

# Against Integrative Bargaining

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## Introduction

Integrative bargaining, also known as “problem-solving,” “value-creating,” or “win-win” negotiation, is the centerpiece of normative negotiation scholarship and negotiation teaching. It has held this position at least since the publication of “Getting to Yes”<sup>1</sup> by Fisher and Ury in 1981, and perhaps since the publication of “A Behavioral Theory of Labor Negotiations”<sup>2</sup> by Walton and McKersie in 1965.<sup>3</sup>

To begin, let me admit that the title of this essay is somewhat misleading, or at least lacks the subtlety that I hope to convey. I am not really against integrative bargaining, by which I mean structuring negotiated agreements in such a way as to increase the joint value of a deal to the participating parties. As a matter of fact, I’m firmly in favor of it. Through integrative bargaining, negotiators can make everyone involved in a transaction better off than they would otherwise be.

But the value of integrative bargaining, although substantial, has been oversold.<sup>4</sup> This is true, I believe, with regard to negotiation generally, and especially concerning legal negotiations, the term I use for the negotiation contexts in which lawyers most

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<sup>1</sup> Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement without Giving In* (1981). Fisher & Ury’s “principled negotiation” framework does not promote only integrative bargaining -- its recommendation to focus on objective standards for fair outcomes is more properly labeled a form of distributive bargaining. But I think it is fair to say that it is principally known for its emphasis on searching for mutual gains, a quintessentially integrative approach. See Roy L. Lewicki et al., *Models of Conflict, Negotiation, and Third Party Intervention*, 13 *J. Org. Beh.* 209, 226 (1992) (categorizing Fisher & Ury’s principled negotiation as a “normative integrative model[s]” of negotiation).

<sup>2</sup> Richard E. Walton & Robert B. McKersie, *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (1965).

<sup>3</sup> For a discussion of how a variety of negotiation theorists from different disciplines converged on the integrative bargaining paradigm in the 1970s and 1980s, see Carrie Menkel-Meadow, *Why Hasn’t the World Gotten to Yes?: An Appreciation and Some Reflections*, \_\_ *Neg. J.* 485, 488-90 (2006). As Menkel-Meadow points out, the idea underlying integrative bargaining dates back much further. *Id.* at 486.

<sup>4</sup> Gerald Wetlauffer made this claim a decade ago in an important article. Gerald Wetlauffer, *The Limits of Integrative Bargaining*, 85 *Geo. L. J.* 369, 372 (1996). The arguments I present here are different, but they can be understood as expanding on Wetlauffer’s general theme.

routinely find themselves. For the past quarter century, the primary normative message of the negotiation theory literature has been that negotiators will achieve better outcomes by focusing their attention on the integrative aspect of bargaining rather than its distributive aspect, by which I mean the division of resources in a way that makes one party worse off to the same extent that the other party is made better off.<sup>5</sup> I call this the “integrative bargaining supremacy” claim.<sup>6</sup>

In some cases, the dedication to the value of integrative bargaining often takes on a kind of missionary zeal. Practitioners of integrative tactics are seen as modern, sophisticated negotiators. In their search for “win-win” outcomes, they display subtlety, creativity, intelligence, and sophistication. In contrast, the negotiators who employ distributive tactics are surly Neanderthals who try to use brute force and other boorish, knuckle dragging behavior to subjugate their opponents. Teaching negotiation is viewed by many as the task of civilizing the great unwashed horde of naïve, instinctive negotiators and convincing them to renounce their backward, distributive ways.<sup>7</sup>

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<sup>5</sup> See, e.g., David Fairman et al., *The Negotiator's Fieldbook: The Virtues and Limits of a Kaleidoscope*, 23 *Neg. J.* 343, 351-52 (2007) (noting the implicit assumption in modern negotiation theory that integrative bargaining is better than distributive bargaining "not because it is ethically superior but because it works better along utilitarian lines"); Linda Babcock & Sara Laschever, *Women Don't Ask* 165 (200x) claiming that two decades worth of research has "shown that a cooperative approach, aimed and finding good outcomes for all parties rather than just trying to 'win,' actually produces solutions that are objectively superior to those produced by more competitive tactics"); Robert H. Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 6 (advising lawyers on how they can “change the game from adversarial bargaining to problem-solving..."); Roy L. Lewicki et al., *Models of Conflict, Negotiation, and Third Part Intervention*, 13 *J. Org. Beh.* 209, 217 (1992) ("the desirability of integrative agreements [has] been simply taken for granted by some writers and widely acclaimed by others").

<sup>6</sup> It is important to distinguish the "integrative bargaining supremacy" claim from a very different with which it is sometimes conflated, which might be called the "communitarian-utopian" claim. The former claim, which I examine in this article, is that integrative tactics serve the self-interest of the negotiator better than distributive tactics. The latter claim, which is beyond the scope of this article, is that negotiators ought to be altruistic and be as concerned with the outcomes of others as with their own. See Robert J. Condlin, "Every Day and in Every Way We Are All Becoming Meta and Meta," or How communitarian Bargaining Theory Conquered the World (of Bargaining Theory), 23 *Ohio St. J. Disp. Res.* 231, 236 (2008) ("[C]ommunitarian bargaining...looks at bargaining from the perspective of what is good for the social group rather than the single individual.... [F]or any single member of the group to be satisfied, all must be satisfied.")

