

# BEHAVIORAL ETHICS, DECEPTION, AND LEGAL NEGOTIATION

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## INTRODUCTION

There is only one specific course that the American Bar Association requires that law schools mandate for all law students: a course in professional responsibility that includes both “substantial instruction[s] in rules of professional conduct, and the values and responsibilities of the legal profession and its members.”<sup>1</sup> For admission to the bar, nearly all states require that applicants pass not only the general bar examination that covers a broad range of subjects, but also the separate Multistate Professional Responsibility Exam.<sup>2</sup> Many jurisdictions also require that a certain fraction of continuing legal education hours required of practicing attorneys, which otherwise may usually be in any subject area, be specifically devoted to education in ethics.<sup>3</sup>

Given the concern of the bar with the subject of professional ethics, and the fact that negotiation is a core activity of most attorneys engaged in either litigation or transactional practice, negotiation ethics is an extremely important subject for members of the legal profession. Yet the ABA’s Model Rules of Professional Conduct refer directly to negotiating behavior in only a single provision, which is accompanied by minimal commentary.<sup>4</sup> The law journal lit-

<sup>1</sup> AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019-2020, at 16, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2019-2020/2019-2020-aba-standards-and-rules-of-procedure.pdf) [<https://perma.cc/B4TU-NDS3>].

<sup>2</sup> All states and territories require the MPRE except Wisconsin and Puerto Rico. *Jurisdictions Requiring the MPRE*, NAT’L CONF. OF B. EXAMINERS, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/JK8P-BBS9>] (last visited Mar. 20, 2020); Connecticut and New Jersey waive this requirement if candidates have earned a “C” or better in a Professional Responsibility class in law school. Conn. Bar Examining Comm., *Admission by Examination July 2020: Instructions, Forms and Requirements*, ST. OF CONN. JUD. BRANCH, <https://www.jud.ct.gov/cbec/instadmisap.htm> [<https://perma.cc/3X4B-FLFH>] (last visited Mar. 20, 2020); *Frequently Asked Questions*, N.J. BOARD OF B. EXAMINERS, <https://www.njbar.org/exams/faq> [<https://perma.cc/MQ9Y-273E>] (last visited Mar. 20, 2020).

<sup>3</sup> California requires four hours of ethics credit per reporting period. *Mandatory CLE*, AM. BAR ASS’N, <https://www.americanbar.org/events-cle/mcle> [<https://perma.cc/GFK4-DNXN>] (last visited Mar. 20, 2020) (selecting “California” from drop-down menu). New York requires “[four] hours in ethics and professionalism credit per reporting period.” *Id.* (selecting “New York” from drop-down menu). And Pennsylvania requires two hours of ethics credit per reporting period. *Id.* (selecting “Pennsylvania” from drop-down menu).

<sup>4</sup> See MODEL RULES OF PROF’L CONDUCT r. 4.1 (AM. BAR ASS’N 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_4\\_1\\_truthfulness\\_in\\_statements\\_to\\_others/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_others/) [<https://perma.cc/J7WA-93RD>]. Model Rule of Professional Conduct 4.1 provides:

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when

erature specifically focused on negotiation ethics is also relatively sparse, especially in light of the huge quantity of law journal articles published each year.<sup>5</sup>

This Article contributes to this literature by viewing legal negotiation through the lens of social science research in the field of “behavioral ethics.” The core finding of body of research is that much unethical behavior is not attributable to the classic Holmesian “bad man,”<sup>6</sup> who is consciously amoral—that is, interested only in his own gratification and completely unconcerned with the interests of other individuals or societal norms and expectations. Rather, cognitive and motivational biases often enable and even encourage people who care about other individuals and society more generally, rather than just themselves, to act in ways neutral observers would view as unethical, without ever recognizing their behavior as such.<sup>7</sup> This Article explores how the findings

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disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

*Id.* The comments to rule 4.1 discuss misrepresentation, statements of fact, and crime or fraud by the client. The relevant comment provides:

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category. . . .

*Id.* at cmt. 2, [https://www.americanbar.org/groups/professional\\_responsibility/publication/s/model\\_rules\\_of\\_professional\\_conduct/rule\\_4\\_1\\_truthfulness\\_in\\_statements\\_to\\_other/s/comment\\_on\\_rule\\_4\\_1/](https://www.americanbar.org/groups/professional_responsibility/publication/s/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_other/s/comment_on_rule_4_1/) [<https://perma.cc/TC7L-Q4DP>].

<sup>5</sup> Search for Negotiation Ethics Law Journal Articles on Westlaw. Follow “Secondary Sources” hyperlink, then select “Advanced” search hyperlink. For date, select “All Dates After” and input “01/01/1999.” For title, input “(“negotiate” or “negotiation” or “bargaining”) & (“ethics” or “lie” or “lying” or “deception”),” then search. After search, select “Publication Type” of “Law Reviews & Journals.” (A Westlaw search of law journals identifies only eighteen articles published in law school-affiliated journals in the last two decades with titles that include the words “negotiate,” “negotiation,” or “bargaining” and “ethics,” “lie,” “lying,” or “deception”: Hadar Aviram et al., *HASTINGS CONST. L.Q.*; Steven K. Berenson, *CASE W. RES. L. REV.*; Anne M. Burr, *DISP. RESOL. J.*; R. Michael Cassidy, *SAN DIEGO L. REV.*; Sara Cobb, *HARV. NEGOT. L. REV.*; Charles B. Craver, *OHIO ST. J. ON DISP. RESOL.*; Lawrence J. Fox, *MERCER L. REV.*; Clark Freshman, *HARV. NEGOT. L. REV.*; Clark Freshman, *NEV. L.J.*; Kevin Gibson, *MARQ. L. REV.*; Art Hinshaw & Jess K. Alberts, *HARV. NEGOT. L. REV.*; Andrew Ingram, *OHIO ST. J. CRIM. L.*; Kirsten A. Johansson, *TEX. ENVTL. L.J.*; David S. Jonas, *HOFSTRA L. REV.*; Patrick Emery Longan, *MERCER L. REV.*; Scott R. Peppet, *HARV. NEGOT. L. REV.*; Scott R. Peppet, *IOWA L. REV.*; Peter Reilly, *OHIO ST. J. ON DISP. RESOL.*). *What’s Fair: Ethics for Negotiators*, published in 2004 by the Harvard Law School’s Program on Negotiation, has a number of chapters that consider ethical questions in legal negotiation. Many of these are chapter versions of some of the most important law journal articles published on the subject prior to 2000. See *WHAT’S FAIR: ETHICS FOR NEGOTIATORS* iii–v (Carrie Menkel-Meadow & Michael Wheeler eds., 2004).

<sup>6</sup> See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 459 (1897).

<sup>7</sup> The most comprehensive review of the scholarly literature is provided in YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES’ ABILITY TO REGULATE HUMAN BEHAVIOR* (2018). DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* (2012) and MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT*

of behavioral ethics can help to better understand, predict, and potentially combat unethical behavior in legal negotiation.

