, or 13% of black men, are disenfranchised, a rate seven times the national average. In seven states that deny the vote to ex-offenders, one in four black men is
Such examples illustrate that beliefs and feelings are often intermeshed. A wealthy person who feels indifference when seeing a homeless person may think to himself, “I worked hard for what I have and I have the right to enjoy it, so don’t bother me.” In contrast, a person who feels compassion when seeing others in such need may think to herself, “We ought to take care of one another, for we are all in this together.”

Applying an integrated heart-mind picture allows us to see respect not merely as a feeling (though sometimes one will simply feel such respect), but more deeply as a choice of orientation which in turn will have ramifications for one’s actions. Consider the tough case where one dislikes the other party, say, because the other party has treated one unfairly. “Though I may not like him,” one might think to oneself, “he is still a person, and I will choose to treat him with respect. I will try to be honest and fair with him, and I will try to refrain from insulting, manipulating or coercing him.” The choice of respect is in some ways like the choice of forgiveness: one may still have certain feelings, yet one chooses a broader perspective. As with forgiveness, while the choice to respect can be done out of concern for the other person, it can also be done for self-benefit. Just as an injured person can say, “I don’t want to spend the rest of my life hating another person,” a negotiator can say, “I don’t want to spend the rest of my life using other people.” What feelings or motivations one will act upon, and relatedly, what actions one takes, can be matters of choice. In this regard, orientation may occupy something of a middle-ground between feelings and reasons.

Respect, in its deepest form, is a choice of how one wants to see other people. It is the process of striving to recognize the fundamental dignity of the other person and to act in accordance with that orientation. Though we often think of respect as a noun signifying certain actions (e.g., “Did he treat me with respect?”) or feelings (e.g., “She felt respect for her parents”), the core of respect is best understood as a verb. As the word itself suggests, re - spect is the process we undertake when we “look again” – when we challenge ourselves about how we want to see, and thus treat, others. This is not to negate the nounal aspects of respect when that process instantiates into particular external signs (e.g., courtesies) or internal feelings (e.g., esteem), but rather to identify its core.

Two further notes are in order. First, sometimes the height of respect is found in what one does not do. When deeply hostile parties must negotiate an agreement, refraining from a tirade can be a major accomplishment. On a more mundane level, listening to others without interrupting is challenging for many. A

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58. Respect derives from the Latin prefix “re” (again) and verb “specere” (to look).
59. As a goal-oriented process, duration and perseverance are no less critical to respect than achievement.
correlate to respecting others is refraining from disrespecting them.\textsuperscript{60}

Second, above I discussed the inherent limit to an external authority’s ability to induce by force one person to respect another. However, this is quite distinct from the matter of what one can do to induce others to be respectful towards oneself. Many have observed that respecting others is one of the best ways of getting them to respect you. As Sara Lawrence-Lightfoot writes, “Respect generates respect.”\textsuperscript{61} An encounter she had encapsulates this poetically:

[There is] a beautiful little East African girl whom I met in 1976 while traveling in Kenya. She is four years old and speaks four languages with astounding fluency. I meet her, ask her name, and she tells me, “I’m Tolani.” I love the name, its lilting, musical sound, and decide immediately that if I ever have a daughter, I will name her Tolani. Much later I discover the name’s meaning. In fact, it is a West African name, used by both boys and girls; and it means “one who gives respect and one who is respected.” How I love its meaning, its promise of symmetry, as much as its music. You get respect when you give it. When my daughter arrives four years later, I name her Tolani, and hope that she will live both sides of this resonant equation.\textsuperscript{62}

Respect is often symmetric: when we give it, it is usually returned to us.

D. IDENTITY, EQUALITY, VOICE AND AUTONOMY

Though we frequently think of ourselves as atomistic individuals, humans are social creatures and we define ourselves in significant measure through our relationships with others. If in a negotiation I see you as no more than a means, then I have not only defined you as an object, but I have also defined myself as a manipulator. How one negotiates helps define one’s identity.

Consider too the issue of equality. If in a negotiation I see you as an equal, then I should also treat you as an equal.\textsuperscript{63} This does not mean that I must value your interests equally with my own. You may care quite deeply about getting your house repainted, and I may quite properly be indifferent. Rather it means that I should see and treat you as an equal being. A qualitative study by psychologists Jory et al. on respect, or the lack thereof, in abusive intimate relationships and possible therapeutic interventions illustrates this vividly:

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60. I will return to this theme in infra Part II, where I argue that treating others with respect in negotiation is likely to be to one’s material advantage, rather than disadvantage.
61. See Lawrence-Lightfoot, supra note 21, at 10.
62. Id. at 4-5.
63. Piaget too links respect with equality. “Just as unilateral respect results from the inequality of the valorizations between two individuals, mutual respect arises from the equivalence.” Piaget, supra note 31, at 119. See also Cynthia Lightfoot, supra note 38, at 180 (“[M]utual respect [ ] can only develop out of exchanges between individuals who consider themselves equals.”). On Piaget’s distinction between unilateral respect and mutual respect, see supra note 38.
Most of the [30 abusive] men interviewed had internalized beliefs that reflected the hierarchical language of power, equating respect with submission, obedience, and deference rather than intrinsic worth. Many [abusive] men seemed capable of feeling good only if their partner felt bad, and putting down one’s partner appeared to be the prescription for feeling good in many of the men. What is required with abusive men, once some level of accountability has been obtained, is a rethinking of what respect is and how one expresses it. It is critical that the therapist identify the essence of respect based on intrinsic worth rather than power.\(^6\)

Where one party to a negotiation does not treat the other party with respect, we can draw a negative inference. Either the first party does not view the second party as an equal — a position to which few would admit, though many implicitly harbor these views — or the first party has a very low assessment of the dignity of all people.

Related to equality are the matters of voice and autonomy. Subjects, unlike objects, have voices and subjects, unlike objects, have wills.\(^6\) If I expect to be listened to, then I should be obliged to listen to you. If I expect my suggestions to be taken seriously, then I should be obliged to take your suggestions seriously as well.\(^6\) If I expect my autonomy to be respected, then I should respect your autonomy. To illustrate, consider an example from the history of labor relations of a negotiation strategy known as Boulwarism that has been found illegal. As Mnookin et al. describe:

Lemuel R. Boulware, General Electric’s Vice President of Relations Service from 1946 to 1960, informed the unions that he would carefully study market conditions and what comparable employees at other companies were paid and then make a “fair, firm [and also final] offer.” A critical component of GE’s strategy was a contemporaneous communications program selling its proposal to its employees and the general public. This also served as a commitment


\(^6\) For an outstanding presentation on human objectification, that is, of treating people merely as a means, see Martha C. Nussbaum, Objectification, in Sex and Social Justice 213 (1999). Nussbaum lists seven dimensions of treating people as objects: instrumentality, denial of autonomy, inertness, fungibility, violability, ownership, and denial of subjectivity (i.e., “The objectifier treats the object as something whose experience and feelings (if any) need not be taken into account[,]”). Id. at 218. I might augment Nussbaum’s list with denial of voice, a concept related to autonomy. See also Catherine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 55 (1987) (“A subject is a self. An object is other to that self.”). On the importance of voice to being a subject rather than an object, see Bell Hooks, Talking Back: Thinking Feminist, Thinking Black 9 (1989) (“Moving from silence into speech is for the oppressed, the colonized, the exploited, and those who stand and struggle side by side a gesture of defiance that heals, that makes new life and new growth possible. It is that act of speech, of ‘talking back,’ that is no mere gesture of empty words, that is the expression of our movement from object to subject—the liberated voice.”).

\(^6\) As Stephen Carter writes of civility, which for Carter is similar to respect, “Civility requires that we listen to others with knowledge of the possibility that they are right and we are wrong.” Stephen Carter, Civility: Manners, Morals, and the Etiquette of Democracy 139 (1999).
strategy to lock the company into its own position. This technique was ultimately [successfully] challenged on the grounds that it was an unfair labor practice [under the National Labor Relations Act] that in essence amounted to a refusal on the part of General Electric to negotiate. 67

While arguments can be advanced both attacking and defending Boulwarism, no doubt one problem with Boulwarism from an ethical viewpoint is the lack of voice it allows the other party in the bargaining process. Beginning the bargaining process by insisting upon and committing to a “take-it-or-leave-it” offer allows the other party virtually no role in the dialogue.

How I see and treat you in a negotiation also helps to define who we are. People are not just individuals. They are also members of groups. If I deceive you to get what I want, then we do not have an honest relationship. If I intimidate you to get what I want, we lack mutual respect. Irrespective of whether our interests are largely convergent or divergent (and divergent interests can result in beneficial exchanges too), 68 how we negotiate with one another is critical to who we define ourselves and how others perceive us (e.g., how the public perceives lawyers). I may hold one view and you may hold the opposing view, but if we are members of a democracy we have a voting mechanism for handling such matters, and that mechanism significantly defines who we are. The same applies in families. How a family makes decisions, including, of course, how they negotiate with one another, is as critical to defining the family as are its actual decisions. A family where decisions are imposed through physical force is very different from one where problems are discussed and consensus developed. In the long run, how we interact, which includes how we negotiate, is often more important than how we dispose of any single issue.

E. DENIAL AND MASKING

I recently gave a guest lecture in a colleague’s professional responsibility class. At one point I asked the students, “How many of you think it’s wrong to manipulate other people?” Most of the hands shot up. I then asked, “How many of you think that manipulating other people is a significant part of lawyering?” 69 Most of the hands again shot up. “What do you make of this?” I asked. There was

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68. MNOOKIN ET AL., supra note 67, at 14.

69. My questions did not, of course, define the loaded term “manipulate.” Nevertheless, the contrast in the students’ response to the two questions is telling, for however one defines manipulate, there is little reason to think an individual student would have changed his or her definition between the two questions.
dead silence.\textsuperscript{70}

For a wrongful practice to persist, denial of the practice's existence, whether done consciously or unconsciously, is usually a requisite element, for facing a wrongful practice can force its reform. For example, not only did the American legal system impose the fiction that slaves were property rather than people,\textsuperscript{71} but we (white society) worked to hide the fact of slavery from ourselves. As Perea et al. observe, "Despite the protections of slavery in the Constitution, its drafters were careful not to use the word 'slave' at all, despite language that was understood by all to refer to slaves. The drafters . . . did not want to 'stain' the document by making any direct reference to slavery."\textsuperscript{72} This pattern is unfortunately common: there is both the primary crime and the secondary offense of denying the primary crime.

Several decades ago, John Noonan, Jr. argued that lawyers frequently impose masks upon people that hide their fundamental humanity.\textsuperscript{73} The system of slavery mentioned above is one of the most evil examples. Yet the practice, suggested Noonan, is prevalent throughout the law. When a law professor poses a hypothetical ("Suppose the promisor fails to deliver the note to the promisee,"') when a lawyer writes a brief ("Defendant denies all claims by Plaintiff,"') or when a judge dons a robe, the parties involved are not full people, but rather fragments of people, legal characters.

Masking of persons occurs in negotiation too. If, when negotiating, Jane sees Bill merely as a means to her ends, Jane is imposing a mask upon Bill. By seeing Bill as a mere means, Jane masks many central features of Bill's humanity, e.g., his autonomy, his dignity, and his fundamental equality with Jane. None are characteristics that a mere means or instrument possesses. Suppose further that, rather than facing her instrumentalization or masking of Bill, Jane would rather deny it to herself, and see herself as a humanistic person rather than as a manipulative person. It is clear that this practice can harm Bill, since seeing Bill as an object may lead Jane to manipulate, deceive, coerce, insult, or otherwise treat Bill wrongly. Yet what ramifications does this have for Jane's internal psychology?

Treating Bill as an object and simultaneously denying or rationalizing this to herself may be a source of psychological distress for Jane. As reflected in a variety of indicators, American lawyers experience exceptionally high levels of

\textsuperscript{70} There may be some complex, though in my opinion unsatisfying, answers to this question based upon notions of role ethics within an adversarial system; however, I suspect that many attorneys never face such questions squarely.


\textsuperscript{72} See Juan F. Perea et al., Race and Races: Cases and Resources for a Diverse America 104 (2000)

\textsuperscript{73} See Noonan, supra note 71.
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psychological distress. While there are undoubtedly many causes to this (e.g., economic pressures to produce many billable hours, the frequency of hostile interactions with others, etc.), part likely stems from the moral emptiness many lawyers experience. Though I would not claim that treating others as objects in negotiations is the root of such emptiness, objectifying others in negotiation and elsewhere (e.g., seeing one's client merely as a source of income) may play a part of it.

A study undertaken by a law student is particularly suggestive. Fourteen attorneys who were experienced negotiators from diverse practice areas were asked to respond to a series of complex negotiation ethics hypotheticals probing topics such as fraud by their client, puffery, candor with their client, exploiting mistaken assumptions, false demands, and so on. Their answers showed both tremendous variety as well as very limited knowledge of rules of profession ethics. Yet what was particularly interesting was the reaction of some to the interview:

A few attorneys were ambivalent about their answers. One peculiar reaction came from an interviewee who remarked that he felt like shooting himself

74. See Andrew H. Benjamin et al., The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse Among United States Lawyers, 13 INT'L J.L. & PSYCHIATRY 233 (1990) (documenting markedly higher levels of depression and alcoholism among lawyers than the general population). “[For the sample studied], law students and lawyers suffered from depression at a rate twice to four times what would be expected in the general population.” Id. at 234. “The percentage [of lawyers with alcohol problems] is almost twice the . . . rates estimated for adults in the United States.” Id. at 241. See also James J. Alfini & Joseph N. Van Vooren, Commentary: Is There a Solution to the Problem of Lawyer Stress? The Law School Perspective, 10 J.L. & HEALTH 61-2 (1995); Connie Beck, Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers, 10 J.L. & HEALTH 1, 2, 23 (1996) (“[B]oth male and female lawyers exhibit symptoms of distress, well beyond the norm, relating to such key areas as obsessive-compulsiveness, social alienation and isolation, interpersonal sensitivity, anxiety, and depression.” . . . “Approximately 30% of the male lawyers score above the clinical cutoff for interpersonal sensitivity, 28% for anxiety, 25% for social alienation and isolation, 21% for depression, 20% for obsessive compulsiveness, 13% for paranoid ideation, 7% for phobic anxiety, and 7% for hostility.”); Susan Daicoff, Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism, 46 AM. U. L. REV. 1337, 1347 (1997); Lawrence S. Krieger, What We’re Not Telling Law Students and Lawyers That They Really Need to Know: Some Thoughts-in-action Toward Revitalizing the Profession from its Roots, 13 J.L. & HEALTH 1, 4 (1998); Patrick Schiltz, On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 VAND. L. REV. 869 (1999).

