

# Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining

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## I. INTRODUCTION

This essay explores whether mindfulness squares with partisanship. I must warn the reader at the outset that I will raise a potentially dizzying number of difficult questions in beginning to work through this topic, all in a very few pages. I do not provide, nor do I have, clear answers to some of these questions. My goal is to provoke, raise doubts, and begin to chart the way toward a theory of negotiation ethics, not to argue each point extensively. That will have to wait for another day.<sup>1</sup>

The essay is partly a response to Riskin and partly a coda. Riskin explores several of the ways that mindfulness might benefit lawyers, including reducing stress, increasing professional satisfaction, facilitating listening, and softening the lawyer's standard adversarial stance.<sup>2</sup> He briefly discusses its potential impact on negotiation, suggesting that mindfulness practice may make a negotiator more mentally agile and thus better able to manage both the tension between creating and distributing value and the choice between adversarial

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1. I develop some of these ideas further in an article currently under development titled *Honesty and Fairness*.

2. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002) [hereinafter Riskin, *Contemplative Lawyer*]. See also STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* 84 (1999) (discussing the benefits of mindfulness for lawyers).

and problem-solving strategies.<sup>3</sup> Mindfulness, in short, will make the negotiator more free to choose how to negotiate.

This essay suggests the opposite. Mindfulness may lead to more deeply-held ethical commitments, which in turn may prevent some forms of partisanship that are required for certain negotiation strategies and tactics. Although mindfulness may not be the *only* path to such commitments, it is our topic here and I will attempt to show that introducing these practices to negotiators—lawyers and non-lawyers alike—may ultimately lead them to eschew adversarial negotiation strategies.<sup>4</sup> I certainly don't claim that this would be a bad thing, but it may, for some, conflict with their vision of the lawyer's role. My point is that the conflict is real, and that mindfulness may exacerbate, not resolve, it.

## II. THE MINDFUL NEGOTIATOR

For brevity, I will largely assume that over time a mindful person will become a more ethical person. This assumption is certainly open to challenge, and it deserves greater exploration than I can offer here. But I will take it as a given. Mindfulness offers a broader view

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3. Riskin, *Contemplative Lawyer*, *supra* note 2, at 55 (arguing that mindfulness permits a negotiator to hold the negotiator's dilemma "in her awareness at virtually all points before and during a negotiation and decide, moment to moment, whether and how to use or blend adversarial or problem-solving strategies and techniques.").

4. I must leave a related, interesting, but unfortunately altogether too broad topic for treatment elsewhere, perhaps by others. This is the question of what ethical challenges lawyer-negotiators who are *not* interested in mindfulness may face if they negotiate on behalf of particularly ethical or mindful clients. I can see at least two such problems. One is that these lawyers are likely to distrust the clients' mindful states, believing perhaps that any altruism or collaboration clients say they desire will be short-lived. These lawyers may feel duty-bound to protect their clients' interests as the lawyers understand them, even while potentially dismissing their clients' expression of those interests. Second, lawyers may feel a need to protect their clients from information learned from the other side. Mnookin, Tulumello and I have identified the agent's "assimilation problem"—that a principal may equate empathy with agreement and thus fear that the agent is beginning to identify too closely with the other side's perspective and interests. See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 170 (2001). A lawyer negotiating on behalf of a mindful client faces the opposite problem. Assuming that the attorney interacts with the other side without the client present, the attorney will possess private information about the other side—for example, that the other side is deeply upset at the prospect of going to court and fears the emotional turmoil of litigation. A lawyer may fear that telling the client about the opponent's fear will lead the client to give in too readily. As a result, the lawyer may keep information from the client or even mislead the client about what the lawyer knows. See generally Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990); Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor*, 138 U. PA. L. REV. 761, 764 (1990).