<sup>7</sup> See, e.g., Carrie Menkel-Meadow, *Legal Negotiation in Popular Culture: What are We Bargaining For?* in \_\_\_ 583, 585 ("popular depictions of adversarial and competitive negotiations dangerously perpetuate the notion that legal negotiations are about 'winning' or besting the other side. These images limit what consumers of popular culture can come to see as possible as human and legal problem solving must become more sophisticated, nuanced, creative and joint, not individual, gain-seeking if we are to survive."); Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation*, 7 *Harv. Neg. L. Rev.* 144, 148 (2002) (arguing that data suggesting "problem-solving" negotiators are more

Integrative bargaining supremacy is often defended with the assertion that, while most everyone has an intuitive sense of how to use some distributive tactics, such as taking a firm position and grudgingly making concessions, individuals who lack formal negotiation training are less likely to intuitively grasp the fundamental concepts of integrative bargaining.<sup>8</sup> This point is probably accurate, but it can obscure the fact that negotiations generally, and legal negotiations specifically, have more distributive potential than integrative potential. For this reason, lawyer-negotiators would be better served, on balance, to think of distributive bargaining as the cake and integrative bargaining as the frosting, rather than the reverse.

The first part of this essay distinguishes between integrative and distributive value and provides a definition of integrative bargaining. Part II explains how integrative potential is achieved by describing four tactics that negotiators use to identify integrative value. With this background established, Part III provides a method of comparing a negotiation's relative potential for integrative and distributive value. Part IV provides three important reasons that integrative potential is often less than the conventional wisdom assumes. Part IV explain why integrative bargaining will often have less potential, relative to distributive bargaining, in typical settlement and transactional negotiations in which lawyers routinely participate.

## I. INTEGRATIVE AND DISTRIBUTIVE VALUE

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effective than "adversarial" negotiators "should help focus negotiation training toward the task of learning these new skills or modifying ineffective habits"); Catherine H. Tinsley et al., Reputations in Negotiations, in *The Negotiator's Fieldbook* 203 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2006) (charicaturing adversarial bargainers as displaying a desk plaque saying "I am the meanest son of a bitch...").

<sup>8</sup> See, e.g., Leigh Thompson, Information Exchange in Negotiation, 27 *J. Exp. & Soc. Psychol.* 161 (1991) (finding very few unprompted negotiators either provided or sought information about preferences necessary to craft integrative agreements); Leigh Thompson & Reid Hastie, Social Perception in Negotiation, 47 *Org. Beh. & Human Decision Processes* 98 (1990) (finding most negotiators suffer from the fixed-pie bias, which impedes integrative bargaining); see generally, Babcock & Laschever, *supra* note \_\_\_, at 166 ("very few people who have not been trained in negotiation realize the full benefits of an integrative approach"); Max H. Bazerman & Margaret A. Neale, *NEGOTIATING RATIONALLY* 16-22 (1992) (describing the "mythical fixed pie" that can impede integrative bargaining); David A. Lax & James K. Sebenius, 3*D Negotiation* 132 (2006) ("[I]n our experience, the world does not suffer from ...an overabundance of value creation in negotiation. We think that the more common risk comes from an excessive focus on claiming 'my share' of the pie.").

An agreement is integrative to the extent that it creates additional cooperative surplus compared to some alternative.<sup>9</sup> Because integrative value is relative, identifying it requires the specification of a baseline case for purposes of comparison.

Suppose that Bonnie Buyer is negotiating to purchase a house from Sam Seller. Bonnie's reservation price,<sup>10</sup> defined as the maximum that she would be willing to pay, is \$100,000. Sam's reservation price, defined as the minimum amount he would be willing to accept, is \$90,000. An agreement, if one is reached, will create \$10,000 in social value, or what I will call "cooperative surplus,"<sup>11</sup> relative to no deal, because Bonnie subjectively values the house \$10,000 more than does Sam. How that \$10,000 is split between them – whether, for example, the price agreed to is \$90,000, \$95,000, or \$100,000 – is a matter of distributive bargaining: any gain for Bonnie means a loss for Sam, and vice versa. We can thus say that the deal will produce \$10,000 in distributive value, divided based on distributive bargaining ability.

Now let's also assume that Sam is an excellent handyman and enjoys tinkering with things around the house. Bonnie, in contrast, can't fix anything, and she hates having to call service people to the house because she fears that they will take advantage of her. These facts suggest that more cooperative surplus might be created by the sale of the house if Sam will promise to repair any item that breaks for one year after the sale. Let's assume, for example, that this would cause Bonnie's reservation price to increase to \$110,000, while Sam's reservation price would increase only to \$92,000. Any deal that included the repair agreement would be integrative because it would create more cooperative surplus than the parties could obtain through the sale of the house alone -- the baseline case. The extra \$8000 can be understood as the value that can be generated by the negotiators' integrative bargaining ability.

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<sup>9</sup> Any agreement that makes both parties better off than they were before reaching a deal can be said to create value. To the extent that any agreement that creates joint value is sometimes referred to as "integrative," however, fails to distinguish between the value of using integrative tactics and distributive tactics, and thus is unhelpful for the purposes of this essay. Cf. Gerald Wetlaufer, *The Limits of Integrative Bargaining*, 85 Geo. L. J. 369, 374 (1996) (observing that not all "value creation" involves integrative bargaining).