75. On the link between ethical integrity and psychological wellness among lawyers, see Schiltz, supra note 74. On the contribution of disconnection from others, which relates to objectification of others, to psychological distress among lawyers, see Steven Keeva, Transforming Practices: Finding Joy and Satisfaction in the Legal Life 11-20, 31-33 (1999) (describing various forms of separation from self and others commonly found in contemporary legal practice as a profound source of dissatisfaction among lawyers as well as ways of overcoming it); Krieger, supra note 74, at 5 (“When we discourage the appreciation and expression of subjective qualities such as values, feelings, and conscience, we undermine our potential for satisfaction by attenuating our connection with the very faculties that define human life.”).

76. Dahl, supra note 3, at 180 n. 53.
77. Id. at 192-93.
78. Id. at 195.
following the interview. His responses to some of the questions may have rubbed his conscience the wrong way. One entertaining interviewee claimed that his motto was “screw the other side.” He expressed only passing regret that this was the nature of the real world.\textsuperscript{79}

While I fear for people who must negotiate with the second respondee more than those who must negotiate with the first, I fear for the second respondee more than for the first. The first recognized his moral demise once it was brought into his consciousness and was pained by it. The second may have “felt no pain,” but, like a ticking bomb, may someday pay a tremendous price for an amoral or immoral existence.

Next are what one might call the problems of isolation and inflexibility. By objectifying Bill, in all likelihood Jane precludes the possibility that she and Bill will enjoy a connected world of mutuality, but rather live in a “dog-eat-dog” one. Where she cannot see Bill’s humanity, cognitive dissonance may also prevent her from seeing other people’s humanity. Jane may lose her ability to distinguish between the humane and the inhumane, as well as the flexibility and sensitivity of judgment inherent in that process.

Jane may also come to mask herself to herself and thereby limit her own humanity. Consider by analogy the white racist who thinks blacks are inferior. The more he defines the other in terms of blackness, the more he implicitly defines himself in terms of whiteness, thereby masking his own fundamentally a-racial humanity. Though she may think of herself as a “smart negotiator” (a mask), the more Jane defines Bill as an object to be manipulated, the more she defines herself as a manipulator rather than a person. Through objectifying others, one also tends to objectify oneself. The external objectification has a correlate internal fragmentation.\textsuperscript{80}

F. GRAPPLING WITH MORALITY

Given both the moral responsibility to respect others in negotiation and (what I take as) the fact that many of us commonly fall short of this goal, objectifying the other person and simultaneously, though unwittingly, diminishing ourselves, one may at first see a dismal, pessimistic picture. If we had no capacity for change, then pessimism might be warranted. However, if one accepts a capacity for human change, then a more optimistic image of human existence can emerge. This is the image of people who define themselves by their willingness to grapple with the morality of their own actions and strive towards moral behavior. Self-examination vis à vis moral benchmarks, coupled with the willingness to try to improve, is amongst the noblest of human endeavors. As Socrates expressed in Plato’s Apology:

\textsuperscript{79} Id. at 197 (emphasis added).
\textsuperscript{80} See Jory et al., supra note 64, at 412 (describing self-objectification by abusive men).
If I tell you that this is the greatest good for a human being, to engage every day in arguments about virtue and the other things you have heard me talk about, examining both myself and others, and if I tell you that the unexamined life is not worth living for a human being, you will be even less likely to believe what I am saying. But that's the way it is, gentlemen, as I claim, though it's not easy to convince you of it.\textsuperscript{81}

We see this concept too in the story of Biblical story of Jacob's wrestling with an angel — perhaps himself, perhaps his conscience, perhaps morality, and perhaps God — before he meets and reconcile with his brother Esau. By such wrestling, Jacob is transformed, and subsequently renamed. As the Bible explains, “Your name will no longer be Jacob, but Israel [literally, God-wrestler], because you have struggled with God and with men and have overcome.”\textsuperscript{82}

Negotiation is quintessential a human encounter and provides not only a rich ground for grappling with another person, but also for grappling with one's own morality. Just as we experience many of our greatest fulfillments and frustrations in relationships, there too we experience many of our greatest moral challenges. Negotiation is one of those places where we, consciously or unconsciously, define ourselves as people.

The struggle to grapple with morality so as to change one's conduct is not an easy one. Socrates' trait of probing beneath his society's surface and revealing its hypocrisies led to his death. When grappling with the angel, Jacob wrenched his hip. For some, facing the extent to which one objectifies others in negotiation — which by implication may force one to face the extent to which one objectifies others generally — can be a painful experience. It involves facing the part of ourselves that would simply use others with disregard to all else. Yet the personal benefits from such struggle can be tremendous. Most obvious are developing one's moral integrity and, relatedly, one's sense of connectedness to other persons.

G. ETHICS GROUNDED IN HUMAN DIGNITY, NOT NEGOTIATION PROCESS

Before addressing some critiques of the orientation ethics argument made above, it may be helpful to distinguish this argument from some other arguments advanced over the past several decades about how one should negotiate. Fisher and Ury have advocated "principled negotiation" as a general approach to negotiations.\textsuperscript{83} In the legal realm, scholars such as Menkel-Meadow and Mnookin et al. have suggested that lawyers approach negotiation in a problem-

\textsuperscript{81} Quoted in Martha Nussbaum, Cultivating Humanity 15 (1997). See similarly Harry Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. of Phil. 5 (1971); T.M. Scanlon, supra note 55; Sen, Rational Fools, supra note 49.

\textsuperscript{82} Genesis 32:29.

solving rather than adversarial manner. While the above scholars are sensitive to the problem of how to negotiate with a party who is not principled or collaborative, no doubt one selling point for such approaches is that if both parties follow them, on average one would expect the parties to be made better off than if they do not. Such approaches, if bilaterally followed, solve the negotiation “prisoner’s dilemma,” i.e., though “defection” may be individually advantageous, both sides will be made better off if they assume collaborative roles than if they both assume combative roles. Further, it has also been powerfully argued, most notably by Menkel-Meadow, that adversarial litigation ethics should not be imported by lawyers to Alternative Dispute Resolution (“ADR”) mechanisms such as mediation and settlement negotiations, for such processes were not built upon adversarial paradigms. Accordingly, some may wonder how the argument for respect in negotiation presented above relates to these types of arguments that are grounded in visions of the negotiation or dispute resolution process.

Unlike these other arguments, my argument for orientation ethics does not depend on a particular view of the negotiation process. The orientational duty to respect others in negotiation is rooted in the other person’s humanity. Derivative upon the conception of fundamental human dignity, we have a general duty to respect other people, and the negotiation process does not excuse us of it. Note, however, that the prescriptive views of both non-legal and legal negotiations mentioned above may overlap with the duty of respecting other people. A “principled negotiator” who looks to legitimate standards to resolve conflicts rather than trying to create a power-based contest of the wills is more likely to respect the other party than one who does not. A lawyer who sees himself as a problem solver is more likely to listen to the other side and value her autonomy than one who sees himself as a gladiator. Hence, though not derived from these


85. See FISHER & URY, supra note 83, at 112-49; MNOOKIN ET AL., supra note 67, at 11-43.


87. See FISHER & URY, supra note 83, at 84-85.
particular views of the negotiation process, the ethics of orientation dovetails nicely with such approaches. 88

II. CRITIQUES AND RESPONSES

Some may contend, “If one wants to view the other party in the negotiation not merely as a means to one’s ends, but as a person, that is all well and good. However, negotiation ethics does not require it.” At this point, they might advance many possible arguments. Below, I address what I take to be the most significant arguments. The first four (arguing from reciprocity, prior harm, custom, and self-protection) are forms of excuse while the fifth (arguing from free market economics) is an affirmative justification. The arguments are: (i) “As the other side hasn’t treated me with respect, I’m not obliged to treat them with respect;” (ii) “Given the harm that the other side has done to me, I am not obliged to treat them with respect;” (iii) “That’s just how the game of negotiation is played. It’s a no-holds-barred game where each side just tries to get the best deal it can;” (iv) “If I try to treat them with respect, I’ll get ‘eaten alive’, for they won’t be trying to respect me and thus I will be disadvantaged in the negotiation;” and (v) “In negotiation, each side should see the other side solely as a means, because social wealth will be maximized when each person eagerly pursues his/her own self-interest.”

A. FOUR EXCUSES

1. RECIPROCITY – “AS THE OTHER SIDE HASN’T TREATED ME WITH RESPECT, I’M NOT OBLIGED TO TREAT THEM WITH RESPECT.”

On a basic level, the claim that the other person’s failure to respect me in the negotiation justifies my failure to respect him/her can be answered by the child’s maxim, “Two wrongs don’t make a right.” Consider an account of an altercation in part triggering the dismissal of former Indiana University basketball Coach Bobby Knight:

88. This might lead one to hypothesize that underlying such approaches rest conceptions of respecting persons. A parallel might be drawn here to the effort, frequently associated with Lon Fuller, to link civil procedure (akin to negotiation) to human dignity. As Fuller wrote, “[W]e are not interested merely in order - the order say of a concentration camp - but in an order that is just, fair, workable, effective, and respectful of human dignity.” LON FULLER, MEANS AND ENDS, IN THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON FULLER 47 (K. Winston ed., 1981). See also Richard B. Saphire, SPECIFYING DUE PROCESS VALUES: TOWARD A MORE RESPONSIVE APPROACH TO PROCEDURAL PROTECTION, 127 U. PA. L. REV. 111 (1978); Jerry L. Mashaw, ADMINISTRATIVE DUE PROCESS: THE QUEST FOR A DIGNITARY THEORY, 61 B.U. L. REV. 885 (1981). Listening to a person’s voice is central in respecting that dignity. See Melvin Aron Eisenberg, PARTICIPATION, RESPONSIVENESS, AND THE CONSULTATIVE PROCESS: AN ESSAY FOR LON FULLER, 92 HARV. L. REV. 410, 417 (1978) (“Where a decision will have a serious impact on a discrete set of persons, preservation of individual dignity points to the desirability of an ordering process in which those persons will be able to express their view of the matter to the decision-maker before the decision is made.”). See also supra notes 30 and 65.
[In explaining Coach Bobby Knight’s dismissal, Indiana University President Brand mentioned] Mr. Knight’s confrontation with Mr. Harvey, [a 19-year-old Indiana University freshman]. Mr. Harvey told the campus police that he bumped into the coach outside the arena and said, “Hey, what’s up, Knight?” The coach responded by grabbing Mr. Harvey by the arm and cursing him for his lack of respect, according to Mr. Shaw. 89

While the alleged altercation was certainly not a negotiation (at least in the conventional sense of the word), the moral is clear: generally speaking, another person’s failure to respect you does not justify your failure to respect them. In the above account, irrespective of whether Mr. Harvey’s bumping into Coach Knight and addressing him simply as “Knight” (rather than “Coach Knight” or “Mr. Knight”) was mildly or severely disrespectful, Coach Knight was unjustified in his response. The moral duty to respect the other person is not rooted in how they treat you, but in how they should be treated. Reciprocity is not the basis for treating the other party with respect, rather each person’s humanity is. One party’s incivility does not justify the other party’s uncivil response. 90

A hypothetical may illustrate this issue. Assume that you have scheduled a meeting with Bob at 6:00 p.m. at your office to see if you can settle a contractual business dispute. You chose 6:00 as you want to get home by 7:00 to have dinner with your family and you anticipate you can conclude the negotiation by then. 6:00 arrives, but Bob does not. At 6:15, you get a call. Bob says he’s stuck in traffic and will be there by 6:30. 6:30 arrives, but Bob still has not. At 6:50, he finally shows up.

How might you respond? 91 A few possibilities run through your mind: (a) externally “ignore” the delay and commence negotiating as though it were 6:00; (b) address the delay (e.g., “I’m expected at home for dinner shortly, and we don’t have adequate time to negotiate. I would like to reschedule our appointment. I would also like to say that I am troubled at having to reschedule this. I had set aside the time for us to meet from 6:00 to 7:00, and with your late arrival that time has been largely wasted.”); or (c) retaliate (e.g., make him wait an hour – not just 50 minutes – before your next meeting to convey the message that you aren’t someone to be pushed around).

The response that concerns me most is retaliation, and it does so for both pragmatic and, relatedly, ethical reasons. In conflict, parties commonly assume

89. Joe Drape, Knight’s Career Ended By an Abrupt Firing, N.Y. TIMES, Sept. 11, 2000, at D9. Brand said numerous other examples of misconduct, rather than this incident, were the basis of Knight’s dismissal. Id.

90. On the need for civility both within and beyond contemporary political life, see CARTER, supra note 66. See also RICHARD L. ABEL, SPEAKING RESPECT, RESPECTING SPEECH (1998) (describing the centrality of the pursuit of respect to contemporary political discourse); Robert C.L. Moffat, Incivility Everywhere!, in CIVILITY AND ITS DISCONTENTS (Jonathan Schonsheck & Christine Sistare eds., forthcoming 2001).