of each experience than we normally adopt. It is a view that permits, even requires, careful weighing of one's immediate needs or wants against a more long-term and thoughtful consideration of one's interests. If each experience or interaction is seen in the context of one's life as a whole and against the background of one's self-realization instead of as a discrete transaction disconnected from one's personal development, the costs of ethically-questionable behavior become more salient. Deception, for example, always risks spoiling a negotiation or one's relationship with the other side. From this broader perspective, however, deception also risks damaging one's integrity—turning you into (or beginning to turn you into) the sort of person that you don't want to be. Because that damage, in turn, may hinder further self-realization and growth, the mindful person will avoid such deceptive actions.<sup>5</sup> This can be the first step towards a more ethical life—taken initially out of self-interest and the desire to progress as a person.

If one accepts this argument, it raises an obvious question: just how far will increased awareness, attention, and focus go in terms of strengthening one's ethical commitments?<sup>6</sup> Riskin seems to agree that increased attention to ethics accompanies increased mindfulness. He notes that certain "positive states of mind"—such as loving-kindness, compassion, empathy, and equanimity—tend to "develop routinely in the course of extensive mindfulness meditation practice."<sup>7</sup> And in the legal context he acknowledges the possibility that "a deeper understanding of one's own motives and a commitment to ethical decision-making might make it difficult for some lawyers to undertake certain activities that are widely—but not universally—

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5. For two very different but equally eloquent discussions of this increasing reluctance to act immorally, see ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 505-25 (1981) (discussing iterative self-improvement as a path to ethical principles) and STEPHEN BATCHELOR, *BUDDHISM WITHOUT BELIEFS* 45-48 (1997) ("Our deeds, words, and intentions create an ethical ambience that either supports or weakens resolve. If we behave in a way that harms either others or ourselves, the capacity to focus on the task [of mindful awakening] will be weakened."). Self-selection likely also creates a correlation between mindfulness and ethical strength. Those who become interested in mindfulness training may often be those who already reflect on their ethical duties and what constitutes a good life.

6. This is not a question reserved only for those interested in mindfulness but is instead a basic question in ethical theory. As Robert Nozick has noted, the ability to focus attention is a fundamental component of our autonomy and a determinant of our character and make-up over time. See ROBERT NOZICK, *THE EXAMINED LIFE* 122 n.\* (1989) ("What we presently focus upon is affected by what we are like, yet over the long run a person is molded by where his or her attention continually dwells.").

7. Riskin, *Contemplative Lawyer*, *supra* note 2, at 65.

considered essential for proper lawyering.”<sup>8</sup> Ultimately, however, Riskin doubts that mindfulness will so change a lawyer as to make the lawyer unable to pursue his client’s interests as zealously as the client might hope. He concludes that it is “quite unlikely” that mindfulness will make lawyers so soft that they will be unwilling to “tear down a hostile witness in a trial, twist the facts, or otherwise push hard enough for their clients’ positions.”<sup>9</sup> A mindful lawyer, the argument goes, can still be an adversarial lawyer—and, by implication, a mindful client can still be competitive and choose an adversarial approach to her negotiations.

I am less sure than Riskin seems to be about this reconciliation of mindfulness and partisanship.<sup>10</sup> One can imagine that the practices Riskin describes might have a far more significant impact on a person’s ethical commitments, whether lawyer or non-lawyer, than he seems to admit. To explore this possibility, imagine that, at the extreme, a diligent mindfulness practitioner might eventually reach a state of complete dedication to an ethical life. I will call this person a “saint” because she adopts a more conscientious stance toward her relations with the world and others than most of us will ever achieve.<sup>11</sup> Our saint would also have to be sufficiently strong-willed to live up to her moral commitments. She must have developed herself to the point that the contingencies of her life—her history, attachments, psychology, and emotions—no longer lead her to act against these deeply-held beliefs. She is so mindful as to be somewhat frightening.

What sort of ethical commitments would our saint adopt? For the sake of argument, I will assert that at the very least such a person would commit to both honesty and fairness, resolving neither to deceive nor to take advantage of other human beings<sup>12</sup> for her own

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8. Riskin, *Contemplative Lawyer*, *supra* note 2, at 64.