<sup>10</sup> See, e.g., Howard Raiffa, *The Art and Science of Negotiation* 37; Leigh Thompson, *The Mind and Heart of the Negotiator* 17 (1998).

<sup>11</sup> See, e.g., Russell Korobkin, *Negotiation Theory and Strategy* 42 (2002).

This example demonstrates what an integrative agreement might look like, but it does not provide an analytically precise description of what the baseline point of comparison should be for a judgment whether an agreement is integrative. Let me suggest the following definition: *for an agreement to be appropriately labeled integrative, it must create more cooperative surplus than the terms of whatever type of agreement would be customary under the circumstances.* If houses were customarily sold with a one-year repair agreement, agreeing to a sale with such a repair agreement would still create \$18,000 in cooperative surplus – which would have to be divided between the parties -- but it would not be an example of an integrative agreement. This definition underscores that integrative bargaining requires creativity on the part of the negotiators – the ability to think “outside the box” rather than simply agree to customary terms.

## **II. Achieving Integrative Bargains**

With this definition in place, it becomes possible to describe a set of tactics, or techniques, that negotiators can employ to reach integrative agreements: adding issues, subtracting issues, substituting issues, and logrolling.<sup>12</sup> All four are variations on the theme of searching for ways to reconfigure the terms of a deal to increase its joint value.

### **A. Adding Issues**

The simplest way to make an agreement integrative is to add one or more issues that buyer values more than the seller to the customary set of terms, or what I will call the “negotiation package.” The seller of a used car might add a warranty, the seller of a company might add his services during a transitional period of time, or a plaintiff in litigation might add a non-disclosure clause, promising to keep the generous settlement price secret to protect the defendant from subsequent nuisance suits. Of course, adding issues to the negotiation package is only integrative if the buyer values them more than the seller. Adding issues that the seller values more than the buyer would reduce the

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<sup>12</sup> For greater description of integrative tactics, see *id.* at 129-34 (2002).

cooperative surplus. Assuming that Sam loves the antique chair that sits in the living room, whereas Bonnie considers it the ultimate example of poor taste, adding it to the transaction would reduce the cooperative surplus rather than increase it: Sam's reservation price would increase (because he values the chair), while Bonnie's would stay the same (because she doesn't) or maybe even increase slightly (because she would have to dispose of it).

## **B. Subtracting Issues**

The opposite of adding an issue that the buyer values more than the seller is subtracting something from the negotiation package that the seller values more than the buyer. Opportunities to profit from this integrative tactic are often more difficult to spot than opportunities to add issues because the negotiators first have to identify ways to unbundle what often appears to be a unitary, indivisible item. If the negotiation package consists of a single house, as in the example I used involving Sam and Bonnie, what is there to subtract? As it turns out, ownership of a house can be sliced and diced in many different ways, as can the contents of almost any negotiation package. Two examples: First, ownership can be divided into physical parts: if Sam loves the original chandelier in the dining room and Bonnie is indifferent, the chandelier can be subtracted from the package. Second, ownership can be divided temporally: if Sam wants to keep the house until his relatives visit in the spring and Bonnie is in no hurry to move, cooperative surplus can be created by subtracting ownership for the next six months from the negotiation package.

## **C. Substituting Issues**

Sometimes, parties can determine in the course of negotiations that the cooperative surplus they could create by entering an agreement would be greater if they completely changed the subject of the negotiation from what they originally assumed it would be. Perhaps when Bonnie visits Sam's house, she learns that he has another, similar property nearby. The main difference is that the second house is located on a main street and has associated traffic noise, so Sam would be willing to sell it for \$85,000. The location makes it far more convenient to public transportation, however,

which Bonnie values highly because she doesn't own a car, so she is willing to pay up to \$110,000 for it. In this case, substituting the noisy, convenient house for the quiet, inconvenient house – which could be understood alternatively as subtracting one issue and adding another – should be considered an integrative move.

#### **D. Logrolling**

Finally, in many bargaining contexts, the baseline, or customary deal includes multiple issues, but the terms that deal with those issues can be changed. In this case, it provides conceptual clarity to think in terms of logrolling – that is, trading one issue for another – rather than adding or subtracting issues. For example, either Bonnie's or Sam's real estate agent might produce a copy of a standard form contract drafted by the local association of realtors that specifies that the sale will close in 30 days and provides the buyer with 10 days in which to conduct a home inspection and cancel the transaction if defects are discovered. If Bonnie is leaving on vacation and wants to conduct the inspection when she returns, and Sam wants at least two months before he has to move, the parties can logroll by agreeing to extend the inspection contingency to 20 days and the number of days until closing to 60.

### **III. COMPARING THE VALUE OF INTEGRATIVE AND DISTRIBUTIVE TACTICS**

Having clarified basic definitions and described a series of integrative bargaining tactics, let me turn to the subject of how we might think about comparing a negotiation's integrative potential with its distributive potential. The governing assumption here is that most negotiators would wish to choose whether to emphasize integrative or distributive bargaining tactics based on which type offers the greatest potential for creating cooperative surplus for their clients. That is, the goal is maximizing a negotiator's private value, not social value. Given this assumption, I will now consider the general contextual features that bear on whether distributive and/or integrative tactics will have substantial potential value in any given negotiation.