91. On responding to offensive behavior, see Craver, supra note 3; Andrea Schneider, Effective Responses to Offensive Comments, 10 NEGOT. J. 107 (1994) (suggesting strategies of ignoring, confronting, engaging and deflecting).
the worst about one another, and develop distorted images of their “opponents,” attributing to them hostile motivations that they do not in fact hold.  

For example, the party who has been made to wait may quickly fantasize that Bob was playing a malicious game, thinking to himself, “If I intentionally delay my arrival, I’ll do better in the negotiation. He’ll be more hungry and tired than I, for the ‘traffic’ I’m ‘delayed’ by is in fact a restaurant I quite like! As he’ll be distracted by the thought of getting home for dinner, and perhaps even by his anger at me, I’m sure I’ll get the best of him.” But how does one know that Bob was not simply stuck in traffic or perhaps delayed by a sudden emergency? Though some may see tit-for-tat as an optimal strategy prescribed by game theory, it does risk retaliatory cycles. Further, where there is error in a system, as there is in most human interaction, even from a game-theoretic viewpoint an approach of tit-for-tat with forgiveness may do better than straight tit-for-tat.

But what if one knows or at least strongly suspects that the other side has intentionally delayed his arrival to manipulate you? Even here ethics calls for restraint. While one’s anger is certainly understandable, the question becomes whether his disrespectful act justifies your treating him with disrespect, for the presumption is that one should treat all people with respect. What justification might one offer? Two common justifications are to cast oneself as a moral educator (“I’ll teach him a lesson”) or as a public defender (“By retaliating against him now, I’ll stop him from acting this way towards others in the future.”). Such reasoning, however, often rings hollow and simply serves to mask revenge. If one wanted to morally educate the other party, would not “calling” him on it communicate the message more clearly? For those who would cast themselves as public defenders, what reason has one to think that retaliating with disrespect will cause the other party to be more respectful of other people in the future? Such retaliation could cause the other party to be more disrespectful of other people. Disrespecting Bob may reinforce his beliefs that it is a dog-eat-dog world and that what he needs to learn is how to be an even tougher “dog.”

My argument is not that one should let oneself be mistreated. Rather, treating the other person like an object reduces you to his (presumed) level. The fact that he has acted wrongly does not excuse your acting wrongly. Before they fall from


95. I am reminded of a comment I once heard Warren Christopher make at a conference after his term as Secretary of State was completed. Christopher was asked how negotiating as Secretary of State compared to negotiating in the private sector. He said that one difference was that, as Secretary of State, he often had intelligence (spy) information indicating what the other side would argue during a negotiation before they argued it. Warren Christopher, Remarks before CPR Institute for Dispute Resolution, Sea Island, Ga. (May 31, 1998).
power, war criminals often try opponents in kangaroo courts. When we try war criminals, we should not. Their wrongful acts do not justify our wrongful acts. We should respect others because, as humans, they have a certain fundamental dignity. Disrespecting them when they disrespect us diminishes us. Our identity hinges upon whether we respect them, not whether they respect us.

2. PRIOR HARM—"GIVEN THE HARM THAT THE OTHER SIDE HAS DONE TO ME, I AM NOT OBLIGED TO TREAT THEM WITH RESPECT."

A colleague once shared with me the following experience. She was driving her car, slowing for a stop light, when another driver drove into her car from behind. The accident was clearly his fault. In her car sat her ten-year-old son. The boy sustained severe injuries. He was hospitalized for more than a month. When released from the hospital, he had permanent injuries. A lawsuit ensued, and eventually a settlement was negotiated through the attorneys. Despite the settlement, the mother remained quite upset at the other party. She was angered that her son was permanently injured. She was also angered that the other party had never apologized for injuring her son.\textsuperscript{96} Given the harm that he had caused her son, would the mother be justified in failing to treat the other side with respect?

There is no question that the mother’s anger towards the other party is understandable. Indeed, to ask that the mother not be angry at a person who had caused permanent injury to her son and who had never said he was sorry is unrealistic. Yet the question remains, does the injury that the other party caused her son, and hence her, justify the mother’s not viewing the other party with respect? And what of the case where the other party intentionally causes the injury? Suppose the other driver, in an act of cruelty, had purposefully driven his car into theirs with the goal of injuring the child. Can it be maintained that the mother whose son was intentionally injured must respect the attacker? Could the reverse be true? Might ethics call for disrespect in such cases?

I do not think that there are simple answers to these questions. However, I will offer some comments focusing on two different ways of framing the issue.

Some may frame the issue as follows.\textsuperscript{97} If one is to justify disrespecting the other party in such circumstances, why does the fact of their having caused you or someone you care about injury serve as such a justification? The original duty to

\textsuperscript{96} After the settlement, she approached the other party and said words to the effect of “My son spent over a month in the hospital and you never even said you were sorry?” The other party responded simply that he was afraid that if he apologized, it would be used against him in court. Such patterns have led to calls for evidentiary reforms for greater exclusion of apologies from admissibility in court. See Cohen, supra note 44, at 1009. See also Aviva Orenstein, Apology Expected: Incorporating A Feminist Analysis Into Evidence Policy Where You Would Least Expect It, 28 Sw. U. L. Rev. 221 (1999).

\textsuperscript{97} This framing of determining a hierarchy of rights and duties fits what Gilligan describes as the masculine approach to ethics. See Gilligan, supra note 29.
respect the other party was grounded not in their relationship with you, but in rather the fact of their humanity and the fundamental dignity that should attach to it. Respecting people one likes is of course easy. The challenge is in respecting people one dislikes. Can it be said that their injury towards you erases their humanity and the dignity that should attach to it? Consider by analogy an argument advanced by Rabbi Harold Kushner concerning perfectionism and love. Kushner asks whether, as imperfect beings, we are lovable either by God or people. Kushner suggests that if only perfect people deserve to be loved, then none of us deserves to be loved, for none of us is perfect. A similar argument may apply to respect: if only people who never hurt other people merit respect, then none of us would merit respect. Though we deplore the injurious act, we should still have respect for the humanity of the injurer.

One might respond that, while all of us, imperfect though we are, may be lovable, there is no requirement that one particular person must love another particular person. So too while one may have a general duty to respect others, if another person injures one severely, one is no longer obliged to respect that person. Under such an approach, the question becomes whether the injury was of a sufficiently severe nature so as to justify your no longer respecting them. Perhaps the mother whose son has been intentionally injured has no duty to respect the injurer, but the mother whose son has been unintentionally injured still has a duty to respect the other driver. Perhaps ethics cannot require what is emotionally infeasible, and, if the injury is sufficiently severe, then the emotional infeasibility justifies not respecting the other party. One might also here introduce the concept of prerogative: following a very severe injury, the injured party is no longer morally bound to respect the injurer, but still may do so if she wishes. Note too the linkage with forgiveness: many see forgiveness following an injury as the injured party’s prerogative.

One critique of this view is the knife-edge way in which respect would work. Suppose we have a scale judging the severity of injuries, A being the least injurious and Z the most injurious. Suppose further that we said that for all injuries more severe than injury M of being punched the injured party is released....
from the duty to respect the injurer, but for all injuries less severe than M the injured party is bound by that duty. It may be easy to see why an injury like looking askance at someone (B) does not justify the release from the duty to respect the injurer and why an injury like torture (Y) would. Yet is it just that the injury of being kicked (N) completely releases one from respecting the other person but after the injury of being slapped (L) one is fully bound to respect the other person? The non-incrementalism of such responses is problematic.\textsuperscript{103}

Arbitrary boundaries should not drive substantive conclusions.

Rather than attempting to resolve the questions of ethical hierarchy of whether a severe injury releases the injured from the duty to respect the injurer, and, if so, how severe that injury must be, a second and perhaps more useful approach is to frame respect as a goal-oriented \textit{process} of incrementally trying to see the fundamental dignity of the other person more than one is naturally inclined. Recall the understanding of respect as a verb, of “looking again” to try to see the other as a person. What would such an understanding imply where a person has injured you? In such circumstances, the duty to respect the other party is in large part a duty to make a good faith internal effort to advance, if only incrementally, the degree to which one sees the fundamental dignity of the injurer. Whether one has tremendous anger following a severe, intentional injury or is only mildly bothered by a slight, unintentional one, the injured party may still be able to take such an incremental step.

There are several benefits to this. First, like a prayer for peace in the midst of war, by maintaining a goal of respect, one helps to maintain one’s own identity as a respectful person. Even if one cannot achieve the goal fully at the time, it will not be lost altogether. Second, having a goal of trying to respect the injurer can be a useful prompt in the process of forgiveness.\textsuperscript{104} Psychological research has shown that empathy — seeing the world from the other party’s perspective — is a central explanatory variable in forgiveness.\textsuperscript{105} Trying to see the other party as a person with dignity rather than just an object of one’s hate can involve, \textit{inter alia}, trying to see the world from their perspective. Respect, like forgiveness, frequently involves a good dose of empathy. Trying to respect the injurer can be instrumentally useful to the injured party who seeks to move beyond the injury. Third, framing respect as an incremental step irrespective of the severity of the injury helps avoid the knife-edge quality of the hierarchical framing discussed

\textsuperscript{103} This problematic non-incrementalism points toward the neglected idea of the apportionment, rather than the binarization, of legal rights. See John E. Coons, \textit{Approaches to Court Imposed Compromise — The Uses of Doubt and Reason}, 58 Nw. U. L. Rev. 750 (1964); John E. Coons, \textit{Compromise as Precise Justice}, 68 Cal. L. Rev. 250 (1980).

\textsuperscript{104} By forgiveness, I mean psychological closure or release of anger rather than release from a debt. The injurer still owes compensation for the injury. See Cohen, supra note 44, at 1015 n.16.

above. Rather than thinking of the duty to respect other persons in binary terms — either you have the duty or you don’t — and asking under what circumstances one is relieved of that duty, it may be more useful to understand respect as an incremental duty to try to respect another slightly more than one’s natural inclination. This argument should not be pushed too far. In some cases (e.g., torture) to even ask that the injured party to take the incremental step of “looking again” at the injurer may be too burdensome. However, the injured party who does try to see the injurer as a full person may benefit tremendously, even after the most extreme of injuries.106

3. CUSTOM — “THAT’S JUST HOW THE GAME OF NEGOTIATION IS PLAYED. IT’S A NO-HOLDS-BARRED GAME WHERE EACH SIDE JUST TRIES TO GET THE BEST DEAL IT CAN.”

Who said that this is how the game of negotiation is played?107 In some organizations, people treat one another as mere instruments, in other organizations they do not. In some families, people abuse one another, in others they do not. In some circles, lawyers lie to one another, and in others they do not. Further, even if that is how the “game is played” in a certain setting, why should it be played that way? Centuries ago Hume denounced the “naturalistic fallacy” of concluding that because the world is a certain way, that is how it should be.108 Recall Holmes’ quip, “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from a blind imitation of the past.”109 The existence of a practice does not serve as its own justification, and merely asserting, “That’s just how it’s done,” carries little moral force.

The statement, “That’s just how it’s done,” also denies one’s responsibility. In some arenas it may be impossible for one individual to change the negotiation culture. Even if he wanted to make the trading process less frantic, a typical trader lacks the power to change the way trading is conducted in the New York Stock Exchange’s “pit.” Most negotiations, however, are dyadic encounters where an

106. See, e.g., Simon Wiesenthal, The Sunflower: On the Possibilities and Limits of Forgiveness (1998) (describing Wiesenthal’s struggles as a Jewish concentration camp prisoner with a request by a Nazi Karl on his deathbed for forgiveness). See also Rebecca Goldstein’s analysis (id. at 148-52) (praising Wiesenthal’s efforts to see the Nazi Karl as a full human being).

107. Related to this is the defense of tacit consent (“As the other party knows this is how negotiation is played, by choosing to negotiate, they have impliedly consented to being so treated.”). To use an analogy, while it is generally wrong to tackle a person, on the football field, tackling falls within the rules of the game; hence, by stepping on the field, the other party implicitly consents to being tackled. The retort to this position is that there is no reason to think that by deciding to negotiate a party consents to being lied to, intimidated, or otherwise treated like an object. For fuller responses, see Wetlaufer, supra note 3, at 1245-49; Arthur Isak Applbaum, Ethics for Adversaries: The Morality of Roles in Public and Professional Life 113-20 (1999).


individual has a great deal of power to shape the environment. Arbitrarily asserting, "That's just how it's done," cannot justify one's abdicating responsibility in such a setting. Further, how can one know that the other party is not simply saying to himself, "Well, I alone would not choose to behave this way, but given how I expect my opponent to behave, so too I will behave?"

4. SELF-PROTECTION — "IF I TRY TO TREAT THEM WITH RESPECT, I'LL GET 'EATEN ALIVE,' FOR THEY WON'T BE TRYING TO RESPECT ME AND THUS I WILL BE DISADVANTAGED."

Is treating the other party with respect when they don’t treat you with respect negotiating with “one hand tied behind your back?” If so, why should ethics require you to let others take advantage of you? Though some may reject this line of argument out of hand — ethics is about doing what is right, and if sometimes this involves self-sacrifice then that is simply the price of being an ethical person — I think this argument merits consideration. Upon inspection, however, this argument does not carry nearly the weight that many would attach to it.

Treating others with respect does not mean being a patsy. It is one thing to refrain from insulting other people, but a very different thing to let oneself be insulted. Treating others with respect by no means implies that one should let others take advantage of oneself. Nor does it imply that one should not competently advocate for one’s own interests. Just as an athlete can be fiercely competitive within the rules of a game, so too a negotiator can advocate for and protect himself while simultaneously respecting the other side. Further, in many, but not all, negotiation settings, one has the option of “walking away.” Being aware of this option can reduce the possibility that one will be taken advantage of or treated disrespectfully.

