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When *Not* to Negotiate

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Editors' Note: "*I shouldn't enter into negotiations at all" is an instinctive reaction of many disputants. Mnookin and Blum provide a useful theoretical framework to demonstrate what a party should consider before making this decision. While they suggest that sometimes it can be entirely rational to refuse to negotiate, their framework shows how disputants may often make distorted assessments, exaggerating the costs and underestimating the benefits of entering into negotiations. Their theoretical contribution is nicely complemented by Lisa Bingham's highly pragmatic treatment of related issues in the chapter that follows.*

The negotiation canon largely focuses on the benefits of the process, particularly when compared to more coercive means of dispute resolution. While conflicts characteristically involve distributive dimensions, negotiation—in contrast to litigation or warfare—provides value-creating, pie-expanding opportunities. Accordingly, negotiation scholars, drawing from a variety of disciplines, have set out to identify and offer prescriptive advice to overcome various barriers to the negotiated resolution of disputes.

We certainly agree that there are a variety of potential benefits that parties can only achieve if they enter into negotiations. The most conspicuous potential benefit is a resolution of the conflict that serves the interest of both parties to better their alternatives. Moreover, even if an agreement is not reached, the parties may through negotiation reduce the total costs of resolution, learn valuable information, sharpen their understanding of their own interests as well as those of their counterpart, and even improve their relationship. At the same time, however, we feel that the literature has often ignored the possible *costs* of entering into and conducting negotiations. Indeed, the negotiation process itself is not costless and it often entails risks. This inevitably raises the question that we wish to address in this chapter: how should a party to conflict decide whether the benefits of negotiation outweigh the costs? Sometimes these potential costs outweigh the potential benefits. In such circumstances, a rational party should refuse to negotiate, and instead, pursue a unilateral alternative.

Our goal here is to offer a decision-making framework that exposes the relevant considerations, both benefits and costs, that a party should appropriately take into ac-

count in thinking whether or not to enter a negotiation process. We then wish to use the same framework to expose the risk that parties to a conflict may too often go through the calculus in a biased way and refuse to negotiate in circumstances when in fact it might well make sense. Finally, we will show how the design of institutional arrangements may affect the relative costs and benefits of a refusal to negotiate, thus influencing parties' decision about whether to negotiate.

The focus of this chapter is on the decision whether or not to enter into a negotiation in the first place, and not decisions about the scope of a negotiation (what issues are "on the table" and what other issues are "non-negotiable"), or tactics within a negotiation that involve claims that one will negotiate no further.[1] For purposes of this current work, we define negotiation as a *joint decision-making process* involving *interactive communication* in which parties *lack identical interests but attempt to reach agreement*.[2] This definition requires active communication, as well as a mixed-motive game, in which not all interests are aligned.

A Framework for Decision-Making

While negotiation involves *joint decision-making***,** the decision whether to enter into negotiation or instead pursue some other alternative can be framed in terms of decision analysis, [Senger, *Risk*] in which a decision-maker *independently* assesses the expected costs and benefits of negotiation and its alternatives. As we noted above, many negotiation scholars have emphasized the potential benefits of negotiation, without due regard to its potential costs.

At the outset we wish to acknowledge that performing the cost-benefit analysis of entering into a negotiation is a challenging task for three reasons: (1) The consequences of different actions are inevitably marked by *uncertainty*: there is always some uncertainty surrounding the estimation of short and long-term costs and benefits of negotiation, as well as the potential costs and benefits of the disputant's alternatives to negotiation. Uncertainty also underlies predictions about the various parties' interests, possible negotiated outcomes, and their future implementation. (2) As both negotiation and its alternatives—whether litigation or war—occur in the context of strategic interaction, the probability of any particular outcome as well as its potential costs or benefits depends on the counterpart's actions (and reactions) no less than one's own.[3] Moreover, while the decision whether or not to negotiate is unilateral, it takes place in a context of strategic interaction. The consequences of that decision are thus not independent of the other party's strategies. (3) The decision whether to negotiate may implicate difficult value choices. Assessing benefits and costs—which involves the use of a utilitarian or consequentialist frame—may be especially difficult when issues of morality or ethics must be weighed.