9. *Id.*

10. To be fair, Riskin’s article is not devoted to this topic, and thus it is hard to know what his considered opinion would be on the matter. I have tried to assemble his position on mindfulness, ethics, and the lawyer’s role as best I can.

11. For the purposes of this essay I make no reference to religious canons regarding the qualifications for sainthood. The “saint” here is merely an extremely aware, moral person.

12. One can question whether such a commitment should be limited to human beings instead of all forms of sentient life, as have both serious ethicists and various religious figures. *See, e.g.*, PETER SINGER, *PRACTICAL ETHICS* 55 (1993); PETER SINGER, *ANIMAL LIBERATION* (1975). Because I focus here on negotiation, I will ignore the question of the ethical treatment of non-human life.

ends<sup>13</sup> and to respect and take others' interests into account.<sup>14</sup> There is good reason to believe that a very mindful person would adopt such a saintly view of life. Even without turning extensively to religious doctrine, one can imagine that our saint would be consistently non-partisan when it came to her own and others' interests.<sup>15</sup> The saint would realize, as the philosopher Henry Sidgwick put it, that "[t]he good of any one individual is of no more importance, from the point of view (if I may say so) of the Universe, than the good of any other."<sup>16</sup> Thomas Nagel calls this an "objective" viewpoint: one that is removed from the individual's own interests.<sup>17</sup> It is a view most often associated with R.M. Hare, who described such non-partisan principles as "universalizable." Hare argued that an ethical imperative must be universalizable in the sense that it recommends an action regardless

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13. There are various justifications for deceit, such as to save a life or serve some other moral end. Here I refer to self-interested deceit designed merely to further one's own welfare. This does not do justice to the complexities of this topic but will have to do for now.

14. These various commitments are not necessarily connected. One might decide not to deceive or manipulate but not take the further step of affirmatively committing to take others' substantive interests into account. For our purposes here, however, I will assume that our saint adopts both sorts of principles.

15. See THOMAS NAGEL, *MORTAL QUESTIONS* 112 (1979) ("[M]oral equality attempt[s] to give equal weight, in essential respects, to each person's point of view. This might even be described as the mark of an enlightened ethic . . .").

16. HENRY SIDGWICK, *THE METHODS OF ETHICS* 382 (7th ed. 1992).

17. According to Nagel, "A view or form of thought is more objective than another if it relies less on the specifics of the individual's makeup and position in the world, or on the character of the particular type of creature he is. . . . We may think of reality as a set of concentric spheres, progressively revealed as we detach gradually from the contingencies of the self." THOMAS NAGEL, *THE VIEW FROM NOWHERE* 5 (1986). Rawls adopts a similar, though not identical, viewpoint when he reasons from behind his famous "veil of ignorance." See JOHN RAWLS, *A THEORY OF JUSTICE* 136 (1971) ("Somehow we must nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage."). The legal system too rests on an ideal of "blind justice," impartial as between persons irrespective of their individual characteristics. See SIDGWICK, *supra* note 16, at 380 (discussing parallel between the universal point of view and this legal ideal). Indeed, there is an odd similarity here to what Dean Anthony Kronman has called "that peculiar bifocality" that law students acquire through the case method in law school, which he describes as a "forcing ground for the moral imagination" because it requires the law student to "disengage himself from the sympathetic attachments he may have formed" and see things from multiple perspectives. See ANTHONY T. KRONMAN, *THE LOST LAWYER* 113 (1993). Of course, not all (Kronman included) agree that law school serves as a place for moral development. See, e.g., BENJAMIN SELLS, *THE SOUL OF THE LAW* 50-51 (1994) (describing how the case method leads to a sort of "false individuality").