The focus of my inquiry is negotiating behavior that is deceptive, meaning that the negotiator intentionally attempts to create or reinforce an incorrect belief on the part of his counterpart in order to create an advantage for himself or his client.<sup>8</sup> Although negotiation behavior can raise ethical concerns for other reasons (coercion, for example), deception is the category of behavior that pushes ethical boundaries most frequently and routinely in negotiation. I will further assume the context of arms-length negotiations between parties who owe no relationship-specific duties to one another, as is most common in legal negotiation settings. Ethics might impose additional requirements on negotiators who owe fiduciary duties to one another based on their relationship status or professional obligations, such as family members, business partners, or clients, but those duties are beyond the scope of this Article.

My admittedly pessimistic conclusion is that legal negotiation is an activity that is likely to be rife with behavior that is unethical, or at least presses hard against ethical boundaries. Part I briefly summarizes the core findings of what is a voluminous body of behavioral ethics research concerning the nature and causes of unethical behavior. Part II contends that the ethical status of most types of deceptive negotiating behavior is unclear, and that the findings of behavioral ethics suggest that this ambiguity is likely to be a source of unethical behavior. Part III argues that the agency role played by lawyers in legal negotiation likely also encourages unethical behavior. Part IV uses the insights of behavioral ethics to propose steps that lawmakers or negotiators themselves might take to reduce the amount of deceptive behavior in legal negotiation.

## I. BEHAVIORAL ETHICS, OR WHY OTHERWISE GOOD PEOPLE ACT BADLY

Ethical issues arise when people must choose between acting to further their own self-interest and acting pro-socially—that is, for the benefit of others, or for society.<sup>9</sup> Neoclassical economists, relying on a strict version of rational

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(2011) also provide useful overviews. For comprehensive applications of this literature to the subject of ethics in the legal profession, see Jennifer K. Robbennolt, *Behavioral Ethics Meets Legal Ethics*, 11 ANN. REV. L. & SOC. SCI. 75 (2015), and Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1113 (2013). For a more abbreviated treatment of the subject, see Jennifer K. Robbennolt & Jean R. Sternlight, *The Psychology of Ethics in Negotiation*, in NEGOTIATION ESSENTIALS FOR LAWYERS 257 (Andrea Kupfer Schneider & Chris Honeyman eds., 2019).

<sup>8</sup> See, e.g., Roy J. Lewicki & Robert J. Robinson, *Ethical and Unethical Bargaining Tactics: An Empirical Study*, 17 J. BUS. ETHICS 665, 667 (1998) (defining deception in negotiation as an “attempt[] to manipulate the opponent’s logical and inferential processes, in order to lead the opponent to an incorrect conclusion or deduction.”). The term “deception” is sometimes understood to include only wrongful acts or omissions. See Gregory Klass, *The Law of Deception: A Research Agenda*, 89 U. COLO. L. REV. 707, 711 (2018). I use it here in a more normatively neutral sense.

<sup>9</sup> See Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85, 92, 96 (2012).

choice theory, often assume that actors will care only about their own interests, so ethical behavior is only likely to occur in the shadow of a threat of sanctions for contrary behavior.<sup>10</sup> Critics document the extensive evidence of people routinely engaging in pro-social behavior, even when doing so incurs a cost.<sup>11</sup> These competing perspectives, taken together, seem like a sound basis for the hypothesis that the desire to act pro-socially, all other things being equal, combined with the threat of sufficient sanctions, should together deter unethical behavior on the part of anyone who is not a psychopath.

Yet a day seldom goes by when the newspapers do not report a political leader, a corporate executive, a respected member of the community, or just a common criminal, who was caught engaging in behavior that most observers would describe as unethical. In many of these cases, the potential benefits would seem to pale in comparison to the material and reputational costs suffered as a result of the behavior's detection, even if these costs are discounted for the possibility that the perpetrator might escape detection. What accounts for this apparent gap between established theory and reality, and what, if anything, can be done to reduce it?

Scholarship in the field of behavioral economics has identified myriad ways in which individuals' decision-making processes often diverge from the assumptions of the rational actor model.<sup>12</sup> A popular general description of the field's findings, as offered by Nobel laureate Daniel Kahneman, is that human beings have two different approaches to reaching decisions, which he labeled "System 1" and "System 2."<sup>13</sup> While System 2 reasoning is deliberate, takes into account a variety of data, and attempts to weigh and compare that data, System 1 uses heuristics—mental shortcuts—to understand the world and to evaluate options.<sup>14</sup> Rather than determining facts through careful and objective analysis of all available evidence and acting in accord with a careful comparison of costs, benefits and alternatives, System 1 takes action based on rules of thumb and contextual cues.<sup>15</sup> Although System 2 reasoning approaches the behavioral assumptions of economic rationality, it is slow and effortful.<sup>16</sup> System 1 is fast and easy, and thus often better meets the needs of life in a complex world, although it can lead to suboptimal decisions in particular instances.<sup>17</sup>

<sup>10</sup> Cf. STEVEN E. LANDSBURG, *THE ARMCHAIR ECONOMIST: ECONOMICS AND EVERYDAY LIFE* 3 (rev. ed., 2012) ("Most of economics can be summarized in four words: 'People respond to incentives.'"). See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

<sup>11</sup> See, e.g., LYNN STOUT, *CULTIVATING CONSCIENCE: HOW GOOD LAWS MAKE GOOD PEOPLE* ch. 3, at 45–71 (2011).

<sup>12</sup> For a detailed review of the literature, see generally EYAL ZAMIR & DORON TEICHMAN, *BEHAVIORAL LAW AND ECONOMICS* 19–138 (2018).

<sup>13</sup> See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* pt. I, at 19–97 (2011).

<sup>14</sup> See *id.* at 89.

<sup>15</sup> See *id.* at 20–21.

<sup>16</sup> *Id.* at 35–36.

<sup>17</sup> *Id.* at 85–87.

The prominence of System 1 decision-making in our lives means that the behavioral predictions that follow from traditional rational choice assumptions will often fail to reflect reality.<sup>18</sup>

The core descriptive finding of research in behavioral ethics is that much anti-social behavior is aided by System 1 automaticity,<sup>19</sup> and that people thus often act unethically without consciously acknowledging that they are doing so.<sup>20</sup> From an evolutionary perspective, this should not seem surprising. In order to survive and reproduce our genes, human beings have always had to balance the desire to act in furtherance of their personal interests and the need to behave cooperatively as part of a community.<sup>21</sup> We are a species that is, and needs to be, part self-interested and part pro-social. Consequently, we wish to perceive ourselves as effective in pursuing our individual goals and also as moral actors, and behavior that would be inconsistent with either of these traits produces cognitive dissonance.<sup>22</sup> If we use a conjunctive decision rule and pursue a course of action only if it is both economically rational and moral, such dissonance might not merely cause psychological discomfort, it might prevent us from acting.<sup>23</sup>

Studies of behavioral ethics reveal that one consequence of this tension, in at least some situations, is that people will act selfishly while honestly believing they are acting pro-socially, thus obtaining the material benefits of selfishness and the psychic comfort of pro-sociality.<sup>24</sup> The mechanisms behind this type of behavior can be divided, very roughly, into two categories, although the line between them can be unclear in some cases. First, because of cognitive biases, actors often do not recognize when their own behavior even raises serious ethical questions. Second, motivational biases enable actors who advert to the existence of an ethical issue to rationalize self-interested behavior as being consistent with ethical demands in their particular circumstances.