Our framework poses six questions that should be addressed. Four of these draw from negotiation analysis and ask about interests, alternatives, possible negotiated outcomes and the feasibility of reliable commitments. These same considerations are equally valid in informing an individual's decision whether one should enter into a negotiation. In addition, in making this decision one must also consider the expected costs—both direct and indirect—of engaging in the negotiation process, as well as issues of legitimacy and morality with regard to each possible course of action.

Interests: What Are my Interests? What Are my Counterpart's Interests?

Analysis begins by identifying one's own interests: long-term as well as short-term, intangible as well as tangible, indirect as well as direct, etc. Interests should also be prioritized, from the very crucial ("deal-breakers") to the less important ("nice to have"). One should then proceed to perform the same identification and assessment, given the available information, of the interests of the other parties. Negotiation theory teaches, among other things, that it is necessary to probe beneath stated demands and positions and ask, what is actually important to the other side and what do they value.

It is in light of these interests that an analyst can assess possible negotiated outcomes, as well as the benefits and costs of alternative courses of actions.

Alternatives: What Are my Alternatives to Negotiation? What Are my Counterpart's?

The second set of questions concerns alternative strategies and outcomes to negotiation. In deciding whether to negotiate, it obviously makes sense to consider one's legitimate alternatives to negotiation, and assess how well those alternatives serve one's own interests. It is also important to try and assess the counterparts' alternatives, and the potential effects of those alternatives on one's self.

One alternative might be to do nothing—walk away from the deal, ignore the conflict, etc.. Another alternative might be to engage in self-help or a unilateral action. Every bigger child who snatches a toy from a smaller one understands the potential superiority of a self-help strategy over negotiation. But it also suggests the need to consider the legitimacy of a self-help alternative, especially when it involves the use of force.

In some contexts, a party can initiate an institutional process that can coercively—and legitimately—impose an outcome. For example, when a party has a legal claim, an alternative might be to bring a lawsuit, which if successful, will require the other party to do or abstain from doing certain things.

An important point here is that when an alternative strategy is implemented, there may be a broad range of possible outcomes. It is not enough, for example, to consider the best outcome of litigation; you must consider the full range of possible outcomes, and assess the expected value of each, i.e., the value (positive or negative) of a certain outcome multiplied by the probability of that outcome occurring. If one is risk neutral, the expected value of the litigation, not the best outcome, would be the yardstick for litigation. But if one is risk averse, the "WATNA" (Worst Alternative to a Negotiated Agreement) may be more determinative.

Negotiated Outcomes: Are There Potential Negotiated Outcomes That Can Satisfy my Interests and Those of the Other Party Better Than Our Respective Alternatives?

The third question requires an assessment of possible negotiated agreements that might serve each party better than that party's alternatives. If a party has an alternative that is clearly superior in terms of its expected value to any possible negotiated agreement, it typically would not make sense to negotiate, although there may be cases in which a decision-maker would find it beneficial to negotiate, even if conscious of the low-probability of a better negotiated outcome, in order to appease constituencies or to prove that all "peaceful" methods have been exhausted prior to using coercive means.

Implementation: Could a Deal be Struck? If So, Would it be Implemented?

In thinking about possible negotiated outcomes, a party must consider not only whether a certain arrangement would be acceptable for the other side, but also whether that party itself could in fact implement the agreed arrangement: practical considerations, constituency pressures, or institutional constraints may all impede the possibility of implementing certain negotiated outcomes, rendering them irrelevant for purposes of analysis.

It would equally make no sense to initiate negotiations if one believes that a deal could never be made, or if made—implemented, due to a lack of will or of capacity on the part of the adversary. If one believes the other party would never uphold its end of the bargain and that there is no effective mechanism for enforcing the negotiated deal, there is no point in negotiating.

In some instances, it may simply be a matter of personal trust. Past behavior may be an indication of future trustworthiness or one that warrants suspicion. Thus, President Bush's refusal to negotiate with the Taliban regime after 9/11 was due, in part, to the futility of previous negotiations with the regime, following the 1998 bombings of the U.S. embassies in Dar-A-Salaam and Nairobi.

In others, there may be a real inability by the counterpart to implement a deal. In some cases, there may be problems of representation, authority and accountability of the negotiator on the other side: if the negotiator is not empowered or is otherwise ineffective in binding her senders in a deal, negotiation is futile. Representation problems may also occur where a counterpart is actually a diverse set of stakeholders, lacking agreement among them, where such an agreement is essential for the deal.