of the perspective or contingencies of the actor.<sup>18</sup> If I think it is morally acceptable for me to torture you, I must also think it is acceptable for you to torture me.<sup>19</sup> As I am unlikely to accept this, freedom to torture is a poor candidate for a moral imperative. This thinking ultimately leads us to a commitment to consider others' interests.<sup>20</sup> Somewhat like Kant, Hare explains that "if we are trying to universalize our maxims, we shall try to further the ends of other people on equal terms with ourselves, treating them as if they were our own ends."<sup>21</sup>

Is there reason to believe that mindfulness will lead to this sort of moral perspective-taking? This is an empirical claim, and one that I can neither substantiate nor refute. But it is plausible, or at least plausible enough to deserve attention. Riskin notes that mindfulness training can help to loosen up a practitioner's attachment to self and ego.<sup>22</sup> As a practitioner looks deeper into the nature of his own and others' conditions, his own life, interests and position may become less primary and others' interests more salient. This, in turn, may permit more compassion, empathy and concern for others' well being. Mindfulness may, in short, allow him to "know" others' experiences or perspectives—know what it is like to be them, in their unique condition—in a way previously unavailable to him. (One cannot, of course, ever *know* another's experience in an ultimate sense or in the way

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18. See generally R.M. HARE, *MORAL THINKING* chs. 5-6 (1981); R.M. HARE, *FREEDOM AND REASON* 94 (1963) ("All that is essential . . . is that *B* should disregard the fact that he plays the particular role in the situation which he does, without disregarding the inclinations which people have in situations of this sort. In other words, he must be prepared to give weight to *A*'s inclinations and interests as if they were his own."). See also R.M. Hare, *Arguing About Rights*, 33 *EMORY L.J.* 631, 636 (1984).

19. See R.M. HARE, *OBJECTIVE PRESCRIPTIONS AND OTHER ESSAYS* 14 (1999) (discussing the torture example).

20. Negotiation scholars have long advocated taking others' interests into account. See generally FISHER ET AL., *GETTING TO YES* 59 (2d ed. 1991). Such perspective-taking permits creative problem-solving and more efficient negotiation. My argument here, however, suggests that putting yourself in the other person's shoes may actually be a moral imperative, not merely a pragmatic prescription. I hope to develop this idea more fully in forthcoming work.

21. R.M. HARE, *supra* note 19, at 14.

22. See Riskin, *Contemplative Lawyer*, *supra* note 2, at 56. Nozick has questioned whether meditative insight into the unreality of the self or ego is valid. See NOZICK, *supra* note 6, at 142 (noting that "observational support for the no-self view is rooted within Buddhist meditative practice" but that "this practice also is guided by the doctrine itself—part of the practice consists in meditating on various pieces of the doctrine—so the reports of what gets observed are themselves to some degree a product of the theory already held, hence somewhat contaminated"). This does not mean, as Nozick points out, that such insights are therefore incorrect; merely that they are not entirely dependable. See *id.*

that one knows the taste of broccoli. Although you might observe or reflect upon another person endlessly, you will never observe from the outside-in what it is like to be that person from the inside-out.<sup>23</sup> But perhaps we don't need such perfect knowledge to ground moral commitments. One can approximate, and it seems reasonable that one's approximation, though never perfect, becomes more accurate to the extent that we can weaken the grip of our own partisan perspective.)

Assuming such perspective-taking occurs, will it lead to our saint's basic commitments to honesty and fairness? I acknowledge that this is a big leap, indeed the biggest leap in this essay. To say that moral imperatives are universalizable does not tell you the content of those imperatives. Arguing for (or even defining) honesty and fairness, however, is beyond my reach or ability here. I must simply assert that both are sufficiently fundamental, and sufficiently derivable from this sort of moral perspective-taking (or from other sorts of reasoning about morals), to attribute to our saint.<sup>24</sup>

To recap, our first proposition is that a more mindful person will likely become a more ethical person. Second, she will become more ethical in a particular way—that is, by committing to a less partisan, more universal perspective. In the negotiation context this change will likely lead her at least to commit (a) not to deceive or manipulate others, given that she would not want to be deceived or manipulated, and (b) to try to respect and take others' interests into account as she would expect others to take her interests into account.