#### **A. The Source of Distributive Potential: Bilateral Monopoly**

The relative opportunity for distributive gains depends on the degree of competition in the market for the goods and services that make up the negotiation package. When negotiating a deal under conditions that approach those of perfect competition – that is, many buyers, many sellers, commodity products, and low transaction costs – the opportunity for distributive gains will be small. In situations of true perfect competition, there will be no opportunity for distributive gains at all, because both buyers and sellers will be price takers and agreement possible only at single price point, with both parties being nearly indifferent to pursuing a different transaction. One dollar more and the buyer won't buy; one dollar less and the seller won't sell. In contrast, under conditions of bilateral monopoly -- one buyer, one seller, and a unique product with no good substitutes -- there typically will be a much larger variance between the reservation prices of buyer and seller.<sup>13</sup> When the seller's reservation price exceeds the buyer's, there will be no opportunity for a mutually beneficial deal. But when the buyer's reservation price exceeds the seller's, the potential benefits to be gained from distributive bargaining often will be large.

For the sake of comparison, imagine two people who hope to negotiate the purchase of a car. One, Carl, is in the market for a commodity product, a new Toyota Camry. He plans to visit his local Toyota dealership, Archie's Autos, this Saturday in hopes of negotiating a purchase. There are many buyers in the market for new Camrys: it has been the best selling car in the United States for nine out of the past 10 years. And there are many sellers of Camrys, at least in urban areas. In this circumstance, the bargaining zone is likely to be small. No matter how much Carl is dying to purchase a new Camry, his reservation price when he walks into the dealership will be limited by the price at which he can buy the model at another dealership in the area. If Carl knows from researching newspaper advertisements that another dealer 10 miles away is offering the car for \$20,000, Carl's reservation price is going to be very close to that amount. For sake of discussion, let's assume Carl's reservation price is actually \$20,100 because, once he is in Archie's showroom, it is worth \$100 to him not to have to drive to and bargain with the dealer down the road.

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<sup>13</sup> See generally Russell Korobkin, A Positive Theory of Legal Negotiation, 88 Geo. L. J. 1789, 1826-27 (2000)

Given the assumption that there is a competitive market amongst dealerships, if the competing dealer is offering the cars for \$20,000, it is unlikely that Archie can sell the cars for much less than that amount and still turn a profit. In the real world, all sellers are usually not completely identical in every respect, which is to say conditions are likely to fall short of perfect competition. Let us assume Archie has limited space on his lot, so he is willing to sell for a bit less than his competitor in order to free up space to display a new model, and as a result his reservation price is \$19,800, meaning that an agreement between Carl and Archie will generate \$300 of cooperative surplus.

Now consider Carl's friend Ulysses, who prefers more unique automobiles. Ulysses is hoping to purchase a 1930 Studebaker Commander Victoria in near mint condition, with the original paint and original interior. After searching for a number of years, he has located one in the possession of Catherine Collector. Catherine occasionally receives inquiries concerning some of her other cars, like her 1957 Mustang, but she rarely comes into contact with anyone interested in purchasing a vintage Studebaker.

Under these circumstances, there is no liquid market of buyers and sellers to enforce a narrow bargaining range. Since neither Ulysses nor Catherine has a good substitute transaction, this negotiation can be classified as a bilateral monopoly situation. In this case, the parties' reservation prices might be close together, by chance, but they also could be widely divergent. For example, it is plausible that Ulysses' reservation price is \$80,000 and Catherine's is \$20,000, in which case there would be a \$60,000 cooperative surplus to be divided in case of an agreement. In this circumstance, the negotiation's distributive potential would be quite large. Skill at distributive bargaining could be worth tens of thousands of dollars to Ulysses or Catherine, whereas distributive bargaining skill is unlikely to be worth more than a couple hundred dollars, at most, to Archie or Carl.

## **B. The Source of Integrative Potential: Incremental Improvements**

While a negotiation's distributive potential depends on the expected variance between the parties' reservation prices, its integrative potential depends on the expected increase in the amount of cooperative surplus that can be created by creatively

restructuring or redefining the negotiation package relative to the baseline package. Integrative potential is likely to be substantial when two conditions are present; less so when either condition is absent. First, there must be a substantial difference in the value of the baseline negotiation package and a reconfigured negotiation package. Second, there must be heterogeneity across parties in the value they place on the reconfigured negotiation package. If the first condition holds but not the second, integrative bargaining might raise (or lower) the buyer's reservation price but simultaneously raise (or lower) the seller's reservation price, substantially changing the nature of the deal but not increasing the cooperative surplus. If the second condition holds but not the first, integrative tactics are likely to create value, but only small amounts that are of little significance to the parties.

To illustrate these points, let's return to the examples of our automobile negotiators. First, we'll consider a situation in which condition one holds but condition two does not. Let's assume that vintage car collectors universally place a very high value on the condition of a car's interior. Consistent with this, Ulysses is willing to pay \$80,000 for a 1930 Studebaker that has been competently maintained, but he is willing to pay \$100,000 if the car is expertly refurbished to look like it did in its original condition. Catherine could have the car refurbished to its original condition, but doing so would make the car far more attractive to her as well. In untouched, used condition, Catherine would be willing to sell the car for \$20,000. If she refurbished it to original condition, however, Catherine would not be willing to sell it for less than \$40,000. In this case, adding the issue of "refurbishment" to the negotiation package would change the nature of the transaction substantially, but it would not add to the cooperative surplus. Integrative bargaining ability would have little if any potential to create value for the negotiators here.