In assessing whether a negotiated deal would in fact be implemented, one must also consider that often deals must be implemented over time; important issues of sequencing may arise and incentives to defect might appear. Commercial lawyers who participate in deal-making often put a great deal of effort into creating incentives to prevent one's counterpart from defecting later. In many commercial deals, one can create legally binding contracts which provide some opportunities to subsequent third-party enforcement, if and when the counterpart proves unreliable.

In the international sphere, things may prove even more complicated, as there is often no third-party effective enforcement, and one must instead rely on a system of monitoring, deterrence, self-regulation and "soft-enforcement". Where effective mechanisms to ensure compliance are nonexistent, the assessment of future implementation of a negotiated deal becomes inevitably more difficult and at the same time more crucial.

Costs: What Are the Expected Costs, Direct and Indirect, of Negotiation?

A rational decision obviously requires a consideration of costs. Beyond the clear benefits arising from negotiating, there are also costs involved in the process. These costs are incurred by the negotiation process itself, regardless of whether a deal is ultimately made, and even if the deal, if made, may subsume some of them. For an informed decision to be made about negotiating, these costs must be weighed in advance by the decision-maker.

We have divided the type of costs into "direct" and "indirect"; this division, as well as the subcategories we enumerate within each one, is of course not clear-cut, and some of the examples we offer involve more than one type of costs.

Direct Transaction Costs

Whether one is making a deal or resolving a conflict, the process of negotiation imposes *transaction costs* on the parties, who must invest time, money, manpower, and other resources.[4] Negotiation can absorb the attention and energy of persons whose time is valuable.

In some instances, transaction costs may make negotiation an economically inefficient process. In general, this would be true for any business that performs a large volume of transactions with a large number of parties, such as restaurants, large stores, theatres, museums, etc. For example, Macy's in Herald Square, New York, receives about 30,000 visitors a day. If, on average, one of three visitors purchases one item, then there are about 10,000 transactions a day at the store. Now, imagine the store willing to negotiate the price of each purchase. The transaction costs involving the hiring and training of additional employees, the devising of complicated employment compensation schemes with incentives for "good negotiators," coupled with concerns regarding possible damages to reputation and branding, would probably outweigh any potential benefit. In fact, many of the large stores aim at cutting transaction time as much as possible, negotiation being the opposite of an effective strategy.

The transaction costs of participating in a negotiation may, in some instances, be so high as to make it altogether impossible for parties to even participate effectively in a negotiation process, even though they may have a real stake in the process. Indeed, protest by developing countries against their lack of voice in multilateral trade negotiations has led to international assistance programs directed at providing technical assistance and funding to developing countries' missions to subsequent rounds of negotiations.[5]

Beyond the immediate transaction costs, direct costs also involve the *disclosure of information*, which may be exploited by the counterpart in future actions, regardless of whether an agreement is achieved in the first instance. This is of course the counter effect of the benefit of gaining information through the negotiation process. Exposing intelligence-gathering capabilities, a company's vulnerabilities, or even personal desires may prove detrimental in future interactions with the same party.

Indirect or Spillover Costs

Apart from the direct transaction costs, there may be a variety of indirect or spillover costs. First, entering into a negotiation may affect a party's *reputation*: people's instincts may tell them that if someone is willing to settle, there must be something to the claims against them. Thus, even if a physician can settle a meritless malpractice claim for less than the expected litigation costs, she may prefer pursuing the litigation to avoid any implication that she was at any way at fault. In a similar vein, the mere willingness on the part of a defendant to negotiate a plea bargain with the District Attorney might be perceived as an admission of guilt.

Reputation is somewhat related to another type of spillover costs. Even if negotiating a resolution of this single dispute may make sense in light of the immediate cost savings, the *precedent* of a negotiated settlement here may bring a flood of similar claims later. An employer may refuse to negotiate with unlawfully striking workers if the employer believes that negotiation may only encourage future employees to go on strike. For example, in 1981 when 11,400 air traffic controllers went on strike for higher wages and better working conditions, President Ronald Reagan and the Federal Aviation

Administration (FAA) refused to negotiate, fired the striking controllers, hired replacements, and barred the strikers from ever being re-employed by the FAA.[6]

In a different context, numerous countries around the globe, including the U.S., Britain, France, Italy, Germany, Israel, the Philippines, Guatemala, Peru, and Russia have a declared policy of refusing to negotiate with terrorists. This refusal, as we shall later show, is no doubt driven by additional considerations, but it is also intended to avoid providing incentives for further extortions by future terrorists.