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23. See generally Zeno Vendler, *Changing Places?*, in HARE AND CRITICS 171 (Douglas Seanor & N. Fotion eds., 1988); Thomas Nagel, *What Is It Like To Be a Bat?*, reprinted in THOMAS NAGEL, MORTAL QUESTIONS 168 (1979).

24. There is certainly disagreement about the role of lies and their justification. For an excellent treatment, see William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433, 435-36 (1999) (arguing for a contextual approach to lying instead of a categorical one). For a useful discussion of manipulation and deception, see T.M. SCANLON, WHAT WE OWE TO EACH OTHER 296-302 (1998). Scanlon's contractualism is but one example of an approach that might lead to such commitments through rational analysis even without mindful insight or perspective-taking. See *id.* at 191 (arguing that contractualism "gives us a direct reason to be concerned with other people's points of view: not because we might, for all we know, actually be them, or because we might occupy their position in some other possible world, but in order to find principles that they, as well as we, have reason to accept"). The most well-known modern discussion of deception is SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 31 (1978) (arguing that lies may only be justified as a last resort). For the most often discussed categorical bar on lying, see IMMANUEL KANT, THE METAPHYSICS OF MORALS 225-26 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

Few of us, of course, are likely to achieve sainthood in the sense described here. I do not think, however, that this failure, if it is one, will be due to our rejecting these basic principles of honesty and fairness. I believe that most reflective people, including mindfulness practitioners, will arrive at these commitments. More likely, the failure will result from a lack of will, or, put differently, from an inability to realize consistently the principles because of our being rooted in an individual life, at a certain time, in a certain setting. The challenges of life are jarring; we do not always respond to them as we know we should.

Nevertheless, all of this suggests that perhaps Riskin understates the effect that mindfulness practice will have on the choice of negotiation strategies. Although Riskin suggests that mindfulness will better equip negotiators to apply either problem-solving or more adversarial strategies "moment to moment,"<sup>25</sup> a more likely effect, I think, is that mindful negotiators will abandon a truly competitive approach to negotiation. It will no longer be morally responsible to, as Riskin describes it, "mislead the other side,"<sup>26</sup> or perhaps even to ascribe to the basic tenets of what Riskin calls the "lawyer's standard philosophical map."<sup>27</sup> Negotiators will not only have pragmatic reasons to search for integrative, value-creating solutions to a problem; they will have moral reasons as well.<sup>28</sup> They not only ought to problem-solve because it is good practical advice but also because it would be wrong not to.

This is true, I think, of both the saint and the more humble novice to mindfulness. Indeed, negotiation and strategic interaction may be a perfect testing ground for a mindfulness practitioner's newfound ethical aspirations. Moreover, negotiation presents these moral choices in a foreseeable and easily recognizable way. It is a salient context with obvious ethical import. Although a saint may practice discernment and equanimity regardless of situation, and may not need context to provide a warning, many more of us will welcome the reminder to be mindful of our behavior.

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25. See Riskin, *Contemplative Lawyer*, *supra* note 2, at 55.

26. *Id.* at 54.

27. *Id.* at 13.

28. See generally Nozick, *supra* note 5, at 542-45 (discussing whether cooperating, in the context of a prisoner's dilemma game, could qualify as a fundamental moral principle).

## III. SOME EXAMPLES

Adversarial bargaining is common in legal negotiations. One study of civil litigation in New Jersey found that litigators thought that “positional” bargaining was used in seventy-one percent of the cases and problem-solving was used in approximately sixteen percent.<sup>29</sup> This suggests that a mindful negotiator committed to honesty and fairness—and thus to certain forms of problem-solving instead of adversarial bargaining—would be in a distinct minority. But what, exactly, would such a negotiator be required to forego to adhere to our basic commitments to honesty and fairness?