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<sup>18</sup> See *id.* at 25–28.

<sup>19</sup> See ZAMIR & TEICHMAN, *supra* note 12, at 72 (2018).

<sup>20</sup> See BAZERMAN & TENBRUNSEL, *supra* note 7, at 6–12; FELDMAN, *supra* note 7, at 32.

<sup>21</sup> See, e.g., ADAM GALINSKY & MAURICE SCHWEITZER, FRIEND & FOE: WHEN TO COOPERATE, WHEN TO COMPETE, AND HOW TO SUCCEED AT BOTH 4 (2015); YUVAL NOAH HARARI, SAPIENS: A BRIEF HISTORY OF HUMANKIND 46 (2015).

<sup>22</sup> Brent Simpson et al., *Does a “Norm of Self-Interest” Discourage Prosocial Behavior? Rationality and Quid Pro Quo in Charitable Giving*, 69 SOC. PSYCHOL. Q. 296, 299–300 (2006).

<sup>23</sup> *Id.* at 300.

<sup>24</sup> See C. Daniel Batson et al., *Moral Hypocrisy: Appearing Moral to Oneself Without Being So*, 77 J. PERSONALITY & SOC. PSYCHOL. 525, 534–36 (1999) (studies found that participants preserved moral integrity by lowering their standard to justify their behavior and that high self-awareness made it harder for participants to live with immoral behavior); Dolly Chugh & Mary C. Kern, *A Dynamic and Cyclical Model of Bounded Ethicality*, 36 RES. ORGANIZATIONAL BEHAV. 85, 89 (2016) (hypothesizing that self-interest competes with a “self-view” that one is a moral person).

A. *Cognitive Biases in Recognizing Unethical Behavior*

Unethical behavior can often be attributed to the reliance on System 1 decision-making processes unaided by reflection. The reason, psychologists believe, is that self-interest tends to be automatic and reflexive, but ethical decision-making requires more ponderous System 2 reasoning.<sup>25</sup> When forced to choose between self-interested and pro-social actions, the former often becomes the default.<sup>26</sup>

An important contributor to unconsciously unethical behavior is egocentric, or “self-serving” bias. This pervasive bias causes people to tend to view objective facts or normative positions that favor oneself more generously than they would from a neutral perspective.<sup>27</sup> One consequence of this is the “illusion of objectivity,”<sup>28</sup> which causes people to view themselves as more objective than others and thus leads to “ethical blind spots.”<sup>29</sup> For example, while people anticipate that others will allow financial incentives to trump ethical responsibilities, they believe they will not succumb to the same temptations.<sup>30</sup> Because people often don’t seem to recognize the tendency to privilege self-interest over other considerations, unethical behavior can occur without conscious recognition.<sup>31</sup>

Another contributing factor is the tendency to reflexively rely on social cues to determine appropriate behavior without reflection. It has long been understood by social psychologists that social context affects whether experimental subjects behave cooperatively or competitively. In one famous study, researchers found substantially higher rates of “cooperative” behavior in a prisoner’s dilemma game when they told subjects its name was the “[T]he Community Game” rather than when they labeled it “[T]he Wall Street Game,” although participants’ payoffs were identical.<sup>32</sup> Newer behavioral ethics research

<sup>25</sup> See, e.g., Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 190 (2004).

<sup>26</sup> See Katherine L. Milkman, *Unsure What the Future Will Bring? You May Overindulge: Uncertainty Increases the Appeal of Wants Over Shoulds*, 119 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 163, 168 (2012); Ovul Sezer et al., *Ethical Blind Spots: Explaining Unintentional Unethical Behavior*, 6 CURRENT OPINION PSYCHOL. 77, 78 (2015); Ann E. Tenbrunsel et al., *The Ethical Mirage: A Temporal Explanation as to Why We Are Not as Ethical as We Think We Are*, 30 RES. ORGANIZATIONAL BEHAV. 153, 154 (2010).

<sup>27</sup> See, e.g., ZAMIR & TEICHMAN, *supra* note 12, at 58, 61, 64, 68 (describing the evidence of a collection of related biases).

<sup>28</sup> Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74, 81 (Don A. Moore et al. eds., 2005).

<sup>29</sup> See Ann E. Tenbrunsel & Kristin Smith-Crowe, *Ethical Decision Making: Where We’ve Been and Where We’re Going*, 2 ACAD. MGMT. ANNALS 545, 574 (2008).

<sup>30</sup> See, e.g., Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 53, 54 (1998).

<sup>31</sup> See Chugh & Kern, *supra* note 24, at 88.

<sup>32</sup> Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, 27 ADVANCES EXP. SOC. PSYCHOL. 255, 291 (1995).

shows that those same context cues affect propensity to behave ethically. In a meta-analysis, David Rand found that when settings are of a type that imply a cooperative norm, subjects are more likely to behave honestly than when the setting implies an expectation of competition.<sup>33</sup>

Tenbrunsel and Messick use the term “ethical fading” to describe the tendency to overlook the ethical dimension of a choice when people are called on to make it.<sup>34</sup> When we do not perceive a decision to have an ethical implication, we are free to make an “amoral” decision, which frees us to pursue our self-interest without having to confront a threat to our self-conception of being a good person.<sup>35</sup> Contextual cues can facilitate ethical fading. When money or finances is made a salient feature in a particular behavioral interaction, for example, experimenters have found that subjects are more likely to invoke a “business frame” rather than a “morality frame” and, consequently, are more likely to behave selfishly rather than pro-socially.<sup>36</sup>

Bazerman and Tenbrunsel interpret the infamous corporate decision to move forward with production of the Ford Pinto in the 1970s based on a cost-benefit calculation (which included paying expected liability claims) with full knowledge that a faulty design could lead to explosions and deaths as a consequence of otherwise good people perceiving the issue as a “business decision” and not seeing it as an “ethical decision.”<sup>37</sup> Even contextual cues that are not explicitly related to a particular action have been shown to affect the choice between self-interested and pro-social behavior. Aquino and co-authors found, for example, that priming experimental subjects with a mention of the Ten Commandments reduces dishonest behavior.<sup>38</sup>

The claim that unethical behavior can result from automatic rather than deliberative processes is further supported by experiments that find that dishonest behavior is more likely when participants suffer from “ego depletion”—that is, when they have more core demands on their focus resulting from time pressure, stress, or fatigue. Mead and colleagues found that experimental subjects are more likely to cheat when reporting their results on puzzle-solving tasks, such as those described in Section I.B below, after being required to write an essay

<sup>33</sup> David G. Rand, *Cooperation, Fast and Slow: Meta-Analytic Evidence for a Theory of Social Heuristics and Self-Interested Deliberation*, 27 *PSYCHOL. SCI.* 1192, 1198 (2016).

<sup>34</sup> BAZERMAN & TENBRUNSEL, *supra* note 7, at 70; Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 *SOC. JUST. RES.* 223, 224 (2004).

<sup>35</sup> Tenbrunsel & Smith-Crowe, *supra* note 29, at 552.