If one has a duty to respect others, then surely one has a duty to respect oneself. Such a duty of self-respect includes protecting and advocating for oneself.112 Recall Hillel’s questions, “If I am not for myself, who is for me? And when I am for myself alone, what am I?” Not only does an individual have a responsibility to “be for” himself, but, as the order of Hillel’s questions suggests, that responsibility may be ethically prior to his responsibilities towards others.113 For some individuals, such self-advocacy is trivial. For others, self-advocacy can be a

110. See Fisher & Ury, supra note 83, at 113-33; Douglas Stone, Bruce Patton & Sheila Heen, Difficult Conversations: How To Discuss What Matters Most 147-62 (1999) (both emphasizing a party’s power to shape the negotiation process).
111. See, e.g., Wetlaufer, supra note 3, at 1219, 1234.
112. See Jory et al., supra note 64, at 410 (“Human respect is grounded in an awareness of the intrinsic worth of every human being and is innately connected to a healthy sense of self-worth.”). See also Cynthia Lightfoot, supra note 38, at 182 (emphasizing the need for both respect of others and self-respect to proper social interaction).
113. From a practical viewpoint this makes sense too: not only does the individual have the strongest natural incentive to be concerned with his own welfare, but generally he has the best understanding of how to promote it.
significant challenge in negotiation: many are better at standing up for the interests of others than they are for their own interests.\textsuperscript{114} At the same time, pursuing one’s interests should not be an unbridled process. Rather it should be subject to ethical constraints on how one should treat people. Indeed, a literal translation of Hillel’s second question is not, “And when I am for myself alone, what am I?” (which suggests a general duty to be concerned for others) but rather “And when I am for myself, what am I?” (which focuses on awareness of how one acts and who one is when one pursues one’s own ends).\textsuperscript{115}

Respecting the other party in a negotiation can often be to the respecter’s benefit.\textsuperscript{116} Listening to the other party can lead to creative, value-enhancing solutions. Recognizing the other party’s autonomy can result in agreements to which both parties will adhere. Being truthful with the other side can lead the other side to accept assertions or commitments that, absent such truthfulness, they would not. Where a negotiation has integrative potential, treating the other side with respect may help the parties discover that potential, which in turn benefits the respecter, not just the respectee.

Failing to treat the other side with respect can “poison” a negotiation.\textsuperscript{117} Negotiation is a two-way street, and if you don’t respect the other side, they may call off the negotiation. To illustrate, consider the “ultimatum game,” a famous and well-researched example from game theory. In the ultimatum game, one player (A) is given a sum of money, say $100, and is told to divide that sum between himself and B. A can divide that sum however he chooses, however A gets his share only if B accepts B’s share. For example, A may allocate $75 dollars to himself and $25 to B. B then gets to decide whether to accept the $25 or reject A’s offer and receive nothing. If B rejects A’s offer, A too will receive nothing, but if B accepts A’s offer, A will get $75.

How should A divide the $100? From a theoretical perspective, one might think that A should offer B only $1, or whatever is the lowest increment above $0, with the goal of keeping $99 for himself. If B is “rational” (where “rationality” is

\textsuperscript{114} See Erica L. Fox, \textit{Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation}, 1 HARV. NEGOT. L. REV. 85 (1996). A quick thought experiment can help illustrate this point. Imagine how you would respond if you were assaulted on the street. Now imagine how you would respond if you were walking with a loved one who was assaulted on a street. People often answer that they would fight more aggressively to defend the loved one than they would to defend themselves.

\textsuperscript{115} See http://mentsh.com/avotl-14.html (last visited Jan. 31, 2001) (“The common translation of the second question as ‘If I am only for myself, what am I’ is not accurate, and narrows the meaning.”).

\textsuperscript{116} As with the topics of assertiveness and empathy, a false opposition should not be created between pursuing one’s own interests and respecting others. See MNOOKIN ET AL., supra note 67, at 50 (“Most people experience empathy and assertiveness as being in tension with one another.”) and at 46 (“In our experience, the most effective negotiators try . . . to both empathize and assert in their interactions with others.”).

\textsuperscript{117} The child’s maxim “Stick and stones may break my bones, but names will never hurt me” notwithstanding; little is more provocative of anger and violence than shaming. See Thomas J. Scheff, BLOODY REVENGE: EMOTIONS, NATIONALISM, AND WAR (1995); James Gilligan, VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES (1996). Though disrespecting another in a negotiation usually does not rise to the level of shaming that person, disrespecting another — in slang, to “dis” — no doubt can trigger an angry response.
defined quite narrowly), when faced with a choice of $1 or $0, B should choose to take the $1. However, in empirical experiments, many B’s do not act that way. The offer of $1 strikes them as unfair, and they reject it. Accordingly, even if A is entirely self-interested and cares nothing about treating B fairly, A will usually do better by offering B far more than $1. As Mnookin and Ross conclude from their review of the empirical literature:

Two results from [empirical ultimatum game] research are [salient]. First, ultimatums offering the recipient less than 50 percent of the purse, especially ones offering much less than 50 percent, are frequently rejected even though the rejecting party thereby forfeits its only opportunity for gain. Second, the most common offer is a fifty-fifty split, and extremely unequal offers are relatively uncommon, which suggests that the party offering the ultimatum accepts the equity principle, or at least anticipates correctly that the other party would rather see the entire purse forfeited than accept a grossly inequitable division of the purse.\footnote{Mnookin & Ross, in ARROW ET AL., BARRIERS TO CONFLICT RESOLUTION, supra note 92, at 11.}

The general lesson is that failing to respect the other party can be to one’s own detriment, resulting in no agreement where a mutually-beneficial agreement was possible.\footnote{Consider as well Dean G. Pruitt’s finding, “Across ten [empirical negotiation] studies . . . the average correlation between joint benefit and measures of competitive behavior was -.34. How can this . . . be explained? The problem with competitive tactics may be in part that they block problem-solving behavior. Bargainers employing them are so busy pursuing their own interests that they do not see the possibility that both parties can win.” \textit{DEAN G. PRUITT, NEGOTIATION BEHAVIOR} 181 (1981). Note that Pruitt defined “competitive (pressure) tactics” as using (i) “put downs,” (ii) “positional commitments,” (iii) “threats” and (iv) “persuasive arguments [that in context were] essentially phony.” \textit{Id.} I consider at least (i), (iii) and (iv) disrespectful. Cf. Russell Korobkin & Chris Gutherie, \textit{Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way}, 10 OHIO ST. J. ON DISP. RESOL 1 (1994) (experimental finding that in certain circumstances an extreme, rather than a moderate, opening offer increased the likelihood of eventual agreement).}

Empirical research on legal negotiations also supports the view that treating the other party with respect is likely to be to the respecter’s benefit. Approximately two decades ago, Gerald Williams conducted a now-famous survey in which he asked lawyers to assess other lawyers as negotiators.\footnote{GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT (1983).} Two of his main findings, which have been reconfirmed in a recent study by Andrea Schneider, were that (1) attorneys with a cooperative negotiating style are generally seen as more effective negotiators than attorneys with competitive negotiating styles, and (2) ethical behavior is associated with effectiveness, rather than ineffectiveness in negotiation.

Williams surveyed lawyers practicing in Denver and Phoenix and asked them to describe the characteristics of the lawyer with whom they had last negotiated (the assessed lawyer) as well as that lawyer’s effectiveness. Based on the characteristics described, Williams divided these 351 assessed lawyers into two types: those with
cooperative negotiation styles and those with competitive negotiation styles. While there are some important criticisms of his approach, his results are nonetheless striking.\textsuperscript{121} Sixty-five percent of the assessed lawyers had "cooperative" negotiating styles while only 24% had "competitive" negotiating styles, thus refuting the popular vision of lawyers as predominantly adversarial negotiators. Further, of the assessed lawyers with cooperative styles, 38% (of the 65%) were seen by their colleagues as effective negotiators, 24% were seen as average negotiators and 2% were seen as ineffective negotiators. Conversely, of those with competitive styles, 6% (of the 24%) were seen as effective negotiators, 10% were seen as average negotiators, and 8% were seen as ineffective negotiators.\textsuperscript{122} In short, far more attorneys were cooperative rather than competitive, and cooperators were far more likely than competitors to be seen by their peers as effective.\textsuperscript{123}

Williams’ study also helped refute the view that ethical negotiating behavior was ineffective. Williams observed that both cooperative negotiators who were assessed effective and competitive negotiators who were assessed effective were also seen as, “ethical, trustworthy and honest, thus dispelling any doubt about the ethical commitments of effective/competitors.”\textsuperscript{124} He concluded that:

Although literature on professional responsibility generally argues that high ethical standards are a precondition to success in practice, many law students and some practicing attorneys continue to believe or suspect that they must compromise their ethical standards in order to effectively represent their clients and attain success in practice. The findings of this survey suggest such compromises may be not only unnecessary, but actually counterproductive to one’s effectiveness in negotiation situations.\textsuperscript{125}

Ethical negotiation was thus also effective negotiation.

\begin{itemize}
\item \textsuperscript{121} See, \textit{e.g.}, \textsc{Leonard L. Riskin & James E. Westbrook}, \textsc{Dispute Resolution For Lawyers} 209-10 (1997) ("Some limitations inhere in the nature of [Williams'] study. First, the 'patterns' [of cooperative and competitive negotiation styles] are an amalgam of goals, strategies and tactics and, thus, are somewhat imprecise. Second, and more important, the adjectives and the ratings impute characteristics to other lawyers which may not accurately reflect the other lawyers' true approach. Thus, for instance, an opponent you perceive as extremely cooperative may be using charm to disarm you and obtain confidential information."). I note as well the possibility of sample selection bias. In both Williams’ study and Schneider’s study discussed below, the data was gathered through voluntary surveys. The response rate to these surveys was 35% in Williams’ study and 29% in Schneider’s study. See \textsc{Williams, supra} note 120, at 138; Schneider, \textsc{Perception, Reputation and Reality, infra} note 126, at 25. I wonder whether the majority of attorneys who chose not to respond to the surveys had similar experiences to those who did. For example, were attorneys more likely to respond if they had had pleasant, “cooperative” encounters with their negotiation counterparts than if they had had adversarial ones? Such issues notwithstanding, these studies have yielded valuable findings.
\item \textsuperscript{122} \textsc{Williams, supra} note 120, at 19.
\item \textsuperscript{123} Being a cooperative negotiator is \textit{not} identical to respecting the other party. It is possible, for example, to be a competitive negotiator who respects the other party. Nevertheless, many cooperative negotiators are probably also respectful negotiators.
\item \textsuperscript{124} Id. at 27. “However, the priority of these traits is ranked much higher for [effective] cooperatives . . . than for [effective] competitives.” Id.
\item \textsuperscript{125} Id. at 27 (emphasis added).
\end{itemize}
Schneider's recent study of lawyers in Chicago and Milwaukee followed Williams' methodology and reconfirmed his results. Approximately 700 attorneys responded to her survey asking them to assess their negotiation counterparts. As with Williams, the majority of the assessed attorneys were seen as cooperative rather than competitive. In Schneider's study, 64% of lawyers assessed had "problem-solving" negotiation styles (akin to Williams's "cooperative") and 36% had "adversarial" negotiation styles (akin to Williams's "competitive"). Cooperative attorneys were far more likely to be seen as effective than competitive attorneys. "Respondents rated only 9 percent of their adversarial peers as effective ... [whereas] more than 50 percent of problem-solving lawyers were perceived as effective and only 4 percent of these problem-solving lawyers were seen as ineffective. Therefore, contrary to the popular (student) view that problem-solving behavior is risky, it is instead adversarial behavior that is risky." Once again, a cooperative approach to negotiation was generally seen as more effective than a competitive one. Further, when lawyers were asked to describe the characteristics of effective problem-solving negotiators, "ethical" was the most common adjective used. Others adjectives used were "personable" (3rd on the list), "trustworthy" (5th), "communicative" (9th), and "fair-minded" (10th). Similar results were found with adversarial attorneys. Adversarial attorneys who behaved ethically were far more likely to be seen as effective than those who behave unethically. Such results support the view that, whether one takes a problem-solving approach or an adversarial approach to the negotiation, respecting the other party is often to the respecter's material benefit. Hence, the criticism that by respecting others one will disadvantage oneself largely fails on its own terms.

Must this always be the case? Might not there be some negotiations where disrespecting the other party is to one's material benefit? For example, could there be highly-distributive negotiations where disrespectful tactics such as


127. Id. at 26 (from analysis of Table 3).

128. Id.

129. Id. at 26.

130. See Schneider, Exploding Negotiation Myths, supra note 126, at 60 (distinguishing between ethical adversarial attorneys and unethical adversarial attorneys). Ethical adversarial attorneys were seen, inter alia, as "firm," "forceful," and "argumentative" while still "ethical." Unethical adversarial attorneys were seen as "hostile," "rude," "sarcastic," and "deceptive." The former group was seen as far more effective than the latter. Reports Schneider, "75% of the unethical adversarial group is considered ineffective. Only [3% of the] attorneys in this group were considered effective. In comparison, the ethical adversarial bargainer is more likely to be average if not effective. 40% of ethical adversarians were ineffective, 44% were average and 16% were effective." Id. at 60.