Many common “hard bargaining” tactics derive their power largely from deception.<sup>30</sup> Making an arbitrary and inflated demand, advocating an issue that one does not really care about in order to create a “bargaining chip,” or making a threat that one does not intend to carry out are all intended to induce action by another person through distortion.<sup>31</sup> These tactics conflict with a basic moral commitment to honesty. Similarly, extreme variants of commitment tactics,<sup>32</sup> good cop/bad cop, or personal attacks may be suspect because of the underlying purpose of denigrating or circumventing the other person’s interests in order to better satisfy one’s own.

Certain positive legal permissions to bend the truth in negotiations may also seem less important in the face of a general moral commitment to honesty or fairness. The law of fraud, for example, distinguishes between misrepresentations of fact and misrepresentations of mere opinion. “Bluffing” and “puffing” are permissible; factual misrepresentations are not.<sup>33</sup> Likewise, the American Bar Association’s Model Rules of Professional Conduct permit certain

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29. See Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want,”* 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997).

30. See Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. OF DISP. RES. 325, 346-48 (reviewing hard bargaining tactics); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 48-52 (1985) (same); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1 (1987) (discussing various tactics and ultimately condemning all forms of deception in bargaining).

31. One might even take the position that exaggerated arguments about the state of the law—arguments too abstracted from existing law to be justified—constitute lies. See Robert F. Nagel, *Lies and Law*, 22 HARV. J.L. & PUB. POL’Y 605, 605 (1999) (discussing “the intriguing but distressing question of whether an individual who claims to be speaking like a lawyer ought to be understood to be lying”).

32. See Thomas C. Schelling, *An Essay On Bargaining*, in SCHELLING, *THE STRATEGY OF CONFLICT* 22-28 (1960) (giving the classic description of commitment tactics).

33. See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing With Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 36 (2000)

sorts of misrepresentations in negotiation. Model Rule 4.1 states that a lawyer shall not knowingly make a false statement of material fact or law to a third person, nor fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a client's criminal or fraudulent act (subject to the constraints of Rule 1.6 governing client confidences).<sup>34</sup> The Comment to Rule 4.1, however, permits certain forms of exaggeration and misrepresentation—regarding “[e]stimates of price or value placed on the subject of a transaction” or “a party’s intentions as to an acceptable settlement of a claim.”<sup>35</sup> In short, it is acceptable for a lawyer to misrepresent a client’s reservation price or intentions regarding what constitutes an acceptable settlement.

One might believe that a lawyer negotiator is morally justified in telling such lies about reservation price even if a non-lawyer negotiator is not.<sup>36</sup> And one could argue about whether these legal distinctions align sufficiently with moral reasoning;<sup>37</sup> what “honesty” and “fairness” require is certainly intricate. Even without bringing these basic duties into such detailed focus, however, the point remains: becoming more mindful may restrict a negotiator’s freedom to adopt what might otherwise be considered acceptable, even if somewhat “sharp,” approaches to bargaining.

#### IV. OBJECTIONS

I can imagine many objections to this brief argument. One is that arriving at ethical principles of this sort is a task in which we all engage already, or should, so long as we are reflective about how to live. Mindful awareness is not required for moral acuity—traditional practical reasoning about what morality requires will do the job. I actually agree with this argument, but I don’t think that it detracts

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(discussing the distinction between, and common justifications for, bluffing and puffing).

34. MODEL RULES OF PROF'L CONDUCT R. 4.1(a)-(b) (1999).

35. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (1999).

36. See Alan Strudler, *Incommensurable Goods, Rightful Lies, and the Wrongness of Fraud*, 146 U. PA. L. REV. 1529, 1544 (1998) (relying on Benjamin Constant's arguments that certain lies—particularly lies about reservation values—are morally permissible because telling the truth is only required when the recipient has a right to the truth, which a counterpart in negotiation may not); *id.* at 1567 (concluding that “lies that sophisticated lawyers tell each other about their reservation prices in certain circumstances may not be wrong in any relevant way”).