<sup>36</sup> Maryam Kouchaki et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 53, 59 (2013).

<sup>37</sup> BAZERMAN & TENBRUNSEL, *supra* note 7, at 70; *see also* Tenbrunsel & Smith-Crowe, *supra* note 29, at 553–54.

<sup>38</sup> Karl Aquino et al., *Testing a Social-Cognitive Model of Moral Behavior: The Interactive Influence of Situations and Moral Identity Centrality*, 97 *J. PERSONALITY & SOC. PSYCHOL.* 123, 127, 129 (2009); Nina Mazar et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 *J. MARKETING RES.* 633, 636 (2008).



without using the letters “a” and “n” (a difficult task) than after being required to write an essay without using the letters “x” and “z” (an easier task).<sup>39</sup> Shalvi and colleagues found that subjects behave less honestly (are more likely to lie) in a negotiation setting when subjected to time pressure.<sup>40</sup> Kouchaki and Smith found that subjects are less likely to lie or cheat in the morning than in the afternoon,<sup>41</sup> and Barnes and colleagues specifically identified lack of sleep and resulting cognitive fatigue as predictors of unethical behavior.<sup>42</sup> This extensive body of evidence suggests that self-interested behavior is the automatic default because of our egocentric tendencies,<sup>43</sup> while pro-social behavior requires mindful self-control.<sup>44</sup>

### B. Rationalization

Behavioral ethics research suggests that not only do people often fail to even notice when self-interested behavior raises ethical red-flags, we are also skilled at justifying acts we implicitly recognize as raising ethical issues in ways that allow us to act in a self-interested manner without viewing ourselves as unethical.<sup>45</sup> We want desperately to believe we are good people. We can satisfy this desire by acting ethically—that is, in a way that values the needs and desires of others and/or is consistent with our moral values and social conventions—but this often means compromising our self-interest.<sup>46</sup> We can also satisfy it by “bridg[ing] the dissonance between one’s bad deeds and the desire to

<sup>39</sup> See, e.g., Nicole L. Mead et al., *Too Tired to Tell the Truth: Self-Control Resource Depletion and Dishonesty*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 594, 595 (2009).

<sup>40</sup> See, e.g., Mary C. Kern & Dolly Chugh, *Bounded Ethicality: The Perils of Loss Framing*, 20 PSYCHOL. SCI. 378, 381 (2009) (indicated greater willingness to lie for a negotiation advantage when told to answer the question immediately); Shaul Shalvi et al., *Honesty Requires Time (and Lack of Justifications)*, 23 PSYCHOL. SCI. 1264, 1269 (2012) (studies showed that people lied more when under time pressure restraints).

<sup>41</sup> Maryam Kouchaki & Isaac H. Smith, *The Morning Morality Effect: The Influence of Time of Day on Unethical Behavior*, 25 PSYCHOL. SCI. 95, 95 (2013).

<sup>42</sup> Christopher M. Barnes et al., *Lack of Sleep and Unethical Conduct*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 169, 169 (2011).

<sup>43</sup> Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 SOC. JUST. RES. 171, 173 (2004).

<sup>44</sup> See *id.* at 173; Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 191, 192 (2011); Kees van den Bos et al., *On Preferences and Doing the Right Thing: Satisfaction with Advantageous Inequity When Cognitive Processing is Limited*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 273, 286 (2006) (egoism automatically creates a pleasurable reaction to advantageous inequity and cognitive resources are required to adjust from this appraisal).

<sup>45</sup> See FELDMAN, *supra* note 7, at 57 (concluding that behavioral ethics research suggests that in some cases bad behavior is completely unconscious but that “in many cases, there is awareness of the misconduct.”).

<sup>46</sup> See ARIELY, *supra* note 7, at 27 (noting the tension between wanting to view ourselves as honorable and wanting the benefits of cheating).

view oneself as a good person,”<sup>47</sup> “substituting a shift in how one thinks about one’s behavior in place of actually behaving ethically.”<sup>48</sup> Sometimes we pursue the latter approach.<sup>49</sup>

Perhaps the most straightforward way to reduce the dissonance between our behavior and our positive self-image is to alter our view of what is ethically problematic to align with our self-interest. In one experiment, using a methodology common in behavioral ethics research, researchers gave subjects a series of short puzzles to solve and paid them based on how many they completed in a four-minute period.<sup>50</sup> For the control subjects, the experimenters reviewed the subjects’ results, counted the number of puzzles solved, and paid the subjects accordingly.<sup>51</sup> Experimental subjects were told to self-report the number of puzzles solved to the experimenter after running their test materials through a paper shredder at the far end of the room, thus providing them with the opportunity to inflate their results with no possibility of detection.<sup>52</sup> All subjects then answered a series of questions about whether they believed cheating was appropriate in different types of circumstances.<sup>53</sup> Not only did subjects who were able to cheat report a greater number of puzzles solved, on average, than those who could not cheat (thus demonstrating that at least some of the subjects who could cheat did so), they also reported views that were much more tolerant of dishonest behavior generally.<sup>54</sup>

Another way to rationalize ethically problematic behavior is to place some limits on the pursuit of self-interest without sacrificing it entirely. Given the opportunity to lie in order to earn more money in the puzzle-solving task described above,<sup>55</sup> or in a similar experiment in which subjects self-report their number of correct answers on a test,<sup>56</sup> subjects in the experimental group usually lie about their performance, on average, but only a little—say, by claiming that they solved just a couple more puzzles or correctly answered just a couple more questions than they did.<sup>57</sup> This finding suggests we tend to give ourselves some leeway in maintaining our self-conception of being a moral person.<sup>58</sup>

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<sup>47</sup> FELDMAN, *supra* note 7, at 50.

<sup>48</sup> Chugh & Kern, *supra* note 24, at 91.

<sup>49</sup> Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 481–82 (1990); Mazar et al., *supra* note 38, at 634.

<sup>50</sup> Lisa L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERSONALITY. & SOC. PSYCHOL. BULL. 330, 337 (2011).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 337–38.

<sup>54</sup> *Id.* at 338.

<sup>55</sup> *See id.*

<sup>56</sup> *See* Zoë Chance et al., *Temporal View of the Costs and Benefits of Self-Deception*, 108 PROC. NAT’L ACAD. SCI. 15655, 15658 (2011).

<sup>57</sup> Shu et al., *supra* note 50, at 338.

<sup>58</sup> *See* Chugh & Kern, *supra* note 24, at 94; Mazar et al., *supra* note 38, at 634.