131. See also notes 119 and 138 (describing Pruitt's research).

threats, lies, and coercion work to one's advantage? From Von Clausewitz's discussion of "total" war, threats, lies, and coercion work to one's advantage? From Von Clausewitz's discussion of "total" war,33 to Schelling's insights into commitment tactics,134 to White's assertion that deception lies at the heart of negotiation,135 many have seen the benefits to "hard" tactics in distributive settings.136 While negotiations are certainly not wars, might not such tactics be most effective strategically in some negotiations?137 That possibility certainly makes theoretical sense. If I can lie to you effectively and pretend that I have one of your competitor's offer's "in my pocket" that I don't, you may be willing to raise your offer. If I can intimidate you effectively, sometimes you will caw in.138,139

135. Though disputable, White's famous assertion is worth heeding:

Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand.
Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment.
The critical difference between those who are successful negotiators and those who are not lies in this
capacity both to mislead and not to be misled.

... Some experienced negotiators will deny the accuracy of this assertion, but they will be wrong. I submit that a careful examination of the behavior of even the most forthright, honest, and trustworthy negotiators will show them actively engaged in misleading their opponents about their true position. ... To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.

White, supra note 3, at 928. Note the linkage between White's view of negotiation as being rooted in misleading acts and concealment and the traditional topics on which most discussion of negotiation ethics has focused, viz., deception and disclosure. See supra note 3.

136. War should not, of course, be seen as a form of negotiation. It is precisely the opposite: unilaterally seeking to force a certain resolution through the use of power rather than via mutual agreement. However, war and negotiation are both forms of strategic interaction.

137. See Wetlaufer, supra note 3, at 1219 ("[W]e cannot say as a general matter that honesty is the best policy for individual negotiators to pursue if by 'best' we mean most effective or most profitable. In those bargaining situations that are at least in part distributive, a category that includes virtually all negotiations, lying is a coherent and often effective strategy. In those same circumstances, a policy of never lying may place a negotiator at a systematic and sometimes overwhelming disadvantage. Moreover, there are any number of lies, including those involving reservation prices and opinions that are both useful and virtually undiscoverable. Accordingly, if the policy we pursue is one of honesty, we must do so for reasons other than profit and effectiveness.").

138. Pruitt, supra note 119, at 181, briefly cites some empirical support for the efficacy of "hard" tactics in distributive negotiations ("Unequal use of competitive tactics leads to an agreement favoring the heavier user."), citing to D. L. Williams & S. A. Lewis, The Effects of Sex-role Attitudes on Integrative Bargaining, Paper Presented at the 84th Annual Convention of the American Psychological Association, Washington, D.C. (Sept. 1976). Most of the competitive tactics Pruitt describes [e.g., "put downs," "threats" and "persuasive arguments [that in context were] essentially phony" (see supra note 119)] are clearly disrespectful. Pruitt observes that such tactics risk sacrificing integrative gains. "Such victories [from competitive tactics] are likely to be pyrrhic in situations with integrative potential, because the use of competitive tactics ordinarily hurts both parties interest, interfering with the attainment of high joint benefit and, when limits are high, making it hard to reach behavior." On Pruitt's general finding that such competitive tactics harm joint gains, see supra note 119.

139. Some might argue, "If disrespectful negotiation tactics were not effective, why would we see them? Surely their use suggests their effectiveness." I am skeptical of the assertion that the existence of a practice (here, disrespectful negotiation tactics) proves the optimality of that practice. Suppose we discover that women
If such is the case — that sometimes there is a distributive price to be paid for respecting the other party in a negotiation — how is a person who wants to be ethical to respond? Might that person properly reason, “If people in this business are sharks, and I want to be in this business, then I must sometimes act like a shark too. It’s not how I would create the world, but it’s the world in which I must function. I cannot play it – and survive – with one hand tied behind my back. Fairness too, may even be on my side. If they disrespect me, we will arrive at fairer results if I disrespect them than if I respect them.”

While I cannot reject such a view entirely, it is worth differentiating between “defensive” disrespect and “offensive” disrespect. Instrumentalizing the other person so as to avoid being taken advantage of oneself or so as to produce fairer results differs from initiating that psychological process for one’s own strategic benefit. In the former case, one does not initiate the cycle of disrespect, and, as mentioned, there is the possibility that defensive disrespect will produce greater parity in the substantive outcome. In addition, there is the issue of future behavior. As Sisela Bok argued concerning lying, one of the great dangers of lying is that by lying in one area, one will grow accustomed to lying and begin to lie in other areas. The same danger is true, I believe, with disrespecting people. When a negotiator feels that he must defensively disrespect others to avoid being taken advantage of, perhaps he is under a duty at least to be aware that when so acting he is disrespecting a person. By facing the moral problem of such disrespect, rather than by ignoring or denying it, he can maintain greater integrity in a suboptimal world, as well as maintaining a vision of a better world.

Finally, the pure deontological position of one who decides to respect the other side despite the fact that this may be to his material disadvantage should not be discounted. Often people pay material prices for maintaining their ethical values. There is both nobility and integrity to such sacrifice. Consider the legend of Rabbi Akiba who, rather than renouncing his beliefs, suffered punishment:

[Around] the year 134 [C.E.] ... the Romans issued their drastic decree forbidding not only the practice but also the study of Torah [Jewish teaching]. When [he was] warned that he was courting death by continuing to teach [Torah] publicly, Akiba [who was then ninety five years old] replied with the parable of the fishes and the fox. The fox, coming to the river’s bank, suggested to the fishes that they might find safety from the fisherman by coming on the are paid, on average, only 70% of what men are paid for equivalent work. Suppose someone argued, “If women only earn 70% of what men earn for equivalent work, that must mean that men do the job 30% better, for if they didn’t employers would hire women to replace them.” Surely that argument is fallacious. At root the wage disparity undoubtedly reflects bigotry rather than different levels of skill. So too with negotiation. Even if many within our society treat others disrespectfully in negotiation, this alone does not prove that such behavior is a strategically optimal.

140. See Bok, supra note 23, at 25 (“It is easy, a wit observed, to tell a lie, but hard to tell only one. The first lie ‘must be thatched with another or it will rain through.’ ... After the first lies, moreover, others can come more easily. Psychological barriers wear down; lies seem more necessary, less reprehensible[.]”).
dry land. But the fishes replied, "If in the water which is our element we are in danger, what will happen to us on the dry land, which is not our element?"

"So, too," continued Akiba, "if there is no safety for us in the Torah which is our home, how can we find safety elsewhere?"

[Akiba was imprisoned and tried three years later.] He was found guilty [of teaching Torah] and sentenced to death. 141

Sometimes there is a material price to be paid for adhering to one's values. The spiritual reward of maintaining one's integrity can far outweigh any material sacrifice.

5. The "Free Market" Argument

Arguments 1 through 4 above offered largely-defective excuses for seeing the other party in a negotiation solely as a means. Now consider an argument that offers not an excuse but an affirmative justification. This might be called the "free market" argument. It can be roughly stated, "In negotiation, each side should see the other side solely as a means, for social wealth will be maximized when each party focuses on pursuing his or her own interest and leaves it to others to fend for their own interests." Though Adam Smith addressed matters of ethics, non-self-interested actions, and drawbacks to free markets much more than is commonly recognized, 142 a proponent of this view might well link it to Adam Smith's famous statement, "It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own self interest. We address ourselves not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages." 143

Such "free market" views have many supporters (and critics) within legal circles; 144 however, in addressing normative questions of how we should treat


142. Smith has been interpreted as much more of a free-market, laissez-faire economist than his writings indicate. For example, Smith has been remembered far more for his economic treatise, Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776), than for his other seminal work, The Theory of Moral Sentiments (1759). Further, his Wealth of Nations has often been selectively used to present a one-sided, "free market" view of Smith's writings. See Amartya Sen, On Ethics and Economics 21-28 (1987). Which of an author's ideas get accepted, and which rejected, within our intellectual canons is itself a fascinating matter of cultural editing and construction. See, e.g., Juan Perea, Democracy and Race: Tocqueville's Missing Legacy (forthcoming 2001) (discussing the removal of the largest chapter from the canonization of Tocqueville's Democracy in America — a chapter which, not coincidentally, focused on American racism).

143. Smith, supra note 142. See also Milton Friedman, The Social Responsibility of Business is to Increase Its Profits, N.Y. Times Mag., Sept. 13, 1970, at 32 (arguing that businesses should focus solely upon profit maximization and disregard "social responsibilities").

one another, such arguments are limited. Even accepting, arguendo, the claim that the free market produces economic efficiency, efficiency tells one nothing about equity, a topic of certain ethical relevance.145 If a poor person is starving and a wealthy person with an excess of food stands nearby, should the wealthy person offer aid? The answer to that question undoubtedly must be yes; however, under a free market view the answer may well be no — it depends only upon whether the rich person views it in his own interest to give the poor person food.

Asserting that people should self-interestedly pursue their own ends does not address the questions of under what moral and legal constraints they should operate when pursuing those ends. Take an extreme example like murder. Bill may grow richer if he kills Jim and takes Jim’s possessions, but this of course does not justify murder. Consider now a less extreme example. It may be acceptable to dangle an unreachable “rabbit” in front of dogs at a race track, yet many would judge it wrong to dangle “possibilities” in front of another during a negotiation that one has absolutely no intention of solidifying. Though self-interested actions coupled with the division of labor may often be economically beneficial, this tells us little about the limits or requirements concerning how people should treat one another.146 Current utilitarian economic models show tremendous indifference, if not a deafening silence, towards the matter of how one individual should treat other individuals. In such models, how one treats a person is essentially no different from how one treats an object such as an orange. Both are simply inputs into one’s utility function. Living an ethical existence requires sensitivity to how one pursues what one pursues.

The roots of seeing other people as mere objects in the pursuit of wealth run much deeper than contemporary economic theory, and it is worth taking a moment to mention two of them. These are (1) the history of human objectification for material advancement and (2) the over-reliance on materialism, especially comparative materialism, in the human search for psychological

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146. Consider Stephen Carter’s remarks about civility. “Civility requires resistance to the dominance of social life by the values of the marketplace. Thus, the basic principles of civility . . . should apply as fully in the market and in politics as in every other human endeavor.” CARTER, supra note 66, at 173 [italics removed].
and spiritual meaning. By no means will I treat these subjects fully. Nevertheless, these two roots are worth addressing. How we see and treat people in negotiation is an aspect of how we see and treat people generally. Changing the orientation we take to others within negotiation implicates these deep aspects of our culture and our self-understanding.

The history of human objectification for material advancement within Western society is long and repugnant. American slavery — a form of economic racism — is an extreme example, but there are many “lesser” forms of such profit-driven objectification, including colonialism (where the colonizer terms the colonized as an inferior to be used for his profit), sexism (e.g., the lower wages women receive for equivalent work), and the improper treatment of workers generally (recall that what we now term employment law was once called “master-servant” law). When considering the history of utilitarian ethics and associated economic works like The Wealth of Nations, it is noteworthy that these works were produced from the center of the British empire, a colonial power.

One can imagine that a colonizer like Britain needed to construct arguments to rationalize the practice of colonialization, which fundamentally treated the colonized as objects rather than subjects. What is striking for our

147. I intend no negative inference toward non-Western societies. My knowledge of those societies is simply far more limited.

148. Factors such as race and gender also influence negotiations. See, e.g., Ian Ayers, Fair Driving: Gender and Race Discrimination in Retail Car Negotiations, 104 HARV. L. REV. 817 (1991) (empirical evidence showing car dealers offered significantly better prices to white men than to that African Americans or women).

149. See ALBERT MEMMI, THE COLONIZER AND THE COLONIZED 1-18 (1965). “What is left of the colonized at the end of this stubborn effort to dehumanize him? He is surely no longer an alter ego of the colonizer. He is hardly a human being. He tends rapidly toward becoming an object.” Id. at 86. Memmi also stresses the impact of colonialization upon the colonizer, not just the colonized. Id. at 45-76. “Colonization can only disfigure the colonizer. It places before him an alternative having equally distasteful results; daily injustice accepted for his benefit on the one hand and necessary, but never consummated, self-sacrifice on the other.” Id. at 147. “Colonized society is a diseased society in which internal dynamics no longer succeed in creating new structures. Its century-hardened face has become nothing more than a mask under which it slowly smothers and dies.” Id. at 98-99. Memmi’s observations in some ways parallel the discussion of roles of masking and denial in negotiation in supra Part I. See also Kenneth B. Nunn, Law As a Eurocentric Enterprise, 15 LAW & INEQ. J. 421, 431 (1997) (“In Eurocentric culture, the world beyond the self is viewed as a collection of objects to be controlled. Indeed, in Eurocentric cultures ’[t]he most valued relationship is between person and object.’ Self-worth is often viewed in terms of the objects one has under control.”) (citation omitted).

150. For a fine analysis of this history, see SEN, supra note 142, chs. 1, 2. See also George J. Stigler, The Development of Utility Theory, 58 J. POL. ECON. 307 (1995).

151. Adam Smith, like David Hume (see supra notes 49 and 142), was a Scottish philosopher, and part of eighteenth century “Scottish Enlightenment.” Apart from a few years in France, Smith spent most of his life in Glasgow, Oxford, and Edinburgh. See George J. Stigler, Preface to Wealh Of NATIONS, supra note 142, at xiii-iv.

152. Today, the United States has taken over the British mantle as the West’s leading power. Note that the efficiency-based arguments offered by the largely American “law and economics” movement follow a similar path to their utilitarian British predecessors. A noble goal (i.e., efficiency, wealth, or social utility) is focused on with little attention typically to other important ethical or social values. (Smith himself did not make this mistake; however, he is often so interpreted. See SEN, supra note 142, at 21-24). The problem is not in asserting that such goals are of value, but in overlooking other important values.
purposes is that the pattern of treating other people solely as objects for one's material advancement maps squarely to the core ethical challenge of negotiation.