37. See, e.g., Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001).

much from the discussion here. Increased awareness of self and circumstance may facilitate such reasoning, even if it is not necessary. And it may lead most mindfulness practitioners toward these ethical principles even if others could also arrive there independently.

A second objection is that our saint—or even any negotiator espousing the saint’s ethic (though perhaps not living up to it consistently)—simply cannot be described accurately as “negotiating.” Honest bargaining that takes all interests seriously is not really bargaining, it’s something else, because deception, the argument goes, is inherent to negotiation.<sup>38</sup> James White has stated, for example, that “[t]o conceal one’s true position, to mislead an opponent about one’s true settling point, is the essence of negotiation.”<sup>39</sup> Walter Steele put a point on this argument with the following hypothetical:

Consider the negotiating standards of two holy men, one a willing buyer and the other a willing seller. If their personal commitments to holiness prevented them from making the slightest misrepresentation or from engaging in any abuse of their bargaining positions, how would the ultimate outcome of their negotiations differ from the outcome achieved by two lawyer negotiators? If deceit truly is inherent to negotiation, the outcome achieved by the holy men could not be defined as the product of a negotiation.<sup>40</sup>

Not everyone agrees with this characterization,<sup>41</sup> but it is certainly common. Perhaps the best example of this sort of thinking is,

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38. See, e.g., HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 142-43 (1982) (“Such posturing is part of the game.”); Geoffrey C. Hazard, Jr., *The Lawyer’s Obligation to be Trustworthy when Dealing with Opposing Parties*, 33 S.C. L. REV. 2, 181 (1981).

39. James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927-28 (1980) (arguing, ultimately, that certain forms of deception in negotiation are immoral, even if not illegal).

40. Walter W. Steele, *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1390-91 (1986). Steele goes on to say “But if the results achieved by their methods are somehow better or fairer than the result achieved by lawyers, then perhaps the legal definition of negotiation should be changed.” *Id.* at 1391. I will return to this question about the lawyer’s role below. See *infra* note 46 and accompanying text.

41. See Jonathan R. Cohen, *When People Are the Means: Negotiating With Respect*, 14 GEO. J. LEGAL ETHICS 739, 743 (2001) (“[T]he act of negotiation does not relieve one of the moral duty to respect others.”); Reed Elizabeth Loder, *Moral Truth-seeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45 (1994); ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 104-08, 113-20 (1999) (arguing against the notion that negotiation requires or legitimizes deception). Some have also argued that lawyers should be fair in their negotiations, although this is a less common position. See Alvin B. Rubin, *A Causeur on Lawyers’ Ethics in Negotiation*, 35 LA. L. REV. 577, 580 (1975); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669,

again, Model Rule 4.1's permission of misrepresentations about reservation price.<sup>42</sup> According to the Rule's Comments, misleading statements of this sort are permitted because "[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact."<sup>43</sup> Although the Rules do not say so explicitly, this Comment seems to imply that barring *all* types of misrepresentation would demand too much—it would make negotiation as we normally understand it impossible.

I disagree with this view, both as expressed in Steele's hypothetical and in the Comment to Model Rule 4.1. Although many negotiators may deceive and manipulate, I see nothing that requires one to do so, nor do I think that one can be effective only by doing so. Negotiation requires parties to manage different and sometimes conflicting interests to determine whether a jointly-created outcome can be found that is more satisfying than any self-help alternative.<sup>44</sup> Two saints could honestly disclose their alternatives and reservation values, their interests and priorities, and still face a variety of challenging decisions regarding how best to maximize achievable joint gain and divide the pie.<sup>45</sup> Even for the enlightened there would likely be no easy answer as to whether to give more of the economic surplus in a transaction to the person who needed it more, wanted it more, or deserved it more. Two saints might disagree about how to classify a used car in the "blue book" scheme, or about when an employment agreement should vest an executive's stock options. I see no reason to redescribe their interaction over these matters as something other than negotiation merely because they chose to avoid dishonesty or manipulation.