If there is high variance in preferences for "refurbishment" amongst vintage car enthusiasts, or in costs of refurbishing, the analysis changes substantially. Assume, for simplicity, that half of vintage car collectors care tremendously about refurbishment and the other half do not care at all – the latter appreciate the patina of time and wear. In this case, adding the issue of refurbishment to the negotiation package might create a very large amount of cooperative surplus. If it turns out that Ulysses is of the type who values

refurbishment highly, and Catherine is of the type that does not, adding the issue could increase the potential cooperative surplus of a deal by tens of thousands of dollars. Under these assumptions, integrative bargaining tactics would have significant potential to create value in the negotiation, although they would not yield value in every single case.

Now let's consider a negotiating circumstance in which condition two is present, but not condition one. Assume that Toyota Camry purchasers have heterogeneous preferences for the presence of floor mats in their cars. Half find them to be a useful accessory and value them at \$50; half think they are useless and value them at \$0. All dealers place a very low value on floor mats, because Toyota manufactures them cheaply in bulk and provides them to its dealers for \$25 a set. In this situation, there is a 50 percent chance that adding a set of floor mats to the new Camry would create cooperative surplus for Carl and Archie, meaning that the negotiation might have integrative value. The problem is that the integrative potential is small in absolute terms, in the context of a \$20,000 purchase; not irrelevant, but obviously far less important than the price of the car.

To summarize: a negotiation will have relatively more distributive potential if its context approaches bilateral monopoly than if its context approaches perfect competition, and it will have relatively more integrative potential if the possible changes to the baseline transaction significantly affect the overall value of the transaction, and the variance in negotiators' valuations of those changes is high.

This analysis provides a construct for comparing the integrative and distributive potential of a given negotiation, but it certainly does not demonstrate that the integrative bargaining supremacy claim is misguided, on average. Part IV argues that integrative potential is often more limited in negotiations than it might initially appear to be. Part V claims that we should expect the majority of legal negotiations to have relatively high distributive potential and relatively low integrative potential.

#### **IV. THREE STRIKES AGAINST INTEGRATIVE BARGAINING SUPREMACY**

Even in conditions that appear to have integrative potential, there are three reasons that the value of integrative tactics might be less than meets the eye. None of these points undermines the theoretical value of integrative bargaining, but all suggest

that integrative tactics might be less valuable, compared to distributive tactics, than integrative bargaining supremacists commonly assume.

### **A. The Possibility of Transactions with Third Parties**

When issues are added to the baseline negotiation package, those issues are often separable from the content of the customary package. For example, rather than adding the floor mats to the sale of the Toyota Camry, one can imagine Carl and Archie entering into a contract for the sale of the Camry and then, a month later, Carl returning to the dealership and negotiating for the mats. Let's assume again that Carl's reservation price for the car is \$20,100 and Archie's is \$19,800, and that Carl's reservation price for the mats is \$50 and Archie's is \$25. Assuming separate negotiations, we would characterize each as purely distributive.

For this reason, Professor Wetlaufer has argued that adding the issue of floor mats to the negotiation concerning the Camry is not an example of integrative bargaining at all.<sup>14</sup> I disagree with this analysis. If Camrys are customarily sold without floor mats, adding the issue of the mats does increase the amount of cooperative surplus available: Carl's reservation price for the package of Camry plus mats will be \$20,150, and Archie's reservation price for the package will be \$19,825, increasing the cooperative surplus from \$300 to \$325. It is true that combining the issues does not produce any more cooperative surplus than the parties could have created by negotiating twice – once for the car and once for the floor mats, but the double negotiation scenario is probably not the appropriate baseline case for comparison. If the parties don't add the mats to the Camry transaction today, it is unlikely that Carl will return next month to negotiate for them separately. If my intuition about this is correct, the proper baseline transaction is cash-for-car, not cash-for-car **plus** cash-for-mats.

The problem for integrative bargaining supremacists is that, in many examples often used to demonstrate integrative potential, it would be more efficient for one or both negotiators to enter into the second part of the transaction with a third party than with their immediate negotiation counterpart. When this is the case, the use of integrative tactics such as adding issues will increase the cooperative surplus available to the parties

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<sup>14</sup> Wetlaufer, *supra* note \_\_\_, at 377-78.

in the particular negotiation but produce less overall value than could have been achieved through an alternative course of action. It might be the case that Toyota can produce floor mats that fit Camrys particularly cheaply, or that Carl places a high subjective value on floor mats with the Toyota insignia. In either case, adding the floor mats to the negotiation would create value. But if a third party vendor can produce an equivalent product more cheaply, and if Carl doesn't care about the logo, more cooperative surplus would be created if Carl were to purchase his floor mats elsewhere.

To generalize, bundling issues can often obscure the fact that integrative tactics can make the parties better off than they would have been had they just made the baseline exchange, but leave them worse off than they could have been had they dealt with third parties with regard to the additional issues. This risk demonstrates an important limitation on the potential of integrative tactics to create value for negotiators.