In a similar type of experiment, subjects privately roll a die (or multiple dice) twice and receive payment based on the self-reported results of the first roll.<sup>59</sup> Since the experimenter can easily calculate the odds of different rolls, it is simple to determine the average amount that subjects lie (although it is impossible to know who lied and who did not). The reported outcomes suggest that few subjects lie by reporting the most profitable possible score, but many are willing to report the result of the second roll if it is better than the first roll.<sup>60</sup> The self-imposed limits on overstating performance suggest that subjects do subjectively believe that falsifying their results is unethical—if they believed cheating were ethical, they would presumably claim performance sufficient to earn the maximum payment—but are able to minimize dissonance and maintain their self-image as a moral actor by reporting the results of the wrong roll, presumably a more minor transgression that is easier to rationalize. As Mazar and colleagues put the point, “[a] little bit of dishonesty gives a taste of profit without spoiling a positive self-view.”<sup>61</sup>

Actors exploit ambiguities and perceived social norms to justify questionable behavior as falling on the appropriate side of the ethical line.<sup>62</sup> One way to do this is to conflate how common a behavior is with its moral status: if everyone acts selfishly in a particular context, it is easy for us to mentally classify that behavior as ethical. Evidence even suggests that the human brain is often willing to invert this relationship too, perceiving behavior to be more common if it would satisfy our selfish interests—that is, the more tempted we are to act in a potentially unethical way, the more likely we are to determine the behavior is common.<sup>63</sup> Unsurprisingly, people are more likely to follow a group norm of selfish behavior if they feel a psychological closeness to the group members or if group membership is highly salient.<sup>64</sup>

A related technique that can reduce the cost to self-image of selfish behavior is to justify the act in question by attributing causation to either the victim

<sup>59</sup> Shaul Shalvi et al., *Justified Ethicality: Observing Desired Counterfactuals Modifies Ethical Perspectives and Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 181, 184 (2011); see also Simon Gächter & Jonathan F. Schulz, *Intrinsic Honesty and the Prevalence of Rule Violations Across Societies*, 531 NATURE 496, 497 (2016).

<sup>60</sup> Shalvi et al., *supra* note 59, at 184; see also Gächter & Schulz, *supra* note 59, at 498 (finding that results of a die-roll experiment in various countries found that self-reported results in countries with high levels of corruption and tax evasion were consistent with subjects reporting the higher of two roles but that the number of subjects falsely reporting the highest possible score were not higher in those countries than in countries with low levels of corruption and tax evasion).

<sup>61</sup> Mazar et al., *supra* note 38, at 633.

<sup>62</sup> See ALBERT BANDURA, MORAL DISENGAGEMENT: HOW PEOPLE DO HARM AND LIVE WITH THEMSELVES I (2016).

<sup>63</sup> See Ann E. Tenbrunsel, *Misrepresentation and Expectations of Misrepresentation in an Ethical Dilemma: The Role of Incentives and Temptation*, 41 ACAD. MGMT. J. 330, 336 (1998).

<sup>64</sup> RICHARD J. CRISP & RHIANNON N. TURNER, ESSENTIAL SOCIAL PSYCHOLOGY 197–98 (3d ed. 2014).

or a third party. That is, rather than interpreting the act itself to be ethically appropriate, the act is judged as ethically permissible in context because the victim brought it on himself, a superior ordered the act, or the ultimate causation is otherwise beyond the actor's control.<sup>65</sup>

When these unconscious techniques fail, people can engage in "moral forgetting," quickly misremembering their actual behavior and thus enabling them to view themselves as ethical in hindsight.<sup>66</sup> In one interesting experiment, researchers paid subjects based on points earned by rolling a die multiple times.<sup>67</sup> Subjects in the control group had no ability to cheat, while subjects in the experimental group could lie about their number of points without possibility of detection.<sup>68</sup> Immediately after the task, subjects were asked to rate themselves on traits including morality and honesty, and they were then asked to provide ratings on the same scale two days later.<sup>69</sup> On the first occasion, subjects in the experimental group who were able to cheat provided lower self-ratings than subjects in the control group, but the difference disappeared by the time of the second self-rating.<sup>70</sup>

Other experiments demonstrate that people seem to conveniently ignore facts that can create dissonance between the desire to maximize material self-interest and the desire to act ethically. In a companion experiment to the study described above, subjects were able to remember fewer facts about a story they were asked to read if the story depicted them as behaving unethically than if they were depicted as acting ethically, suggesting that we suffer "unethical amnesia" when behaving in ways that are inconsistent with our self-conception of being a good person.<sup>71</sup> In a different study, participants were or were not given the opportunity to lie about the number of puzzles solved after reading a statement of a university's honor code that the experimenters represented as being part of an unrelated study.<sup>72</sup> Subjects in the experimental group, who had the opportunity to lie to collect more money, remembered less about the honor code afterward than subjects in the control group who had no opportunity to lie.<sup>73</sup>

## II. THE UNCERTAIN ETHICS OF DECEPTION IN NEGOTIATION

Behavioral ethics teaches that unethical behavior is as likely to result from cognitive bias and motivated reasoning as it is from consciously antisocial

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<sup>65</sup> *See id.*

<sup>66</sup> Shu et al., *supra* note 50, at 343.

<sup>67</sup> Maryam Kouchaki & Francesca Gino, *Memories of Unethical Actions Become Obfuscated Over Time*, 113 PROC. NAT'L ACAD. SCI. 6166, 6169 (2016) (Study 6).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See id.* (Study 5).

<sup>72</sup> Shu et al., *supra* note 50, at 337.

<sup>73</sup> *Id.* at 339.

preferences. Those who act unethically are usually not psychopaths or monsters; often, at least, they are regular people with an evolved disposition to pursue their self-interest while maintaining a self-perception of being pro-social. They are us. This Part argues that unethical behavior is likely to be unusually rife in the negotiation environment. The following Part contends that the agency role played by lawyers in legal negotiation exacerbates the problem.

Behavior that is labeled as “unethical” typically favors the self-interest of the actor over the needs and desires of other individuals, or of society in general. But there is nothing morally objectionable about pursuing one’s self-interest in many situations, so this clearly cannot be a sufficient condition of unethicality. Additional factors must be present, but what are they?

Laboratory experiments in the field of behavioral ethics almost uniformly involve clear cases of cheating. Typically, the experimenters promulgate a set of rules that subjects have a selfish interest in violating, and the experimental design provides subjects with an opportunity to violate those rules. The rules are clear, and violations of those rules are both obvious and ethically unambiguous. Very few people would contend, for example, that when an experimenter promises to pay a specific amount of money for every puzzle a subject can solve in a four-minute period, it is not unethical for the subject to lie about the number of puzzles solved in order to receive a higher payout.

Because the ethical content of the actions studied is usually so clear-cut, or perhaps because behavioral ethics researchers typically shy away from making normative judgments,<sup>74</sup> the experimental behavioral ethics literature pays scant attention to the precise location of the line between ethical and unethical behavior.<sup>75</sup> Indeed, the literature is often criticized for failing to offer any definition of ethical behavior.<sup>76</sup> In the best-case situation, authors label certain types of acts—such as lying or being dishonest—as unethical, but provide no explanation of what, precisely, makes such behavior unethical, or whether there are contexts in which it could be ethical.<sup>77</sup> In other cases, authors offer vague defi-

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<sup>74</sup> See Tenbrunsel & Smith-Crowe, *supra* note 29, at 551 (suggesting behavioral ethicists “don’t believe it’s our place to” “define what an ethical decision is”).

<sup>75</sup> See generally Sezer et al., *supra* note 26 (reviewing literature on “ethical blind spots” but never defining “ethics” or explaining how, precisely, the studies cited demonstrate “unethical” behavior).