The human search for spiritual and psychological meaning is undoubtedly as old as humanity itself. No doubt this quest affects a significant part of the human psyche. In response, many have focused on material achievement. The pleasure sought from such pursuit can be either of a direct type ("I will be happy by possessing more goods than I currently do") or of a comparative type ("I will be happy if I possess more material goods than you."). The first approach might be called "simple materialism." The second might be called "comparative materialism."

Provided that it is appropriately bounded, I do not take issue with simple materialism. It is good for people to meet their material needs. It also is good for people to derive pleasure, and material consumption certainly can be a source of pleasure. Such consumption-based pleasure, however, should not be pursued with disregard to all else. Many would agree that it is misguided to make consumption the focus of one's life, that it is wrong to partake in wasteful or excessive consumption, particularly when others are in need, or (as was discussed above) that other people should be treated as mere objects in one's pursuit of wealth.

Comparative materialism, on the other hand, is almost always ethically problematic, yet it is also endemic to how many people approach negotiation. Before addressing the ethical issue, some cultural background may be in order.

Sociological research supports the prevalence of comparative materialism. Several decades ago, Richard Easterlin conducted a seminal study of the link between economic development and human happiness. Easterlin examined data on individuals from around the world and discovered that, on average, people within wealthy countries were not significantly happier than people within poor countries, however, wealthy people within a given country tended to be


154. The economic term "goods," as in "goods and services" is to some extend "loaded." The bivalent nature of the word "good" implies a built-in judgment, namely, that material goods are morally good. For criticism (more than just ambivalence) of such bivalent language, see Jonathan R. Cohen, Ruler's Rules, Right Rights, and "Civil" Wars: Language Games Reveal Legal Tensions (draft 2001). Rhetoric that uses terms with built-in, moral judgments inhibits meaningful policy discourse, for it undermines the articulation of reasons for policy positions (i.e., clear normative justifications). See Jonathan R. Cohen, Disentangling Rhetoric and Values, in Issues for the Millennium: Cloning and Genetic Technologies (Jensine Andresen ed., forthcoming 2001). Some of our free market terminology even reveals internally contradictory, oxymoronic properties calling for investigation, as with "free market" (where nothing is sold for free) and "human capital" (in what sense are humans capital?). Such paradoxical terms may reflect cultural blind spots. Id.

significantly happier than poor people within that country.\footnote{156} How is one to understand these results? Easterlin offered perhaps the simplest explanation, “The basic idea was stated quite simply by Karl Marx over a century ago: ‘A house may be large or small; as long as the surrounding houses are equally small it satisfies all social demands for a dwelling. But if a palace rises beside the little house, the little house shrinks to a hut.’”\footnote{157} For many people the link between material success and happiness seems to be a zero-sum one: what matters is that I possess more than you, not what I myself possess. Such a view is reflected in Western culture on many levels. Many foundational Biblical stories depict sibling rivalries (e.g., Cain and Abel, Isaac and Ishmael, and Jacob and Esau) where the characters appear to understand both Divine and parental love in zero-sum, materialistic terms.\footnote{158} Popular sports like basketball, football, and baseball also present this frame: implicit in the definition of one side winning is the other side losing.

In the context of negotiation, a paradox arises from comparative materialism.\footnote{159} If what it means for each of us to do well is to do better than the other, then, at least as to the distributive aspect of the negotiation, both of us cannot do well. In my opinion, such a game is ultimately spiritually unfulfilling for both the “victor” and the “vanquished”. Focusing on “doing better than” another to feel good about oneself is not a morally-grounded source of fulfillment, and hence not a source of lasting fulfillment either.\footnote{160}

\footnote{156} Id. at 99-108.

\footnote{157} Id. at 111-12. See similarly JAMES DUESENBERY, INCOME, SAVING, AND THE THEORY OF CONSUMER BEHAVIOR (1949) (presenting a ratchet-income hypothesis in which consumption is driven in part by the social effect of “keeping up with the Jones”). While Easterlin’s study received scholarly attention (see, e.g., W. Pavot & Ed Diener, The Affective and Cognitive Context of Self-Reported Measure of Subjective Well-Being, 28 SOC. INDICATORS RES. 1 (1992); Ed Diener et al., The Relationship Between Income and Subjective Well-Being: Relative or Absolute, 28 SOC. INDICATORS RES. 195 (1993)), it may not have received as much attention as it deserved. Part may stem from the implicit critique it raises to our general focus on economic growth: if people base their sense of happiness on being wealthier than others, having a general goal of economic growth becomes less important than one might initially think. See FRED HIRSCH, SOCIAL LIMITS TO GROWTH (1976); ADRIAN ELLIS AND KRISHNAN KUMAR, eds., DILEMMAS OF LIBERAL DEMOCRACIES: STUDIES IN FRED HIRSCH’S SOCIAL LIMITS TO GROWTH (1983). See generally Cohen, supra note 55, at 120-35 (discussing Easterlin’s results).

\footnote{158} See generally Harold Kushner, Cain and Abel: Is There Enough Love to Go Around?, in Kushner, supra note 98, at 119-41.

\footnote{159} Excessive simple materialism produces moral emptiness too. However, for simplicity, I focus here on comparative materialism.

\footnote{160} Consider Ecclesiastes’ account of the spiritual futility of objectifying people, excessive simple materialism, and comparative materialism:

I acquired male and female servants, and had servants born in my house, also I had great possessions of herds and flocks, more than all who were in [Jerusalem] before me: I gathered also silver and gold, and the treasure of kings and of the provinces: I acquired me singers and women singers . . . And whatever my eyes desired I did not withhold from them; I did not restrain my heart from any joy . . .

Then I looked at all the works that my hands had wrought, and at the labour that I had laboured to do:

and, behold, all was vanity and striving after wind, and there was no profit under the sun.

Ecclesiastes 2: 7-11.
III. LAWYERS AND OTHER AGENTS

The analysis above has focused upon the basic case of direct, principal-to-principal negotiations. Yet negotiations are often conducted through agents. In realms such as law, business, politics, and international diplomacy, negotiating through agents is the norm rather than the exception. For example, after a lawsuit has been initiated, it is common for the lawyers to conduct the negotiations on behalf of their clients. Observe too that whenever a corporate entity negotiates, by necessity it must do so through agents, that is, through particular individuals. Even if the president of a business conducts the negotiations herself, she is ultimately the corporation's agent. What implications does this have for orientation ethics?

Below I will consider this in two stages: (1) how should orientation ethics influence agents who negotiate on behalf of others, and (2) how should orientation ethics influence lawyers—a particular subset of agents with distinct professional norms—who negotiate on behalf of clients?

A. AGENCY

The fact of agency does not nullify the duty to respect the other party. As it is wrong for the principal to view or treat the other side as a mere object when negotiating, it is also wrong for the principal's agent to view or treat the other side as a mere object when negotiating. What is wrong for a person to do directly does not become right when s/he delegates the task. Role ethics do not facilely excuse the wrong.

What about the converse circumstance? Might the fact that the other side uses an agent to conduct its negotiations serve as a justification for treating that agent like an object? Here too the answer is answer no. Suppose that Dan is directly selling his used car to Ernie and that one accepts that it is wrong for Dan to lie to Ernie in that process. Now suppose that Dan is selling his used car to Fabulous Car Company and is negotiating with George, an employee of Fabulous. Must Dan treat George with respect even though George represents a corporation? At first one might think that Dan need not respect George, for the argument advanced above grounded the duty of respect in the

161. On the prevalence of negotiation through agents and the special challenges involved (e.g., the Janus-like challenge for an agent simultaneously involved in across-the-table and behind-the-table negotiation, the scope of the agent's authority, etc.), see Robert H. Mnookin & Lawrence E. Susskind, eds., Negotiating on Behalf of Others: Advice to Lawyers, Business Executives, Sports Agents, Diplomats, Politicians, and Everybody Else (1999).

162. See David Luban, The Good Lawyer (1983); David Luban, Lawyers and Justice xxii (1988) ("The key insight is that a role morality cannot deviate from common morality without a reason."); Applebaum, supra note 107, at 4-9, 259 ("In what way, then, should we take roles [e.g., agency in negotiation] seriously? The answer is clear: though roles ordinarily cannot permit what is forbidden, they can require what is permitted.").

163. See similarly Applebaum, supra note 107, at 7-8.
fundamental dignity of the other person, and George's principal, Fabulous, is not a person. However, the agent George is a person who deserves to be treated with respect. Further, when George negotiates on behalf of Fabulous, he ultimately represents the interests of the people behind that corporate name (e.g., the stockholders and the employees), and these people deserve to be treated with respect. Just as it is wrong to steal jewelry from an individual, it is wrong to steal jewelry from a department store. This is not to say that in all respects organizations are like people. While both may charge theft, an individual who has a necklace ripped from her throat may also claim assault, but a store that has a necklace ripped from a mannequin cannot. Yet, for most negotiating circumstances that I can envision, just as one's use of an agent does not relieve one of the duty to respect the other party, the other party's use of an agent does not relieve one of the duty to respect that agent.

B. LAWYERS AND ORIENTATION ETHICS

Above I have argued that employing an agent to conduct one's negotiations generally does not excuse the principal or the agent from the responsibilities of orientation ethics. Yet questions arise as to how this applies to lawyers, who are members of a distinct profession regulated by particular codes of professional ethical conduct. For example, if a lawyer is to be a zealous advocate for her client, might she be not only permitted but perhaps even required to see the other party to the negotiation merely as a means? And how should the profession as a whole handle the challenges of orientation ethics in negotiation? For example, could codes of professional conduct require lawyers to see their negotiation counterparts as people deserving respect?

C. LAWYERS ARE GENERALLY PERMITTED TO ADHERE TO ORIENTATION ETHICS

One might initially hope that codes of professional conduct would not only permit but require lawyers to view and treat the other party in negotiation with respect. As was discussed above, as it is wrong for a principal to view or treat the other side as a mere object when negotiating, it is wrong for the principal's agent to view or treat the other side as a mere object when negotiating. Lawyers are agents. Accordingly, from this abstract moral perspective, they too should be bound by this stricture.

Despite this moral backdrop, there is a serious question of whether, under existing codes of professional conduct, a lawyer is even permitted to see the other side as more than an object to be manipulated for his client's purposes. Both the Model Rules and the Model Code rest upon the conception that the lawyer is to
pursue the client’s interests, not the lawyer’s interests, and to do so zealously.\textsuperscript{164} This is stated most clearly in the Comment to Model Rule 1.3, “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” Indeed, one of the most famous expressions of this duty of zealous advocacy would suggest that, whenever it is to one’s client’s disadvantage, respecting other persons must be disregarded. As Lord Brougham stated:

\begin{quote}
[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.\textsuperscript{165}
\end{quote}

Hence, the question arises of whether this internal code-based duty of zealousness owed to the client overrides what one might call the external moral duty to respect the other party within the negotiation.\textsuperscript{166}

While neither the \textit{Model Rules} nor the \textit{Model Code} requires that the lawyer see the other party in negotiation as a person deserving of respect, neither forbids the lawyer from doing so either. However, if the lawyer anticipates that respecting the other party to the negotiation will be to his client’s disadvantage, under either the \textit{Model Rules} or the \textit{Model Code}, the lawyer should have an up-front conversation with his client about this.\textsuperscript{167} Let me explain.

Generally speaking, the lawyer is permitted to see and treat the other side with

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\textsuperscript{164} See \textit{Model Rules of Professional Conduct} Rule 1.3 cmt. 1 (2000) [hereinafter \textit{Model Rules}]; \textit{Model Code of Professional Responsibility} Canon 7 (2000) [hereinafter \textit{Model Code}]. I discuss here the \textit{Model Code} and \textit{Model Rules} for simplicity. Note that not all authorities use the language of zeal in describing the advocacy duty the lawyer owes the client. See, e.g., \textit{Restatement of the Law Governing Lawyers} §16 (2000) (“A Lawyer’s Duties to a Client – In General: To the extent consistent with the lawyer’s other legal duties and subject to the other provisions of this Restatement, a lawyer must, in matters within the scope of the representation: . . . (2) act with reasonable competence and diligence.”). There is an enormous literature on the ethic of zealous advocacy. For forceful arguments defending this ethic, see MONROE H. FREEDMAN, LAWYERS ETHICS IN AN ADVERSARIAL SETTING (1975); MONROE H. FREEDMAN, UNDERSTANDING LAWYERS ETHICS (1990). For fine arguments concerning the limits of this ethic and its role justification, see LUBAN, THE GOOD LAWYER, supra note 162; LUBAN, LAWYERS AND JUSTICE, supra note 162. On the limits of this ethic when lawyers engage in non-advocacy functions such as negotiation, see particularly Schwartz, supra note 3.


\textsuperscript{166} The duty of zealous advocacy relates of course to the duty of fidelity that the lawyer owes the client.

\textsuperscript{167} If the lawyer discovers this tension during the course of the negotiation and has not had an ex ante conversation with his client about it, he should attempt to consult with his client.
\end{flushright}
respect when negotiating. The same comment to Model Rule 1.3 that provides that a lawyer should zealously advocate for his client also provides that, "[A] lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued."\(^{168}\) Hence, the means by which to pursue the client's interests are generally matters of the lawyer's choice. Further Model Rule 4.4 ("Respect for the Rights of Third Persons") provides that, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person[.]" Accordingly, though the Model Rules certainly do not require it, if a lawyer wishes to respect the other party in a negotiation, generally speaking, he may do so.

The same holds under the Model Code. Disciplinary Rule 7-101 ("Representing a Client Zealously") provides, "A lawyer shall not intentionally: (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . A lawyer does not violate this Disciplinary Rule, however, by . . . avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process."\(^{169}\) Consider too Ethical Consideration 7-10, "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligations to treat with consideration all persons involved in the legal process and to avoid the needless infliction of harm."\(^{170}\) As with the Model Rules, under the Model Code, if a lawyer wishes to respect the other party in a negotiation, generally speaking, she may do so. The fact that, as was discussed earlier, respecting the other party is typically to the respecter's benefit further buttresses this view.