## **B. Incorporation of Integrative Potential into Baseline Transactions**

When negotiation theorists conceptualize integrative bargaining, they often begin, as I have done in this essay, by imagining very simple baseline transactions and then imagining how adding complexity to them could increase the available cooperative surplus. So, for example, the baseline transaction between Carl and Archie is conceptualized as "car for cash," and adding the issue of floor mats is described as a potential way to use an integrative tactic to increase cooperative surplus. Or, alternatively, substituting a "lease" for a "purchase" is described as a potential way to subtract ownership in later years from the baseline transaction in order to increase potential cooperative surplus.

Although their simplicity makes these minimalist conceptions of baselines useful for illustrating abstract theoretical points, such simple examples can obscure the fact that trade custom often builds complex and sophisticated terms into the baseline version of transactions. In these situations, skill at employing the tactics of integrative bargaining isn't necessary for negotiators to take advantages of potential efficiencies. If most car buyers value floor mats more than it costs sellers to provide them, the standard baseline transaction offered by auto dealers is likely to include the floor mats; customer and salesman will not have to identify the opportunity to create value by bundling floor mats

with cars, because the manufacturers will offer the mats as part of the "car" package. If leases provide more joint value for many dealer-customer pairs than do sales, many car dealers often will offer customers the choice of a pre-designed lease transaction.

This analysis, of course, does not suggest that integrative tactics can never help the parties create cooperative surplus because all deals are optimally efficient. Trade custom only evolves after early movers innovate. Someone has to identify that cooperative surplus is maximized by bundling floor mats with cars and offering leases in addition to sales before these terms can become part of the baseline transaction, which means that the unusual transactions can provide substantial opportunities for integrative tactics even when commonplace transactions might not. And even after the development through custom of baseline transactions that maximize the cooperative surplus in common transactions, some (and perhaps many) parties will have unusual or idiosyncratic preferences or cost structures, which will make integrative tactics profitable in their specific deals. If most car buyers value floor mats but Carl does not, cooperative surplus can be created in his negotiation with Archie by subtracting the floor mats from the negotiation, assuming that trade custom has caused them to be included in the baseline transaction. But the amount of value that can be gained only if the lawyers negotiating the deal's terms are personally skilled at using integrative bargaining tactics is often much less than what is assumed in the typical negotiation classroom, where the acquired wisdom of industry-specific custom that informs the baseline for transactions in the real world is rarely assumed.

### **C. Integrative Tactics Create Distributive Potential**

Another reason that negotiators should be skeptical about the relative potential of integrative tactics, as compared to distributive tactics, is an important asymmetry between the two: skillful use of integrative tactics increases the opportunity a negotiator has to benefit from distributive tactics, but the reverse is not true.

Let's create a set of facts that make integrative tactics *appear* to have far more profit potential than distributive tactics. Assume that Ulysses has a reservation price of \$40,000 for the 1930 Studebaker, and Catherine has a reservation price of \$39,000. Ulysses would value the car, refurbished, at \$60,000, and Catherine, who considers

refurbishing vintage cars a relaxing hobby, is willing to do the refurbishing for \$2000. Assume that no one can refurbish a Studebaker as well as Catherine, and because she considers doing so fun rather than work, no one can do it for cheaper, so adding the issue of refurbishment to the baseline transaction is not masking a more efficient possible transaction with a third party for either negotiator. In this example, the distributive potential of the negotiation seems small – specifically, the \$1000 of cooperative surplus in the baseline condition -- but its integrative potential is \$18,000.

This analysis is correct as far as it goes, but it doesn't go far enough. By employing the integrative tactic of adding an issue, the parties have created \$18,000 of cooperative surplus, but that surplus must be divided. The parties can capture the deal's integrative potential only if they now agree on a sales price between \$41,000 and \$60,000, and that price will be determined based on the negotiators' skill in using distributive tactics. *The more integrative potential of a negotiation, the more potential value of distributive bargaining.*

This principle holds true even when the negotiation is not over price. Consider a divorcing couple who own a townhouse in the city and a cottage in the country, each with approximately the same market value. Their lawyers advise them that a standard divorce agreement calls for the sale of non-liquid assets and an equal division of the proceeds and, in fact, if they do not agree to a division of their property, a court will order exactly this. Husband Harold hates the congestion of the city and loves the clean air of country. Wife Wendy loves the energy of urban life and despises the isolation of rural life. Clearly, cooperative surplus can be created if Wendy keeps the townhouse and Harold the cottage, because both would enjoy far more than half of the subjective value produced by their joint assets.

Make no mistake, however: the integrative potential of this negotiation makes distributive skills *more, not less*, important as long as side payments are possible, which they virtually always are. Precisely because she values the townhouse much higher than the cottage, Wendy would prefer to keep the townhouse and pay Harold significant cash compensation rather than going to court. Because Harold values the cottage so highly, he would prefer to keep it and pay Wendy significant cash compensation rather than go to

court. Which spouse pays the other (in cash or other marital assets) as part of the deal? The answer will depend on the exercise of distributive tactics.

A common intuition is that the most likely outcome in such a negotiation would be that each spouse agrees simply to keep his or her preferred house and neither makes a side payment. I agree with this empirical conjecture, but the reason such an outcome is likely is because one or both parties might argue that payments are inappropriate because each spouse obtains an equal amount of objective value by simply keeping his or her preferred residence, because an agreement to make no side payments is a salient focal point amongst an infinite number of possible arrangements, or because it is customary not to exchange cash in this type of situation.<sup>15</sup> Employing any of these arguments to reach an agreement constitutes distributive bargaining.