<sup>76</sup> See, e.g., Tenbrunsel & Smith-Crowe, *supra* note 29, at 548 (noting that many studies make no attempt to define the terms “ethical” or “moral”).

<sup>77</sup> See, e.g., Kouchaki & Gino, *supra* note 67, at 6170 (concluding that when subjects have the “opportunity to act dishonestly” they often act “unethically” without explaining the link); Mazar et al., *supra* note 38, at 634 (investigating the conditions for dishonesty and equating this with morality but not addressing when and why honesty is required by morality or ethics); Treviño et al., *Behavioral Ethics in Organizations: A Review*, 32 J. MGMT. 951, 952 (2006) (explaining that studies focus on “unethical behaviors, such as lying, cheating, and stealing,” without exploring what makes these behaviors unethical).

nitions that offer no real help for making normative moral judgments about behavior in complex cases.<sup>78</sup>

The principal conclusion of behavioral ethics—that ethical breaches are most likely to result from biased construal or rationalization on the part of actors who care deeply about thinking of themselves as ethical—implies that a lack of clarity of the line between ethical and unethical behavior is a serious problem because actors are likely to interpret any ambiguities in a manner that permits self-interested behavior.<sup>79</sup> This Part contends that negotiation is an activity that suffers from precisely this problem to a substantial degree. Examining a series of deceptive negotiation tactics from the perspectives of both consequentialist and deontological ethical theory, I argue that, with one significant exception, the line between ethical and unethical behavior in negotiation is far from clear. It follows that negotiation is likely to be an activity rife with self-interested behavior that pushes and often crosses ethical boundaries.

#### A. *Lies About the Subject Matter of the Negotiation*

One type of deceptive behavior in the negotiation setting can easily be categorized as unethical: lies—defined as statements that the speaker believes to be factually false uttered with the intention of causing the listener to believe they are true<sup>80</sup>—concerning characteristics of an item that is the subject of potential exchange or agreement. For example: a seller tells a potential buyer that a used car is in good working order when the seller knows the engine is damaged, a job applicant represents to an employer that he earned a college degree when he actually dropped out prior to graduating, or a plaintiff in litigation asserts to the defendant that his leg was broken in a collision that gave rise to the lawsuit when he actually suffered only a bruise. I conclude that this type of lie in the context of negotiation is unethical because both deontological and consequentialist philosophical perspectives clearly lead to this conclusion.

Deontologists believe that humans are morally obligated to act in certain ways toward each other and that certain types of actions are inherently wrong.<sup>81</sup> Deontological theories vary substantially and defy uniform description, but nearly all identify lying as morally wrong (at least as a general matter).<sup>82</sup> Immanuel Kant, the most famous of deontological theorists, argued that the principle goal of social interaction is to communicate attitudes, which, in turn, re-

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<sup>78</sup> See, e.g., Aquino et al., *supra* note 38, at 124 (defining “moral behavior” as “responsiveness to the needs and interests of others”).

<sup>79</sup> See, e.g., Robbennolt, *supra* note 7, at 77 (“The less wiggle room or elasticity there is to rationalize or justify an unethical decision, the less likely it is for unethical behavior to occur. But ambiguity creates room for justification to flourish.”) (internal citations omitted).

<sup>80</sup> Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 LAW & PHIL. 393, 395 (2003).

<sup>81</sup> EYAL ZAMIR & BARAK MEDINA, LAW, ECONOMICS, AND MORALITY 1 (2010).

<sup>82</sup> See *id.* at 41.

quires truth telling.<sup>83</sup> A lie that causes the listener to buy a car, hire a job candidate, or pay to settle a lawsuit when she otherwise would not have done so infringes on that person's freedom of action in that case.<sup>84</sup> But, from the Kantian perspective, the problem with lying goes far deeper than this. Human flourishing requires that we be able to trust in the veracity of communication as a general matter.<sup>85</sup> Lies undermine that trust and strike at the very foundation of the human project.<sup>86</sup> By lying, Kant claimed, "[a man] makes himself contemptible . . . and . . . annihilates his dignity . . ."<sup>87</sup> On this view, the entire purpose of communicating is undermined if people lie. It follows, at least from this strand of the deontological tradition, that intentionally false statements undermine human fellowship and are, therefore, unethical, regardless of whether they cause material harm to the recipient of any particular communication.<sup>88</sup>

In contrast to deontologists, consequentialists judge the ethics of actions on the basis of the outcomes they cause.<sup>89</sup> From this philosophical perspective, lying has no particular ethical valence beyond its impacts.<sup>90</sup> But even from this more flexible perspective, it is easy to classify lies concerning the subject matter of a negotiation as unethical.

Negotiated exchanges increase social welfare, and are thus desirable from a consequentialist perspective,<sup>91</sup> because they represent Pareto improvements over the status quo—technically, this means that at least one party is made better off as a result of the trade and neither party is made worse off.<sup>92</sup> The buyer, the employer, or the defendant has a reservation price (an amount of money at which he would be indifferent between reaching an agreement and not reaching

<sup>83</sup> Immanuel Kant, *Of Ethical Duties Towards Others, and Especially Truthfulness*, in LECTURES ON ETHICS 200, 200–01 (Peter Heath & J.B. Schneewind eds., Peter Heath trans., 1997).

<sup>84</sup> See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 362 (1991).

<sup>85</sup> See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 18 (2d ed. 1999); SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 11 (2014).

<sup>86</sup> See CHARLES FRIED, *RIGHT AND WRONG* 61 (1978) (citing G.F. WARNOCK, *THE OBJECT OF MORALITY* 84 (1971)).

<sup>87</sup> IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 182 (Mary Gregor ed. & trans., 1996).

<sup>88</sup> *Id.*

<sup>89</sup> See ZAMIR & MEDINA, *supra* note 81, at 18.

<sup>90</sup> See, e.g., FRIED, *supra* note 86, at 104 ("If only consequences count, there are no categorical wrongs."); see also JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 134 (1907).

<sup>91</sup> I follow the standard assumption from welfare economics that consequences should be judged based on their effect on social welfare, although there are strands of consequentialism that measure consequences in other ways. For a useful discussion, see ZAMIR & MEDINA, *supra* note 81, at 12–18.

<sup>92</sup> See AMARTYA SEN, *ON ETHICS AND ECONOMICS* 31 (1987) ("A social state is described as Pareto optimal if and only if no-one's utility can be raised without reducing the utility of someone else.").

an agreement<sup>93</sup>) for the car, the labor of the job applicant, or a release of liability from the lawsuit. The recipient of the communication would be better off, based on his subjective analysis, by agreeing to a deal for any price lower than his reservation price, but he would be better off declining to enter into an agreement at any price higher than his reservation price. If the speaker misrepresents the qualities of what he is selling, the recipient might set his reservation price incorrectly,<sup>94</sup> which can result in him agreeing to a deal that would leave him materially worse off than if there had been no deal. This will clearly reduce the recipient's utility and can even be viewed as a form of theft.<sup>95</sup> Of course, this undesirable consequence might be avoidable if the buyer conducts an independent investigation of the subject matter of the negotiation. But at best this will result in an inefficient waste of social resources, which will reduce the total cooperative surplus available to the parties and which could have been avoided if the seller had simply refrained from telling the lie.