I must make one caveat, however. One can imagine a person who becomes *so* universal in her views—so detached from the particulars of her individual position—that she no longer values her own interests at all. Her only interest becomes to serve others' interests.

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679 (1978) ("When acting in a nonadvocate capacity . . . a lawyer must . . . [refrain from] unfair, unconscionable, or unjust, though not unlawful, means . . . [or pursuing] unfair, unconscionable, or unjust, though not unlawful, ends[.]").

42. See *supra* notes 34-35 and accompanying text.

43. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 2 (1999).

44. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 11 (1986) (defining negotiation).

45. The saints would still face, for example, the problem that there are sometimes tradeoffs between "fair" division and efficiencies or value-creation. See, e.g., STEVEN J. BRAMS & ALAN D. TAYLOR, *FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION* (1996); STEVEN J. BRAMS & ALAN D. TAYLOR, *THE WIN-WIN SOLUTION: GUARANTEEING FAIR SHARES TO EVERYBODY* 26 (1999); HOWARD RAIFFA, *LECTURES ON NEGOTIATION ANALYSIS* (1996).

Although it is difficult to imagine how two such people could interact (wouldn't they merely circle each other endlessly, each trying to help the other?), I think the introduction of even *one* such person into what would otherwise be a negotiation *does* require redescription of the interaction as something other than bargaining. In this extreme circumstance there would not be two people with differing or conflicting interests; only one with interests and another with a desire to serve. There would be nothing to negotiate about—person *A* would express needs and person *B* would satisfy them to the best of *B*'s ability.

Finally, one might object that lawyers have a duty to compete. If a lawyer refuses to do so because of ethical commitments that include consideration of an opponent's interests, then even if we cannot redescribe that lawyer's interactions as something other than negotiation, perhaps we should simply decide that the person can no longer be a lawyer. Robert Condlin, for example, has written that lawyers "must use any legally available move or procedure helpful to a client's bargaining position. Among other things, this means that all forms of leverage must be exploited, inflated demands made, and private information obtained and used whenever any of these actions would advance the client's stated objectives . . ."46 If negotiating lawyers will not play the game, they should be disqualified as players.

Although it opens yet another difficult line of argument, I think it unlikely that a saint, or even just a very reflective person, would decide, like Condlin, to prioritize client loyalty over the saint's already-discussed ethical commitments. As Riskin explains, mindfulness loosens one's attachments—one's loyalties. This is, again, what suggests that these practices might aid in adopting a more universal perspective on moral questions.<sup>47</sup> It also suggests, however, that a loyalty-driven ethic, peculiar to one's particular duties to a particular client, will be relatively unpersuasive to our saint as compared to the basic obligations to honesty and fairness.<sup>48</sup>

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46. Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 MD. L. REV. 1, 71 (1992) (citations omitted).

47. See *supra* note 22 and accompanying text.

48. See generally, e.g., DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 53-58 (2000) (discussing the basic premises of partisanship and arguing that the most common justifications for the advocate's role "unravel at several key points"); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); DAVID LUBAN, *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* (1984); William H. Simon, "Thinking Like a Lawyer" *About Ethical Questions*, 27 HOFSTRA L. REV. 1 (1998).

## V. CONCLUSION

Luckily, however, I need not resolve these matters here. This discussion of role ends the essay exactly as I set out—illustrating the complexity of Riskin's introduction of mindfulness to legal negotiation. Although I have made many assumptions, my general point is simple. Increasing one's awareness has ethical consequences. One becomes, over time, a different sort of person. And that sort of person may no longer wish to engage in certain negotiation strategies. Rather than becoming *more* free, moment-to-moment, to choose a negotiation approach, a mindful negotiator may constrain himself, limiting his freedom of action in deference to his ethical commitments. And this, particularly for lawyers, may chafe against the lawyer's understanding—or others' understanding—of the lawyer's role.