## **V. INTEGRATIVE VS. DISTRIBUTIVE BARGAINING IN LEGAL NEGOTIATIONS**

From the standpoint of negotiation theory, there is no such category as “legal” negotiation. There are, however, some negotiation contexts in which the participation of lawyers is ubiquitous. Certain characteristics of these contexts suggest that lawyer-negotiators, in particular, will have more to gain for their clients through their skill as in distributive tactics than through their skill at integrative bargaining.

### **A. Litigation Settlement**

Perhaps the prototypical bargaining context involving lawyers is the out-of-court settlement negotiation, in which the negotiators seek to exchange the waiver of the legal claims of the plaintiff (effectively the “seller”) for some consideration, usually money, offered by the defendant (effectively the “buyer”). Since the large majority of all

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<sup>15</sup> See generally Korobkin, Negotiation Theory, *supra* note \_\_, at 182-220 (“Fair Division and Related Social Norms”).

lawsuits are resolved through negotiation rather than adjudication,<sup>16</sup> settlement negotiations might be called the primary business of litigators.<sup>17</sup>

With a few very narrow exceptions, settlement negotiations reflect nearly perfect bilateral monopoly conditions, which suggests that distributive potential is likely to be substantial. If Walker files a lawsuit against Driver for negligent operation of her automobile, neither has the option of settling the claim with a third party instead of the other litigant, in the way that Carl can purchase his Camry from dozens of Toyota dealers (or a similar car from many other automakers) if he thinks Archie is trying to drive too hard of a bargain.

The distributive potential is reinforced by the fact that the transaction costs of pursuing adjudication are high, and the outcome of adjudication is always uncertain. Assuming that litigants are risk averse, both factors suggest that not only are the plaintiff and defendant likely to have divergent reservation prices in settlement negotiations, in most cases the defendant's reservation price should be higher than the plaintiff's. In such circumstances, the cooperative surplus that can be produced by the baseline agreement -- the exchange of cash for a waiver of claims -- will often be large.

While the distributive potential of settlement negotiations is, on average, large, their integrative potential will usually be small. Where the litigants have an ongoing relationship, it is conceivable that they could add issues concerning that relationship to the negotiation package and create substantial value -- for example, a defendant could promise to place future orders with the plaintiff in return for the plaintiff dropping his breach of contract suit -- but this can increase joint value relative to the baseline transaction only if the dispute has not sufficiently poisoned the relationship to the point that continued dealings aren't feasible (that is, the benefits of an ongoing relationship must outweigh the costs), and the parties would not have independently entered the same agreements concerning the future (because if they would have negotiated the same future arrangements regardless, the integrative bargaining tactics would not create any marginal

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<sup>16</sup> See Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 *Stan. L. Rev.* 1339, 1339 (1994).

<sup>17</sup> This observation causes some scholars to refer to the term "ADR," usually shorthand for "alternative dispute resolution," as "appropriate dispute resolution." See, e.g., Christopher Honeyman & Andrea Kupfer Schneider, *Introduction: A 'Canon' of Negotiation Begins to Emerge*, in *THE NEGOTIATOR'S FIELDBOOK* 1, 4 (2006).

value). And this possibility of integrative value, of course, does not exist at all when the lawsuit is between strangers or near-strangers.

A common example of an integrative tactic that can be used in a settlement negotiation between strangers is the addition to the negotiation package of an apology by the defendant. Adding an apology often will be more valuable to the recipient plaintiff than costly to an issuing defendant, so it has the possibility of creating cooperative surplus.<sup>18</sup> But except in cases where reputational damage has caused long term harm to a plaintiff's financial interests, apologies usually have a small amount of value in comparison to the issue of damages.

Consider a wrongful death plaintiff willing to accept \$1 million to settle his claim out of court, and a defendant with a reservation price of \$1.5 million. If the defendant offers to add a formal apology to a settlement, the plaintiff's reservation price is likely to decline only slightly. A gratuitous apology – that is, one provided without the explicit condition that it be considered part of the compensation package – offered by the defendant at the outset of negotiations is likely to be a very good distributive tactic, because it is likely to engender goodwill and cause the plaintiff to be less recalcitrant when the parties bargain over the \$500,000 in cooperative surplus.<sup>19</sup> But the apology probably has only modest potential to expand the bargaining zone and increase the total cooperative surplus.

Structuring settlement payments over a period of time (effectively adding the issue of a financing arrangement to the baseline transaction) can create joint value by taking advantage of differences in discount rates and/or tax status,<sup>20</sup> but this also will usually expand the bargaining zone only modestly compared to the amount of

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<sup>18</sup> For some evidence on how a defendant's apology might reduce a plaintiff's reservation price in settlement negotiations, see Jennifer K. Robbenolt, *Apologies & Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 484-91 (2003); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 147-50 (1994).

<sup>19</sup> See Russell Korobkin, *Psychological Impediments to Mediation Success: Theory and Practice*, 21 Ohio St. J. Disp. Res. 306-07 (2006) (apologies useful in breaking cycle of increasing anger); David F. Sally and Gregory Todd Jones, *Game Theory Behaves*, in *The Negotiator's Fieldbook* 87, 92 (Andrea Kupfer Schneider & Chris Honeyman, eds., 2007) (apologies useful in reducing social distance).