Both deontological and consequentialist perspectives lead to the conclusion that lies concerning the subject matter of a negotiation are unethical. Although law need not—and frequently does not—mirror morality, the legal prohibition of lies concerning the subject matter of the negotiation underscores and supports this analysis. Lies concerning the subject matter of the analysis are clearly contrary to law, in that they may subject the speaker to legal liability for damages (tort law), rescission of a contract (contract law), prosecution for criminal fraud in some cases (criminal law), and they can subject lawyer-negotiators to professional discipline by state bar associations (law of professional responsibility).<sup>96</sup>

### *B. Other Methods of Deception in Negotiation*

There are a variety of negotiating behaviors that are employed with the intent of deceiving the other party. Once we progress beyond lies that concern the subject matter of the negotiation, the ethical terrain quickly becomes murky, which suggests that these behaviors are likely to be common.

#### *1. Puffing*

While lying about the negotiation's subject matter usually runs afoul of various legal doctrines, there is an exception for statements that constitute "trade puffing," or "sales talk," usually understood as claims that are so non-specific or future looking in their promotion that no reasonable listener would actually rely on them. As the Second Restatement of Torts explains:

<sup>93</sup> See RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 30–31 (3d ed. 2014).

<sup>94</sup> See Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1226 (1990).

<sup>95</sup> Alexander & Sherman, *supra* note 80, at 395–96.

<sup>96</sup> See MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 2018).



[I]t is common knowledge and may always be assumed that any seller will express a favorable opinion concerning what he has to sell; and when he praises it in general terms, . . . buyers are expected to and do understand that they are not entitled to rely literally upon the words.<sup>97</sup>

So, a seller who falsely claims that his car's engine is in good working condition would cross the line from acceptable sales behavior into illegality, but a seller who claims that his car is the "best money can buy" would not.

Are puffs ethical (or at least not unethical) as well as legal?

Some statements that appear at first glance to be puffs are actually statements that the speaker believes to be true, even if they are objectively false. For example, even if a lawyer's case is objectively weak, an honest (but perhaps mediocre) lawyer might subjectively believe his assertion that "my case is airtight, and I can prove every element of the cause of action." From the perspective of deontology, such statements are not ethically problematic because the speaker lacks the necessary intent to mislead. A consequentialist would probably consider such false statements unproblematic as long as the speaker has used a reasonable (i.e., cost-justified) amount of care in developing his belief.

The best argument for the position that puffs are not unethical is that they are not actually false because social convention transforms words ("this is the best car money can buy") that would seem on their own to communicate a false fact/opinion ("my car is better than any other car that you could purchase") so that they actually communicate a less extreme fact/opinion that is true ("my car is pretty good")—at least to any objectively reasonable listener.<sup>98</sup> This argument can be taken a step further and the case made that if sellers routinely exaggerate the desirability of their wares, the failure to do so could have the effect of communicating that they believe their car is far less desirable than they actually do believe!<sup>99</sup> If the literal implication of a puff is appropriately discounted by the reasonable listener, it arguably does not communicate any false fact at all, and therefore does not do harm to social trust, harm the listener in regards to the particular transaction, or contribute to inefficient allocation of social resources.

This was precisely the view taken by the Seventh Circuit Court of Appeals in the securities fraud case of *Eisenstadt v. Centel Corp.*<sup>100</sup> Believing its stock price undervalued the company, Centel announced that it was putting its assets

<sup>97</sup> RESTATEMENT (SECOND) OF TORTS § 542 cmt. e (AM. LAW INST. 1977).

<sup>98</sup> A less plausible defense of puffs is that they are usually matters of opinion rather than matters of fact. When a seller claims that his broken-down jalopy is "the best car that money can buy," he might not be asserting a provable fact about the car, but he is asserting a fact about what his opinion actually is, and the assertion is both false and intentionally so. As Lord Justice Bowen famously remarked, "the state of a man's mind is as much a fact as the state of his digestion." *Edgington v. Fitzmaurice* 29 Ch. Div. 459, 483 (1885) (Bowen, L.J.).

<sup>99</sup> See, e.g., BOK, *supra* note 85, at 69 (noting that a professor who makes an honest statement in a recommendation letter that a student is among the top 60 percent in the class might be wrongly understood to mean that the student is among the very worst).

<sup>100</sup> *Eisenstadt v. Centel Corp.*, 113 F.3d 738 (7th Cir. 1997).

up for auction, which caused the stock price to rise precipitously.<sup>101</sup> As the auction date approached and several potential bidders announced they would not participate, Centel management issued a public statement that “‘the bidding process continues to go very well’ and ‘very smoothly.’”<sup>102</sup> The actual bids turned out to be so disappointing that Centel accepted none of them.<sup>103</sup> It then went on to negotiate a sale of itself to a non-bidder for an amount per share considerably less than the market price at the time of the failed auction.<sup>104</sup> Writing for the panel majority granting summary judgment for the company in a securities fraud lawsuit, Judge Posner suggested that the company’s public statement, although literally false (and intentionally so), conveyed a true impression.<sup>105</sup> In a world in which puffing is expected, he observed, a candid statement by the company would have been “taken to indicate that the prospects for the auction were much grimmer than they were.”<sup>106</sup>

When a puff is intended to combine with conversational conventions to accurately convey facts, it is difficult to argue that it is unethical. The problem is that even if puffs are neither intended nor understood to be literally true, they are often made with the intent to deceive the listener to some extent. If a seller’s honest opinion is that his car is of average quality, or a plaintiff’s lawyer’s true opinion is that his case has a 50 percent of success in court, the seller who claims his car is the “best money can buy” most likely hopes to convince the buyer that the car is better than average (if not the very best), and the plaintiff’s lawyer who professes complete confidence in his case likely hopes to convince the defendant that he believes his chances are better than even (if not actually 100 percent). While Judge Posner might have been correct that Centel’s stock price would have dropped further than was actually justified by the objective facts if its management had reported that the auction was “going miserably,” one suspects the company’s public statement was intended to cause observers to believe the process was going better than they otherwise would have concluded. When this is the case, the puff would seem to be as ethically problematic as any other lie about the subject matter of a negotiation.

The uncertainty about whether and when puffery carries with it an intent to deceive, and actually does deceive, renders its ethical status ambiguous, and this ambiguity is likely to encourage its use by negotiators.

## 2. *Lies Concerning the Speaker’s Valuation*

The paradigmatic case concerning a lie about the speaker’s (or the speaker’s client’s) valuation is an intentionally false state about one’s reservation

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<sup>101</sup> *Id.* at 740.

<sup>102</sup> *Id.* at 741.

<sup>103</sup> *Id.* at 742.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 744.

<sup>106</sup> *Id.* at 746.

price. For example, a business lawyer might claim that her client won't pay more than \$1 million to purchase an asset, when she knows that her client is willing to pay up to \$2 million; or, a plaintiff's attorney might assert that his client will not settle a lawsuit for less than \$100,000, knowing that a \$50,000 settlement offer from the defendant would ultimately be accepted, if grudgingly.