What about the "tough" case in which the lawyer believes that treating the other party with respect could be to his client's disadvantage? In this circum-

\(^{168}\) Model Rule 1.2 ("Scope of Representation") provides that, "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." MODEL RULES Rule 1.2. The Comment to that Rule provides in part, "Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or to employ means simply because a client may wish that the lawyer do so . . . . In questions of means, the lawyers should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected." (italics added). I do not understand the italicized section above to require that before an attorney can choose to treat the other party with respect, the attorney must raise this topic with her client and obtain her client's consent. In support of this view, I note the prior language of this Comment as well as the Comment to Rule 1.3 mentioned above. ("[A] lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.").

\(^{169}\) MODEL CODE DR 7-101 (emphasis added)

\(^{170}\) See also MODEL CODE Canon 8 ("A Lawyer Should Assist in Improving the Legal System") and EC 8-1 ("[The legal] system should function in a manner that commands public respect").
stance, under both the Model Code and the Model Rules, the lawyer is duty bound to discuss this with his client. Ethical Consideration 7-8 of the Model Code illustrates this well:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant consideration . . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible . . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by the Disciplinary Rules, the lawyer may withdraw from the employment.\footnote{171}

Note too the requirement of Model Code Ethical Consideration 7 - 9:

In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interest of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.\footnote{172}

Hence, if the lawyer believes that respecting the other party will harm his client’s interests, the lawyer should discuss this with the client directly. For example, at the time the client retains the lawyer, or, if needed, before or even during the negotiations, the lawyer might say to the client, “In negotiation, I am there to represent you. However, I will not do that by any means conceivable. I treat other people with respect in negotiations. I see them as people with their own interests too. On the whole, I think this approach does much better for my clients than if I try to manipulate the other party. But if you’re not comfortable with it, we should talk about it.”\footnote{173} While I expect that most clients would respect the lawyer who takes this position, if the client insists on a disrespectful course of action, the attorney might consider withdrawing from the case.\footnote{174}

\footnote{171. Model Code EC 7-8 (emphasis added). See similarly Restatement of the Law Governing Lawyers §20 (2000) ("A Lawyer’s Duty to Inform and Consult with a Client: (1) A lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer").}

\footnote{172. Model Rules Rule 1.2 cmt. ("The terms upon which representation is taken may exclude specific objectives or means [including those] that the lawyer regards as repugnant or imprudent.").}

\footnote{173. See Roger Fisher, A Code of Negotiation Practices for Lawyers, 1 Negot. J. 105, 106 (1985) (arguing that to avoid ethical conflicts in negotiating with the other party, the lawyer should have a prior conversation with his client concerning his approach to negotiation).}

\footnote{174. Some clients might have difficulty understanding the issue presented by the lawyer here, and lawyers should strive to communicate about the matter as straightforwardly as possible.}
D. SHOULD THE CODES OF PROFESSIONAL CONDUCT BE REVISED TO INCLUDE A DUTY OF RESPECT?

The American Bar Association ("ABA") passed the Model Code in 1969 and the Model Rules in 1983. There has since been much criticism of the ethical minimalism within these codes, especially the Model Rules, and within the provisions governing legal negotiations specifically. As noted, current sections of the Model Rules directly addressing negotiation require little more than that the lawyer refrain from assisting in fraud. The Model Rules even explicitly permit puffery about estimates of price or value as well false statements concerning a client's intentions to settle. The ABA is now undertaking its first substantial revisiting of these ethics codes ("Ethics 2000") since the development of the Model Rules led by its Kutak Commission roughly twenty years ago. Accordingly, some may ask whether lawyers' codes of ethics should be amended to require lawyers to respect others in negotiation and elsewhere as well. For example, might the ethics codes include language such as, "In negotiation as well as other matters, a lawyer should attempt to maintain respect for the dignity of all persons, including that of the opposing party and counsel?:"

175. For a brief history of American legal professional ethics standards over the past two centuries, see RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS AND THE PRACTICE OF LAW 4-8 (1995).

176. See Murray L. Schwartz, The Death and Regeneration of Ethics, 1980 AM. B. FOUND. RES. J. 953, 953 (1980) ("The Model Rules in their present form represent the culmination of a historical process that began a century and a half ago: the shift from articulating professional standards, suffused with ideas of morality and ethics, and enforced if at all by informal sanctions and peer pressure, to enacting comprehensive and explicit legislation attended by formally imposed sanctions for breach."); id. at 955, quoting Geoffrey C. Hazard, Jr., The Legal and Ethical Position of the Code of Professional Ethics, in SOCIAL RESPONSIBILITY: JOURNALISM, LAW, MEDICINE 7 (L.W. Hodges ed., Lexington, Va.: Washington and Lee University, 1979): "[Geoffrey C. Hazard, Jr.] has written of his task as reporter for the Kutak Commission [that generated the Model Rules], 'Hence, we need a code. But we should not call it a code of ethics. . . . Whatever it is called, the code will be legislation defining role and rules of role in the practice of law; it will not be ethics." See also LUBAN, THE GOOD LAWYER, supra note 162, at 17-18 ("[M]uch of the ABA [Model Code], its predecessors going back into the nineteenth century, and the pre-1970 literature on the [legal ethics] focus on virtue and character, rather than formal moral rules, as the decisive concern in lawyers' ethics."); Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 647 (1985) ("[T]he bar's insistence on minimal, enforceable standards [in the Model Rules] may have missed the mark."); Geoffrey C. Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239 (1991) (hereinafter Hazard, The Future of Legal Ethics) (describing the evolution of norms and rules within professional legal ethics).

177. See supra note 3.


179. See supra note 3.

180. The above language is meant only to be suggestive and not as a specific proposal. The section of the Model Code closest to this is EC 7-10 ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligations to treat with consideration all persons involved in the legal process and to avoid the needless infliction of harm."). A similar sentiment is expressed in the Preamble to the Model Rules, "[A] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.").
I will not attempt to resolve such questions here. Ethics codes are complex matters, and revisions to them, even minor revisions, implicate many considerations. Rather, let me offer a very rough sketch of what I see as the central debate.

If one takes the view that ethics codes should prescribe minimum behavioral norms whose breaches will be punished with sanctions, then one will likely be highly skeptical about attempting to promote the type of inner respect of the heart and mind discussed above among attorneys through ethics code revisions. The argument might run as follows. Consider by analogy calls for revising the ethics codes to include greater requirements of candor and fairness in negotiation. While candor and fairness are often considered ethically praiseworthy in negotiation and elsewhere, many have opposed codifying such ethical norms as professional requirements. They argue, inter alia, that (i) such higher ethical standards are unenforceable due to their inherent vagueness (e.g., “fair” is an imprecise term\(^{181}\)) and to the private, unmonitorable nature of the vast majority of negotiations, (ii) the attorney’s loyalty should lie fully with the client so as to promote the client’s confidence in the attorney, and (iii) caveat emptor is a workable system.\(^{182}\) The philosophy behind such opposition is that it is a mistake to pass rules that cannot be enforced,\(^{183}\) and, relatedly, that it is hypocritical for the legal profession to pretend to have loftier ethical norms or rules than it actually has.\(^{184}\) If, arguendo, higher standards of candor and fairness in negotiation are beyond our reach because of the difficulty of enforcement, establishing sanctions for breaches of respect would be even more difficult to codify. Did the lawyer see the other side merely as a means to an ends rather than as a person having his own interests? Did the lawyer treat the other party with respect? Even if an external authority such as a Court or Bar association wanted

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181. The desire for specificity in standards when imposing sanctions is reflected in the constitutional requirement that criminal laws not be “void for vagueness.” See Posters ‘N Things, Ltd. v. United States, 511 U.S. 513, 525 (1994) quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983) (“The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”) For arguments that fairness is too vague a concept to legally require of negotiators, see Hazard, supra note 3; Rosenberger, supra note 3. The Model Rules, however, do use the language of fairness in judging transactions between lawyers and their clients. See Model Rules Rule 1.8 (a)(1) (“A lawyer shall not enter into a business transaction with a client... unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client[.]”) (emphasis added). For an excellent analytical explorations of possible conceptions of substantive (as opposed to procedural) fairness in negotiation, see Howard Raiffa, The Art and Science of Negotiation 228-99 (1982); Howard Raiffa, Lectures on Negotiation Analysis 80-88 (1996).

182. See supra note 3.


184. Id. at 758, 787, and 788 (“[A]lthough some of the moral norms expressed in professional creeds may be the statement of high moral values, these are the very rules that are not enforced.”).
to sanction such ethical lapses, except for gross cases of incivility, detecting and proving such lapses with a degree of certainty that would merit sanctioning would be highly problematic. Further, even if orientational ethics could be monitored and sanctioned, ultimately respecting another person cannot be commanded but must be a chosen, volitional act.

Others argue that lawyers' ethics codes do, or can do, far more than prescribe minimum behavioral norms whose breaches will be punished with sanctions. Rather, such codes can also establish aspirational models for the proper practice of law, educative models that help define lawyers' self-understanding. Such new models or ideals can break the focal hold of the dominant ideal of zealous advocacy on professional behavior. And if our codes are to include such aspirational models, surely respecting others should form a part of that ideal. Supporters of this position might point to the non-advocacy functions that lawyers perform (e.g., negotiation, counseling), the rise of ADR processes over the past several decades, as well as lofty aspirational creeds that do exist in some jurisdictions. The model or ideal from the litigation context of the lawyer as a zealous advocate who, like a Ramboesque gladiator, shows no respect for the

185. See, e.g., ZTRIN & LANGFORD, supra note 175, at 316-23 (exploring whether there is a duty of civility among lawyers and presenting examples of gross incivility by lawyers).
186. See Hazard, The Future of Legal Ethics, supra note 176, at 1242 (“The legal profession’s basic norms are expressed both in its ‘narrative’ [ideals] and in its rules. There has been remarkable continuity in the substance of both.”).
188. See Schwartz, supra note 3 (arguing that different professional ethics should apply when lawyers perform advocacy and non-advocacy roles); Menkel-Meadow, Ethics in Alternative Dispute Resolution, supra note 86 (arguing that ADR processes require textured ethical analyses recognizing lawyers multiple roles); Kimberlee K. Kovach, Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic, 38 S. TEX. L. REV. 575 (1997) (discussing a good faith requirement for lawyers in mediation). See also MODEL RULES pmbl. (“[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client’s rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent as a spokesman for each client.”).
189. See TEX. R. OF CT., TEXAS LAWYER’S CReED – A MANDATE FOR PROFESSIONALISM (Nov. 7, 1989) (“The conduct of lawyers should be characterized at all times by honesty, candor and fairness.” “I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive tactic.”), quoted in ZTRIN & LANGFORD, supra note 175, at 321-22; CONTRA COSTA [CA] BAR ASSOCIATION, STANDARDS OF PROFESSIONAL CONDUCT (June 1983) (“[T]he following standards of professional courtesy describe the conduct preferred and expected by a majority of attorneys practicing in Contra Costa County in performing their duties of civility, professional integrity, personal dignity, candor, diligence, respect, courtesy, cooperation and competence.”), quoted in ZTRIN & LANGFORD, supra note 175, at 323.
other party has very deep cultural roots. But, even assuming, arguendo, this gladiatorial model is appropriate for a lawyer within litigation, why must it form the professional ideal for the lawyer in negotiation or other non-litigious processes? In settings such as negotiation and mediation, could not our ethics codes present an image of a lawyer who, in keeping with his loyalty to his client, acts with respect for the other party in his effort to solve his client's problem? If, arguendo, the disregard of other parties reflected in Lord Broughman's statement above formed an aspect of the model of the lawyer as a zealous litigator, might not respecting other parties form an aspect of alternative conceptions of legal practice that have received much attention over the past several decades, such as the lawyer as a problem solver or lawyer as statesman? Put differently, ethics codes revisions that present alternative aspirational models for lawyers might help "unstick" the legal profession's self-understanding away from excessive focus on zealous advocacy to include a richer array of professional self-conceptions which, in complementing the model of zealous advocacy, create varied professional ideals better suited to the varied roles lawyers play. As I said, I will not attempt to resolve these matters here. However, I hope the reader will have gained a taste the issues involved.

IV. PROMOTING ORIENTATION ETHICS

Ethics codes are not the only possible avenues for promoting better orientation ethics. At least two other possibilities deserve attention: (i) reputation-based economic incentives, and (ii) education.

A. REPUTATION-BASED ECONOMIC INCENTIVES

Even if one takes the position that failures of orientation ethics are generally beyond the sanctioning power of an external organization like a professional bar

190. See Lord Brougham's statement, supra note 165. See also Hazard, The Future of Legal Ethics, supra note 176, at 1244 ("The legal profession's basic narrative [of Brougham's unbridled zealous advocate] has been sustained over two centuries, notwithstanding pervasive changes in American society and the profession itself."); Leonard L. Riskin, Mediation and Lawyers, 43 OHIO ST. L.J. 43-48, 57-59 (1982) (describing and critiquing the lawyer's "standard philosophical map" built around the adversarial paradigm).