Beyond the costs associated with the parties "at the table", there are also spillover costs "behind the table" relating to one's *constituents* or *coalitions*.[7] The decision to enter into negotiations may have an adverse effect on those whom you will need to rally to your cause in the event negotiations fail. Constituents might believe your ineffective negotiation has been the cause of failure, or question the justifications for taking extreme measures against someone with whom an agreed deal had almost been struck.

A dramatic example with respect to constituents relates to Sir Winston Churchill's refusal to accept an invitation to begin negotiations directly with Mussolini—and indirectly with Hitler—in May of 1940. Churchill had just become Prime Minister, France had very nearly been overrun, and tens of thousands of British troops appeared to be trapped around Dunkirk. The Battle of Britain had just begun, and German bombers had launched their attack. While Churchill's refusal to negotiate reflected a number of considerations, one of which was his skepticism that Hitler would abide by any deal that might be at all acceptable to his government, a primary reason for Churchill's refusal related to his concern that the act of negotiating with the Axis would have a devastating impact on the morale of his constituents and their ability to make the sacrifices necessary if negotiations failed.[8]

Apart from one's own constituents, there can also be effects on coalitions—those whom one may need as allies if negotiations fail. A decision by one member to negotiate separately may also have a devastating effect on the viability of a previously effective coalition. Liggett's decision to negotiate with a plaintiff in a tobacco suit generated a flood of lawsuits and settlements across the country because of its destructive impact on the previously effective coalition among all the major tobacco companies, which for years had insisted on litigating to the end all tort claims.

A final cost consideration relates to the opportunities that must be foregone if one chooses to negotiate with a particular party at a particular time. In circumstances where it is impossible to negotiate simultaneously with more than one party, choosing to negotiate with one may preclude the opportunity to negotiate with another. The basic idea here relates to the straightforward economic concept of "opportunity costs". Because resources are always constrained, devoting resources to negotiation precludes using them somewhere else.

Legitimacy and Morality: What Considerations of Legitimacy and Morality Should be Taken Into Account?

In considering the benefits and costs of the decision whether to negotiate, there is no avoiding questions of legitimacy, morality and ethics. One aspect of such considerations was mentioned earlier: when thinking about alternatives to negotiation, one must consider the legitimacy of those alternatives. A bigger child may have the power to grab the toy of a younger and smaller sibling, but most parents would prefer that the child not exercise that alternative but instead ask to use the toy. A self-help alternative to negotia-

tion may not be considered legitimate, at least without some institutional approval. Few doubted the capacity of the U.S. to bring about a regime change in Iraq, but many have questioned the legitimacy of the American resort to force in the absence of explicit U.N. Security Council authorization.

Considerations of legitimacy and morality underlie decisions to negotiate, especially in conflict situations. The mere process of negotiation with a counterpart is perceived as conferring some *recognition* and *legitimacy* on them. Providing a counterpart with "a place at the table" acknowledges their existence, actions, and (to some degree) the validity of their interests and claims. To avoid such validation, countries have often refused to negotiate with rebels or insurgent groups, denying them any recognition or legitimacy. Thus, for decades, Israel refused to formally negotiate with the Palestinian Liberation Organization, Britain denied any status to the Irish Republican Army, the Spanish would not negotiate with the Basque separatist rebels, Peru would not engage in a dialogue with the Tupac Amaru, and Russia announced an absolute policy of not negotiating with the Chechen rebels. The interest of denying recognition and legitimacy is also apparent in the interstate sphere, and largely determines the relationships between Israel and some Arab countries, between China and Taiwan, and between the European Union and the Turkish Republic of Northern Cyprus.