<sup>20</sup> See, e.g., Lax & Sebenius, *supra* note \_\_\_, at 144-46 (explaining how structured settlements can create joint value).

cooperative surplus at stake in a baseline transaction that assumes an immediate cash payment.

## **B. Business Transactions**

Perhaps settlement negotiations have more distributive than integrative potential, on average, but what about the transactional negotiations conducted by business lawyers that grease the wheels of commerce? Most business negotiations are not defined by bilateral monopoly conditions, and many offer the possibility of significantly changing the overall nature of the transaction by adding or subtracting issues. For these reasons, it is clear that the relative potential of integrative bargaining tactics is far greater, on average, in transactional negotiations than in distributive ones. But the relative potential of integrative bargaining can easily be overstated even in this context.

One reason is that in many transactional negotiations, the clients agree on the foundational structure of the negotiation package, including price, before the lawyers become involved. At this point, the business executives call on their legal department or their outside attorneys to "paper the deal" with a formal contract, and it is only at this point that the lawyers become involved in the negotiation.

Under these conditions, the negotiation context looks more like a bilateral monopoly, and the value of distributive skill increases. Although both parties technically retain the option to walk away from the negotiation and enter into an agreement with a different party, the transactional and reputational costs of doing so at this point can be substantial. In addition, the lawyer, as an agent, faces high personal costs of recommending this course of action to her client, because she risks being labeled as a deal-killer. In this situation, there will tend to be a large bargaining zone, which is to say that both the buyer's and seller's lawyers will prefer to sacrifice a substantial amount of the cooperative surplus that a completed transaction will create rather than break off negotiations and recommend cancellation of the deal to their clients. This feature, common in business transactions at the time the lawyers enter into the picture, suggests that distributive tactics will often be quite valuable.

While the distributive potential of transaction negotiations is often greater than it initially appears, the integrative potential of transactional negotiations is often relatively

less than it first appears because the widespread adoption of efficiencies into the baseline negotiation package through the development of trade custom. This is true for large-scale business transactions generally, and for industry-specific negotiations in which transactional lawyers develop specializations.

Take, for example, a merger negotiation, in which a large conglomerate, Alpha Company, seeks to purchase a small, high-technology company called Beta. Beta's value to Alpha is primarily in the former's portfolio of technology patents. Because Beta has more information than Alpha about whether competitors might seek to challenge the validity of these patents on the grounds that they are not sufficiently novel or non-obvious, Alpha's reservation price is likely to increase more than Beta's will if Beta provides a contractual representation that it has no knowledge of any current challenges to its patents and agrees to indemnify Alpha for harms suffered if such a challenge is subsequently mounted by a third party.

On its face, this looks like an excellent example of integrative potential, and indeed it would be we were to assume that the baseline transaction between Alpha and Beta would include no such representation or indemnification provision. This probably was a fair description of the situation the first time one company purchased another principally for the latter's patent portfolio and consulted a lawyer for assistance in structuring the terms of the deal. In most cases, however, lawyers do not begin negotiating the terms of complicated transactions from scratch. Instead they draw on a large base of institutional memory and industry custom. Where this is the case, the value of providing these terms is captured by customary practice, and the integrative potential that depends on the skill of the negotiators will be correspondingly limited.

Complex transactions in which terms are negotiated to some degree -- as opposed to deals in which one party offers an adhesion contract to the other on a take-it-or-leave-it basis -- will always will offer some potential for integrative bargaining, because the preferences, needs, and cost structures of the parties are unlikely to be precisely the same from one transaction to the next. But the amount of value that can be gained only if the lawyers negotiating the deal's terms are personally skilled at using integrative bargaining tactics is often much less than what is assumed in the typical negotiation classroom,

where the acquired wisdom of industry-specific custom that informs the baseline for transactions in the real world is rarely assumed.

## CONCLUSION

Notwithstanding the provocative title of this essay, my criticism is of the integrative bargaining supremacy claim, not integrative bargaining itself. The point is one of emphasis. My argument is not that integrative bargaining has no value or even minimal value, but more modestly, that the majority of legal negotiations will have more distributive than integrative potential. I have tried to support this claim, admittedly circumstantially, by showing that the types of negotiations in which lawyers typically participate will usually have substantial distributive potential, and at the same time that their integrative potential will tend to be more limited than often assumed.

What has been most obviously lacking, perhaps, is a description of the tactics negotiators might use to take advantage of the distributive potential that I claim is ubiquitous. Distributive bargaining is itself a complex activity that deserves its own nuanced analysis. Proponents of integrative bargaining supremacy sometimes caricature distributive tactics as being limited to making unreasonable demands and then refusing to make concessions. Although aggressiveness and stubbornness do have their place as tactics, distributive bargaining is not limited to these stereotypic behaviors. A savvy bargainer who focuses attention on distribution devotes resources to improving her options away from the bargaining table, understands the needs of her counterpart, invokes external norms as the basis for decisions, uses social norms of fair bargaining to reach agreement, and builds a reputation as a fair and honorable business partner.<sup>21</sup> Unfortunately, a discussion of how a negotiator can best combine these approaches to achieve success at capturing cooperative surplus from her counterpart – that is, at distributive bargaining -- is a topic for another essay.

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<sup>21</sup> See generally Korobkin, Negotiation, supra note \_\_\_, chs. 5-6.