192. See generally Menkel-Meadow, Ethics in Alternative Dispute Resolution, supra note 86; see also Yarn, supra note 165, at 70 ("[O]ne of the reasons attorneys perform poorly as peacemakers is not merely from 'want of experience' but from want of a functional role model that strikes an appropriate balance between the seemingly contradictory activities of being both a peacemaker and an advocate, of having to compete and cooperate at the same time."); Rhode, supra note 176, at 648 ("[A] more ethically rigorous code might perform a salutary function by sensitizing professionals to the full normative dimensions of their choices.").
association, adverse consequences may still flow from disrespecting others in negotiation. Suppose A hoodwinks B into accepting a deal that is highly favorable to A and highly unfavorable to B. What may happen? First and foremost, B may refuse to deal with A in the future. The correlate of “using people” is that people feel “used”, and a person who feels he has been “used” may be unwilling to conduct future business. In the deal-making setting, the adverse impact upon A is apparent. Even in dispute resolution, adverse consequences can still flow from offending the other side. Disputes are usually resolved in stages. Offending the other party at the beginning of the settlement process can yield problems later. If the parties are to have a future relationship, disrespectful acts at the end of the negotiation process can poison that future relationship.

If A’s relationship with B does not provide a sufficient incentive for A to treat B with respect, A’s reputation may. The reputation for fair dealing can be a very valuable asset, both within business and within law. A lawyer who negotiates unethically risks damaging not only his personal reputation, but also his law firm’s reputation. Such reputational effects can provide very powerful incentives for ethical negotiation. It must be noted, however, that certain lawyers may benefit from having precisely the opposite reputation. If what some clients want is a “no-holds-barred” lawyer who will do whatever it takes for that client to “win” — and no doubt some clients, either from anger, greed or the misperception that effective bargaining is codeterminous with “hard” bargaining do want such an attorney — such a reputation may benefit certain attorneys financially.

As reputation can provide a significant incentive towards better orientation ethics, questions arise as to what might be done, on either the structural or individual levels, to make better use of this incentive. On the individual level, negotiators can investigate their counterparts’ reputations before negotiations begin. Not only does this serve as self-protection, but this habit provides an incentive for all to adhere to good orientation ethics. On the structural level, we might create or reinforce structures that reward people with good reputations. Encouraging repeated interaction is no doubt one possibility, as are forming clubs or groups of negotiators that promise to adhere to high ethical standards or problem-solving behavior. Such a practice of “collaborative lawyering” already exists within certain parts of the bar, particularly in family law, and the suggestion has been made that it be extended generally. Institutions, structures,

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193. At times, this can pit the interests of one of a lawyer’s clients against her other (e.g., future) clients. For example, what should a lawyer do if misleading the other side in the instant negotiation would benefit client A but harm the lawyer’s ability to negotiate effectively for client B in the future? See Condlin, supra note 3.


and even cultures are not simply "givens" but can and should be shaped to meet important needs.

Reputational incentives are not panaceas. Some negotiations are one-shot, where reputational dynamics play little role. Further, some negotiators may be so skilled in "using" other people that those other people don't even know that they have been used. The materialistic incentive provided by reputational effects may also be of concern to some. The line between treating others with respect because it is ultimately to one’s material advantage and treating other people as mere instruments is a thin one, and both are distinct from the deontological justification for treating others with respect because they are people deserving of respect.

B. EDUCATION

Education provides the most promising avenue of promoting better orientation ethics in the long run, for ultimately seeing other people as having fundamental dignity must be a matter of human choice. There are many levels to this. Let me address several of the most salient.

On the most immediate level, questions of orientation ethics should be included within negotiation courses, both in law schools and elsewhere. The first challenge is to develop the student's self-awareness on matters of orientation ethics. Following a role play exercise, teachers should ask students questions such as, "How did you see (i.e., what stance did you have towards) the other party? How do you think they saw you? as partners? as equals? as adversaries? Were you trying to manipulate them in the negotiation? How do you feel about that? Were they trying to manipulate you during the negotiation? How do you feel about that? What do you mean by manipulation? If it is wrong to treat people unfairly, is it okay to treat people unfairly within a negotiation? Which do you think is more likely to get you a better result, treating the other side with respect or treating them with disrespect?"

Teachers can also address topics such as responding to disrespect without becoming disrespectful ("If the other party treats one with disrespect, is one justified in responding in kind? Are there ways to respond to someone who treats one with disrespect without being disrespectful and without getting taken advantage of?") and navigating principle-agent tensions (e.g., "If a lawyer wants to be a zealous advocate for her client, must the lawyer just see the other

196. In forming guilds for cooperative lawyers, there is always the risk that highly adversarial lawyers will enter such clubs. See Gilson & Mnookin, supra note 194, at 544 ([T]he members [of the cooperative club of lawyers] consistently described a smaller number of members as being more adversarial."

197. Developing the student's self-awareness already forms a significant part of negotiation pedagogy in law schools and elsewhere. See Ron S. Fortgang, Taking Stock: An Analysis of Negotiation Pedagogy Across Four Professional Fields, 16 NEGOT. J. 325, 327 (2000) (reflection and self-evaluation, as promoted through journal writing and other self-assessment tools, are central components of negotiation courses across professional fields.). On negotiation pedagogy generally, see that essay as well as the other essays in 16 NEGOT. J. (2000).

198. See Craver, supra note 3; Schneider, supra note 91.
party as a means to his client's ends?" "Can a lawyer treat the other party with respect in negotiation and still be a financially successful lawyer?") As was noted, such questions dovetail nicely with particular negotiation approaches (e.g., principled negotiation) and techniques (e.g., active listening) that are commonly taught.

Note too the inquisitive, Socratic approach to these subjects taken above. Unlike much education in which material is presented didactically, responding to questions that call for self-evaluation is a powerful, if not essential, technique for promoting self-awareness and self-cultivation.199 The goal, of course, is not for the teacher to tell each student what orientation the student takes towards others (even if the teacher wanted to, such would be an impossible task), but rather to help students realize that they can make conscious choices about how they want to act. The teacher need not, however, leave students "entirely on their own." Modeling for students different ways of behaving within negotiations (e.g., how to respond with respect efficaciously to someone who treats one disrespectfully) can help them learn ways to behave that, without external modeling, they may not be able to concretely envision. Note too that, if taken seriously, such self-evaluation and self-cultivation can be challenging, sometimes gut-wrenching, processes. This reflects the ultimately subversive — in the best sense of that term, namely, replacing what is wrong with what is right — nature of Socratic enterprise. Squarely facing one's ethical constitution and choosing to behave differently are not easy steps. I recommend that teachers use restraint when challenging students on these matters.

Discussions of respect should extend beyond law students to practicing attorneys and others who negotiate regularly. Whether in a continuing legal education program or most importantly around the office, lawyers need to discuss the pervasive habit of seeing other people merely as means. (Ethics code revisions might prompt such discussions.) Indeed, the habit of seeing others as mere means extends not just to how many lawyers see opposing parties, but to how they see each other, their clients, and at times even themselves. The psychological and existential challenges raised by this practice are profound — as are the risks posed by failing to address them.200

Client education is also needed. Here too lawyers can play an important role. Consider the following skeptical position. "Lawyers," a skeptic might argue, "just do what their clients want them to do. Until clients change what they want, lawyers will not change. Irrespective of the claim that agency does not provide an excuse for so doing, if their clients want them to treat the other side as mere

199. See generally Martha Nussbaum, Cultivating Humanity: A Classical Defense of Reform in Liberal Education (1997). "Three capacities, above all, are essential to the cultivation of humanity in today's word. First is capacity for critical examination of oneself and one's traditions — for living what, following Socrates, we may call 'the examined life.'" Id. at 9.

200. See supra Part I and notes 74-75.
instruments, then lawyers will. It is fine for individual lawyers to be high and mighty, but ultimately client preferences drive the market for legal services. What society really needs is clients who care that the other side is treated with respect or who see the process as about more than just money. While clients like that exist, they are rare.\textsuperscript{201} Many parties in lawsuits are very angry. People have been injured. Further, there is usually at least some irreducible zero-sum element to the process — the more the plaintiff gets, the less the defendant has left. It is unrealistic to expect that the client will want to respect the other party, and it is unrealistic to expect that, in the long run, lawyers can be successful doing other than what the clients want.” There is much truth in the observations that clients’ attitudes are significant drivers of the system and that parties often have hostile attitudes towards one another. However, there are significant countervailing factors too.

Many clients simply do not care how the lawyer goes about his work, including whether the lawyer treats the opposing party with respect. As the \textit{Model Code} and \textit{Model Rules} reflect, the means by which the client’s legal ends are pursued are ordinarily to be decided by the attorney. Most clients do not want to “micromanage” their lawyers’ choice of means.

A client who is too angry at the other party to treat the other party with respect is often very well served by a lawyer who can. One great advantage of lawyers and other agents is that they can buffer the principals’ hostilities, making it more likely an agreement will be reached. By dampening hostility, including disrespect, the lawyer can often do a great service for his client: the civility that hostile parties could not find when they spoke directly they can find by proxy through respectful lawyers.\textsuperscript{202} The act of hiring a lawyer to negotiate when one feels tremendous hostility can be deeply respectful.

Instead of simply accepting the “angry client’s” position towards the other party, in some cases the lawyer \textit{qua} counselor might compassionately challenge it. Not only may the lawyer advise the client that treating the other party with respect is likely to be to the client’s material advantage,\textsuperscript{203} but the lawyer might ask the client questions like, “When you look back at these negotiations or this litigation five years from now, what do you want to see? How will you want to

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\textsuperscript{201} See KEEVA, supra note 75, at 161-76 (describing a "new" genre of clients deeply concerned with the ethics of dispute resolution and litigation).

\textsuperscript{202} See Jeffrey Z. Rubin & Frank E.A. Sander, When Should We Use Agents? Direct v. Representative Negotiations, 4 NEGOT. J. 395, 397 (1988) ("[A]n important reason for using an agent to do the actual negotiation is that the principals may be too emotionally entangled in the subject of the dispute. A classic example is divorce . . . . Rather than confront each other with the depth of their anger and bitterness, the principals may do far better by communicating only indirectly, via their respective representatives."). See also Gilson & Mnookin, supra note 194 (arguing that lawyers can help clients negotiate agreements that clients could not reach on their own). Note, however, that lawyers can also inflame conflict, as when a client hires a lawyer simply to harass the other side.

\textsuperscript{203} See supra Part II.4. While this reason is weak morally, it may be persuasive.
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have conducted yourself?” Not all clients would be receptive to such a dialogue, but some might. As disputes provide opportunities for profound learning and growth, those who examine such issues may benefit tremendously.

C. OTHER REALMS

The challenge of seeing other people as people extends well beyond the topic of negotiation. As is now the case in some law firms, employers often see employees merely as interchangeable and disposable parts rather than as full human beings. Members of different races, religions, ethnic tribes, and nations frequently objectify those from other groups. Observe that the challenge of seeing the fundamental dignity of the person can run both from the more powerful to the less powerful and from the less powerful to the more powerful. Just as we can ask how do lawyers, doctors and teachers see their clients, patients and students, we can also ask how do clients, patients and students see their lawyers, doctors and teachers. The lawyer is a means to the client’s ends. But this does not mean that the client should view the lawyer, or the lawyer should view himself, solely as a means. The humanistic challenge posed by the object-subject tension is widespread.

The concerns of orientation ethics also extend beyond the realm of human interaction. Is our natural environment a garden to be tended or a resource to be consumed? Are animal pets inferior life forms to be “mastered” by pet “owners” or different life forms to be respected pet “guardians?” Does one view one’s work simply as a means for generating income or also as a way to contribute to society? In many realms, questions of orientation ethics are critical to defining both who we are and how we should interact with the world. Common to such questions is the challenge of seeing the “sacred” or the “ethical” when these exist simultaneously with the functional.

D. A RESPONSE TO REALIST SKEPTICISM

Madison once remarked that, “If men were angels, no government [and hence laws] would be necessary.”204 I suspect that some readers will react to this Article with a similar realist skepticism. “If people want to see others as more than objects in negotiation, that’s fine, and I suppose there might be a few such people out there. But most people are not going to do that. The ethical vision you have presented is an unrealistic, Pollyanna one. At bottom, you have talked about lofty ethical goals, but you have said that sanctioning will not work to promote them and that education ultimately provides the best hope. If men were angels that might work, but they are not, especially the worst of them.

I disagree. The argument presented here takes seriously, though largely rejects,
the claim that treating the other party with respect will be to one’s material disadvantage. It is sensitive to the reality of human emotions in offering an incrementalist view of respect, viz., of trying to look again and see the other person as a person. It recognizes the limits to promoting such ethics through sanctioning, as well as obstacles lawyers who want to pursue such ethics might face. Most fundamentally, it outlines a vision of ethical behavior in negotiation that rests on one’s own behavior rather than the other side’s presumed cooperation.

The greatest obstacle, in my opinion, to the claims of orientation ethics are not the challenges of how such ethics can be pursued and promoted, but whether we ultimately want to do so. What negotiation ethics we adopt, or fail to adopt, are matters of human choice. Are we willing to give up seeing others as mere objects and measuring our worth solely by our material achievements? If we do, there is great moral and hence psychological benefit to be had, irrespective of whether others follow that path.

CONCLUSION

Negotiation is both a basic social activity and an important ethical ground. It involves how we interact, often when our interests conflict. Most legal scholarship on negotiation ethics has focused on the topics of disclosure, deception, and (occasionally) fairness. This Article has argued for considering a different aspect of negotiation ethics, namely, the ethics of orientation. In negotiation, the other party is both a possible means towards one’s ends and also a human being. In response to this object-subject tension, I have argued that, as a human being with fundamental dignity, the other party should to be respected. I have characterized respect as a chosen orientation whose roots lie in the process of “looking again” to try to see, and hence treat, the other person as a person with fundamental dignity. This moral duty applies both to direct, principal-to-principal negotiations and to negotiations conducted indirectly through agents. Common counter-arguments that might be posed against such a duty are unpersuasive. I have also argued that existing codes of profession legal ethics do not provide an excuse for lawyers to disrespect others in negotiations and that education offers the most promising path for promoting such ethics within the legal profession and elsewhere.