The policy of refusing to negotiate with terrorists and insurgent groups derives not only from the fear of conferring legitimacy or recognition, but also from aversion to *rewarding past bad behavior*. When previous interactions have failed to satisfy the claims of a party, satisfying its claims under the pressure of violence implies that violence was indeed worthwhile. This consideration, of course, is problematic. Although most of the national liberation movements around the world have employed violence in their struggle to gain independence or self-determination (among very few Gandhi-like exceptions), once violence is employed it usually entrenches political rivals, at least in the short term following violence.

Beyond these considerations, a party may refuse to negotiate with a certain counterpart for reasons of deep moral aversion. Perhaps the most renowned example of a refusal to negotiate for moral convictions is the earlier mentioned refusal by Churchill to negotiate directly or indirectly with Adolf Hitler in May of 1940. For Churchill, the refusal derived not only from the questionable effectiveness of such negotiations, or the potential effects of failed negotiations on his fellow citizens, but also from a strong moral aversion to *"doing business with the devil."* Churchill truly believed that Britain had a deep moral obligation, on behalf of itself as well as the rest of the world, to fight Nazi Germany. In relation to British advocates of appeasement, he said: "An appeaser is one who feeds a crocodile—hoping it will eat him last."[9] More recently, Iraqi officials have expressed an outright refusal to negotiate with insurgents in Iraq, arguing that "[t]hese groups have no religion and no limits."[10]

On the domestic front, the dealing-with-the-devil consideration often fuels debates over plea-bargains made between prosecutors and suspected criminals, in which sentences are mitigated in exchange for confessions and trial-avoidance. Although such bargains are intended to make the justice system more cost-efficient, opponents argue that the moral price associated with such bargains is just too high.[11]

As we have indicated earlier, adding considerations of morality, legitimacy or ethics into the calculus of whether or not to negotiate necessarily complicates the decision-making analysis, not only because such considerations are impossible to quantify and incorporate into a simple cost-benefit analysis, but also because parties in conflict, as we

shall show, tend to exaggerate these considerations and turn them essentially into trump cards.

The Limitations of the Rational Decision-Making Framework

Our suggested framework demonstrates that it would be unwise to believe that it always makes sense to negotiate. It shows that a party must assess a variety of considerations, including the costs of negotiation, before deciding whether to negotiate. In this section, we will apply our own framework, to real people, *in situations of conflict*, recognizing that real people may too frequently make biased assessments that lead them to erroneously refuse to negotiate. Especially in conflict situations, human emotions, implications for identity, as well as common cognitive biases may cloud and distort judgment. We illustrate this theme by revisiting the elements of the general framework, and demonstrating possible distortions in their application in situations of conflict.

Interests

The rational analytic model implicitly assumes that parties' interests and preferences are exogenous, fixed, and well understood. But as any experienced mediator can report, many parties to a conflict have a very difficult time articulating, much less prioritizing, their own interests. Indeed, negotiation analysts have demonstrated that parties often fall prey to the zero-sum, or fixed-pie fallacy—the assumption that a conflict is purely distributive, and that any gain by one necessarily poses a loss to the other.

To complicate things further, in particularly bitter and protracted conflicts, a party may believe that they have an important interest in punishing, harming, taking revenge, or even destroying their opponent. Recognizing that no one would ever rationally consent to their own destruction, they may conclude that negotiation makes no sense

While unattractive, we do not believe that this kind of interest is necessarily irrational. Instead, our concern is more fundamental: we believe that through the process of negotiation people's priorities and interests can sometimes change and evolve. In thinking about whether to negotiate, a party to conflict may too readily assume that their interests and priorities are fixed. They might attach exaggerated importance to some interests, and be ready to forgo the achievement of others, where a process of negotiation might have altered this. This is not to say that negotiation would always succeed, or to deny that the process itself may inflame conflict; it is only to suggest that at times, the negotiation process itself may be transformative, and that *ex ante*, people may overlook or underestimate this possibility.

However difficult it is for a party to assess their own interests, these problems are obviously compounded when assessing those of someone you define as "your enemy". Problems of negative attributions—assuming the worst about the rival's motives, interests, and wishes (often believing their main preoccupation is with harming you)—or of projections of a party's own negative feelings onto the rival, often mark the bilateral dealing in situations of deep-rooted conflict. [Coleman, et al., *Dynamical*]

ATNAs

With respect to alternatives to negotiated outcomes (ATNAs), the risk is that in deciding whether to negotiate, a party to a conflict may exaggerate the expected value of their unilateral alternatives. If litigation is the alternative, parties may systematically overestimate the probability that the judge would rule in their favor. This is because they would

have spent a good deal of time thinking about their own arguments and the justness of their own cause, and may not have fully assessed the countervailing arguments, factual, legal or normative.[12] [Korobkin & Guthrie, *Heuristics*] Even where such assessment has been made, parties tend to view their own positions as more justifiable. Daniel Kahneman and Amos Tversky's research shows that parties systematically underestimate the risks of extreme adverse outcomes, and tend to be overconfident and optimistic about their ability to succeed.[13]

Potential Negotiated Outcomes

In addition to the problems associated with the zero-sum mindset, and the consequential limitations in imagining value-creating possibilities, there is a more general problem: parties to a conflict may be prone to having a very constricted and constipated view of what might be possible. Negotiation analysts often encourage a process of "brainstorming," in which parties are encouraged to think about the unthinkable and to be creative in terms of option-generation. The risk is that *ex ante*, a party to a conflict may systematically have too narrow a view of potential outcomes, not taking into account the possibility of generating new options through direct interaction with the rival.

Implementation and the Reliability of the Counterpart

Parties to a conflict are often quite distrustful of each other. The relationship is often marked by deep suspicion and one or both parties may believe that they have been betrayed by the other in the past. [Lewicki, *Trust*] The risk here is that a party may, based on their past experience, simply assume that their counterpart will betray them in the future, and underestimate the extent to which the other party would actually want to abide by a negotiated agreement in the future. Even more basically a party may underestimate the possibility that through a combination of incentives, monitoring, and potential sanctions, future behavior might be constrained.

Costs

Of the various types of costs we have outlined in our model, it can be predicted that while the direct transaction costs could normally be objectively evaluated even in times of conflict, some of the costs that we have labeled as "indirect" or "spillover" might be exaggerated. A party may tend to exaggerate the degree to which a reputation may be harmed—especially in the longer term—by entering into a negotiation with a rival as well as the degree to which a current precedent would prove constraining in the future. Parties to a conflict may also tend to overlook the fact that reputations can recover from a short-term hit, and that in the future, precedents can always be distinguished.

Similarly, a leader may be exquisitely attuned to the objections of parts of her constituents to entering into negotiation, but may underestimate the possibility that she could in fact manage or contain these behind-the-table conflicts, or rally the necessary support of the constituents if and when negotiations fail. [Wade, *Tribe*]

We are reasonably confident that the magnitude of these indirect costs is a function of the intensity of the conflict. We also believe that conflicts exacerbate a short-term perspective: a decision-maker may see these costs as immediate and salient, while the benefits of negotiating remain speculative.

Legitimacy and Morality

A core tenet of social psychology has been the "fundamental attribution error."[14] This relates to the human tendency, when evaluating the conduct of others, to exaggerate the importance of character and to underestimate the influence of context. For example, when we observe someone engaging in inappropriate behavior we tend to attribute that to the person's bad character and not take into account the contextual pressures that may have in fact influenced the behavior. Interestingly, in assessing our own behavior, there is a human tendency to have quite the opposite reaction: we tend to justify our own bad behavior on the grounds that there were special circumstances that put us under unusual pressure.

This social science finding has obvious relevance in terms of assessing legitimacy and morality in dealing with an adversary. Because of past behavior, we may tend to characterize our "enemy" as being evil, akin to the devil. This may make us extremely reluctant to confer any recognition and legitimacy on the adversary.

We have often observed a tendency by parties to a conflict to place undue emphasis on the moral dimensions of the conflict while underestimating the importance of more tangible interests. This occurs both with respect to themselves and to the other party. The rivalry will tend to be framed almost exclusively in terms of good vs. evil, truth vs. falsehood, justice vs. wrongfulness. In judging others, character may be emphasized at the expense of context. There may be a reluctance to acknowledge the degree to which material and tangible interests (as opposed to "morality" or character) are determining the behavior of both sides.

When a conflict implicates issues of identity, which is often true, for example, in ethnic disputes, there may be a greater tendency towards framing issues in moral terms. We also think that the converse is true: once a dispute is framed in moral terms, identity is often defined in opposition to "the other." Making a concession—even in the form of entering into a negotiation—may be seen not only as a moral concession, but even as a potential threat to one's identity.

We are not claiming that the tendency to accentuate issues of morality or legitimacy is necessarily wrong, irrational, or "biased," although our intuition is that often disputants have not carefully considered alternative ways of framing their conflicts or the issues at hand. Our own anecdotal experience suggests that this may well be the case. When conflicts are resolved through negotiation, parties after the fact often express regret that it took them so long to get to the bargaining table.

Our suggestion that parties to conflict may tend to underestimate the potential benefits and exaggerate the potential costs of entering into negotiations is necessarily tentative and speculative, unsupported by systematic empirical evidence. We do believe, however, that on average parties too often refuse to enter into negotiations where it would make sense. To the extent we are correct, it would suggest that in situations of conflict, parties should begin their decision-making process from a presumption—rebuttable to be sure—in favor of entering into negotiations. One possible way to make such a presumption operational would be to urge disputants to seek the advice of more dispassionate third parties who might be less subject to biased assessments.

Another possibility, discussed below, might involve the careful design of institutions to affect the assessment of the costs and benefits of negotiation. Some institutional arrangements, by raising the costs of a refusal to negotiate, may create a de-facto presumption in favor of negotiation.

Institutional Design Implications

Institutional structures can affect both the costs and benefits of negotiation. In many contexts, the existence of an institutional hierarchy may make negotiation unnecessary because one party can impose its will very effectively by fiat or command. In an army, a superior can order a subordinate to undertake some task and reasonably expect his command to be followed. Parents are often advised not to negotiate bedtime with their young children. And a teacher in school would most often impose on the students the date and time of the final exam.

Rules and procedures that are established to *inhibit* negotiations are not unique to hierarchical institutions. Thus, although customers and dealers typically haggle over the price of a new car, at least one new brand—Saturn—has made part of its marketing strategy that at their dealers, the price will be fixed and there will be no haggling. In this way, the manufacture has gone to great length to ensure that local dealers and their salespeople have no discretion with respect to price. This marketing strategy in effect precludes negotiation.

Another example comes from the academic world: Harvard University has a rule that no Harvard professor may simultaneously be on the faculty of another university. Realizing that a valued faculty member might have more leverage to negotiate such an arrangement with his or her Dean, the rule explicitly provides that neither the Dean, nor the President of the University can make an exception to the case. In fact, the only authorized body to make such an exception is the Harvard Corporation—a seven person governing board. The purpose of this rule is obviously to make the question non-negotiable, and signal to even powerful faculty that neither the Dean nor the President has the power to negotiate.

Equally interesting are situations where an institution is designed to *encourage* or even *require* negotiation as a prerequisite to some other method of dispute resolution. In the family law area, for example, several states require mediation—in which a neutral facilitates negotiation—as a condition precedent to the adjudication of child custody disputes.[15] In California, for instance, a judge would not hear a child custody dispute until after the parents have tried to work out a negotiated resolution. Similarly, in various kinds of civil disputes, federal district courts have implemented a variety of schemes to encourage early negotiated resolutions. Similarly, a number of state courts either allow or require judges to order mediation before a trial can begin.

Nongovernmental institutions have also acted to lower the costs of negotiation in commercial conflicts: the International Institute for Conflict Prevention and Resolution is an organization composed of major corporations and law firms. Its corporate members are encouraged to sign a "pledge," which commits their corporation to entering into negotiation before suit is filed, whenever it is in conflict with another CPR member. [16] The same logic operates in the international arena: the World Trade Organization's Dispute Settlement Understanding calls on member states to initiate a consultation process with a view to attempting to reach agreement over trade disputes, before asking for the establishment of a formal dispute settlement panel.[17]

Although some analysts claim that mandatory mediation is an oxymoron—how do you make a party who does not think negotiation is helpful, engage in good faith in the negotiation process?—empirical research suggests that requiring negotiation in fact leads to many settlements that might not otherwise occur. This evidence, to some degree, confirms the analysis offered in the previous section, for it indicates that some parties who would never voluntarily enter into negotiation would in fact find the process beneficial.[18]

This also means that institutional designs may make the rebuttable presumption in favor of negotiation, as we have argued for in situations of conflict, operational: by raising the costs of the refusal to negotiate, parties in conflict would have to add these costs to their calculus of whether they should abstain from negotiation, and only if willing to bear these costs, adhere to their refusal to negotiate.

Conclusion

This chapter is a preliminary foray into an important set of intellectual and practical questions relating to negotiation: how should a party rationally decide about entering into negotiation? What social, cognitive or perhaps cultural biases may make rational analysis more difficult? And by what means can institutional mechanisms influence the decision?

While much theoretical and empirical work remains to be done, we offer several preliminary conclusions:

First, it is wrong to assume that entering into negotiation is always the right thing to do. The model of rational decision-making that we lay out plainly shows that there will be cases where the costs of entering the negotiation plainly outweigh the potential benefits.

Our second conclusion is in some ways more troubling: it is that parties engaged in conflict often tend to make distorted assessments, in which the costs of entering into negotiation may be exaggerated and the potential benefits may be underestimated. This analysis indicates that the negotiation imperialists may be intuitively correct in assuming that negotiation is under-utilized, especially in conflict situations. For this reason, we recommend that individuals in conflict be aware of such biases and operate with a rebuttable presumption that favors the use of negotiation as means for the conflict's resolution.

Finally, we demonstrate how various institutional arrangements can affect the costs and benefits of the negotiation process, and consequently, the individual decision about whether to enter into the process. Institutional design could thus be used, at least in some contexts, to effect the rebuttable presumption in favor of negotiation. Viewing institutional design through the prism of its effects on the costs and benefits of negotiation may offer important insights with respect to a variety of possible policy alternatives.

Endnotes

This chapter draws on and extends earlier work, a portion of which was previously published as Robert H. Mnookin, *When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits*, 74 UNIVERSITY OF COLORADO LAW REVIEW 1077 (2003).

[1] Refusals to negotiate can often simply be a tactic that is used as part of the negotiation process. *See id.* at 1081-82.
[2] The term "negotiation" is hardly self-defining. Negotiation scholars have defined "negotiation" in a variety of ways. *See id.* at 1079-80 for a discussion of the definitional issues.
[3] Parties typically have access to different information. Predicting another party's reaction is especially difficult in the context of informational asymmetries.
[4] ROBERT H. MNOOKIN, ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 104-05 (2000).
[5] *See* Global Trade Negotiations Home Page—Development Summary, *at* http://www.cid.harvard.edu/cidtrade/issues/development.html (last visited Dec. 20, 2005).
[6] *See Postal Service Said to Beckon to Ex-Air Controllers*, N.Y. TIMES, Aug. 20, 1982, at A17.
[7] MNOOKIN, ET AL., *supra* note 4 at 303-06.
[8] *See generally* JOHN LUKACS, FIVE DAYS IN LONDON: MAY 1940 (1999).
[9] Tom Kuntz, *Aftermath*, N.Y. TIMES, Sept. 23, 2001, §4 at 3.

[10] AMER OAULI, *IRAQ'S UNIVERSITIES FACE CATASTROPHE*, MIDDLE EAST ONLINE (Sept. 16, 2004), *at* http://www.middle-east-online.com/english/culture/?id=11281.
[11] In some cultures, this may take the form of denial that such negotiations take place at all, despite vanishingly small trial rates. *See* Alexander Hawkins, Chris Stern Hyman and Christopher Honeyman, *Negotiating Access*, Chapter 16 in this volume.
[12] *See* Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, 45, 46 *in* BARRIERS TO CONFLICT RESOLUTION (Kenneth Arrow, et al., eds., 1995).
[13] *Id.* at 46-50.
[14] Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY (Leonard Bekowitz ed., 1977).
[15] California is one example. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY (1994).
[16] *See International Institute for Conflict Prevention & Resolution* , *The Pledge*, *at* http://www.cpradr.org/CMSdisp.asp?page=CPRPledgeIntro&M=11.1 (visitedMar.14, 2006).
[17] Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, *in* WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 357-58 (1999).
[18] *See e.g.*, Craig A. McEwen & Thomas W. Milburn, *Explaining a Paradox of Mediation*, 9 NEGOTIATION JOURNAL 23 (1993).