A related category of lies concerns the course of action the speaker intends to take if the negotiation ends in an impasse. This course of action, or the speaker's "plan B," is known in negotiation parlance as his BATNA (Best Alternative to Negotiated Agreement).<sup>107</sup> Lies about BATNAs can take two somewhat different forms. The speaker's claim might be a lie because the course of action identified does not exist, or the claim might be lie because the course of action he professes that he will follow absent an agreement exists, but the speaker has no intention of pursuing it. For example, the business lawyer's claim that he will purchase an asset similar to the one offered by his counterpart for \$1 million might be a lie either because no such asset exists for sale, or because the alternative asset exists but is different in a significant enough way from the asset under negotiation that he has no intention of purchasing it regardless of the resolution of the negotiation.<sup>108</sup>

Lies about BATNAs are conceptually similar to lies about reservation prices because the two types of lies share the purpose of convincing the listener that the speaker's reservation price is more desirable than it actually is.<sup>109</sup> To continue the example, the business lawyer who falsely claims that he will purchase a similar asset as the one offered by his negotiating counterpart for \$1 million does so in an effort to convince the counterpart that his client's reservation price is \$1 million, or at least significantly less than his actual reservation price of \$2 million. If the claim is believed, the counterpart is likely to accept \$1 million (assuming that the listener's reservation price is \$1 million or less) rather than holding out for more than that or ending negotiations and declaring an impasse.

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<sup>107</sup> ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 51 (Bruce Patton ed., 2d ed. 1991).

<sup>108</sup> The law is conflicted about lies concerning BATNAs. Courts have occasionally found lies concerning the existence of a BATNA to be legally actionable, although exemplars are few. *See Kabatchnick v. Hanover-Elm Bldg. Corp.*, 103 N.E.2d 692, 692–95 (Mass. 1952) (holding that tenant negotiating a lease renewal could maintain a cause of action for deceit by alleging that landlord falsely claimed to have a bona fide offer to lease the premises from Melvin Levine for \$10,000 per month). I am unaware of a published judicial decision holding that a lie about whether the speaker intends to pursue an available course of action is legally cognizable.

<sup>109</sup> In the rare circumstance, the negotiator might lie about his BATNA for a different reason—for example, to persuade the listener that the negotiator has strong social connections and thus is a good person to conduct business with—but in the vast majority of circumstances a lie about one's BATNA is intended to create a false impression about one's reservation price.

From the Kantian deontological perspective, as described above, lies are categorical wrongs because they undermine honest communication. Whether the lie concerns the subject matter of the negotiation or the value of that subject matter to the speaker (or whether the second type of lie concerns a reservation price or the party's plan B) makes no difference.

Whether this type of lie is unethical from a consequentialist perspective is less clear. A speaker's lie concerning value, if believed, would not cause the recipient to enter into a deal that is worse for him than the status quo. Assume that the seller's reservation price for selling an asset is \$750,000, and the buyer's reservation price for purchasing the asset is \$2 million. If the buyer falsely claims (and convinces the seller) that he stands ready to purchase a similar asset for \$1 million, the seller is likely to agree to a sale for between \$750,000 and \$1 million, whereas in the absence of the lie the seller might attempt to hold out for a higher price (although he still might end up accepting between \$750,000 and \$1 million). The parties will still reach a Pareto efficient transaction that increases total social welfare relative to the status quo ante and improves the situation of the buyer.

Unlike a lie concerning the quality of the asset, which might cause a seller to part with it for a price below its actual value to him, a lie concerning the buyer's reservation price will not cause the seller to enter into any agreement that would make the him subjectively worse off than if there had been no agreement, at least in the usual case.<sup>110</sup> So, there are no efficiency consequences. The lie might enable the buyer to obtain more cooperative surplus from the subsequent agreement (and the seller less) than would have otherwise been the case; this is precisely the reason for the lie. But to determine that this example of self-interested behavior is unethical from a consequentialist perspective, we would need an independent theory of why the negotiator's counterpart would have a valid claim to a particular portion of the cooperative surplus.<sup>111</sup> If neither party has an *a priori* claim to any particular share of the cooperative surplus, a lie about value is arguably not unethical from a consequentialist perspective.

That lies about value reside in the gray area of morality almost certainly encourages their use as negotiation tactics.

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<sup>110</sup> An exception could be if the lie concerns the speaker's BATNA, and the false claim of the existence of a particular BATNA implies facts about the subject matter of the negotiation and thus causes the listener to reassess her own reservation price. For example, if the seller's BATNA is to wait on selling a used car in hopes that another buyer will come along who is willing to pay a high price, a buyer's false claim that the buyer has the ability to purchase a car of the same make and model for a very low price could cause the seller to infer that the market is weak and that it is unlikely another buyer will come along and make a higher offer, thus causing the seller to lower the seller's reservation price.

<sup>111</sup> Cf. David A. Lax & James K. Sebenius, *Three Ethical Issues in Negotiation*, in WHAT'S FAIR: ETHICS FOR NEGOTIATORS, *supra* note 5, at 5, 10 (calling the problem of how negotiators should divide common value "the age-old problem of 'distributive justice'").

### 3. *Non-Disclosure*

Is it unethical for the seller, job applicant, or plaintiff to simply say nothing at all about the state of the car's engine, his educational qualifications, or the extent of the injury suffered in the automobile collision?

Let me begin this discussion by making what I think is an uncontroversial assertion: there is no ethical obligation to disclose information that is not (a) material to the transaction and (b) at least potentially surprising to one's negotiating counterpart. That is, no plausible view of ethics would require me to disclose my car's engine problems to a person negotiating to purchase my house or to someone who has inspected the engine and identified the problems independently. General norms of communication require that language be limited to that which is relevant and to what is necessary for the purpose of the conversation,<sup>112</sup> and disclosure of information about my car in these examples would fail this test. No communicative act can be fully complete. There simply isn't time for me to provide an extended discourse on my many shortcomings, disappointments, and ailments to a person who might wish to buy my house, nor a list of all the features my house might have but obviously does not (an elevator, a nuclear fallout shelter, a subway station, a tennis court). Ethics cannot plausibly demand a verbal discourse that is practically impossible to provide.

But what if the status of the car's engine, or the job-applicant's education, or the plaintiff's injury is both relevant to the value the counterpart would place on the transaction under consideration and potentially unknown? Assume also that I refrain from informing the buyer of the engine's defects, the applicant's status as a drop-out, or the plaintiff's quick recovery not because I am distracted or lazy, but because I prefer that these facts remain unknown to my counterpart.

A deontological perspective might lead to the conclusion that non-disclosure is not unethical in these situations, even though lying would be. Lying is proscribed because human flourishing requires that we can trust in the sincerity of communicative acts of others. Few deontologists would assert a moral duty to affirmatively provide every other person with every piece of evidence one might have access to that would assist the other in achieving life plans.<sup>113</sup> Such a requirement would take up all of our time and make pursuing our own life plans impossible. And if ethics would not require me to assist a car purchaser to fully understand and appreciate the features of other people's cars, why would ethics require me to go out of my way to assist a buyer in evaluating my car? As a result of some relationship or freely undertaken responsibility, a negotiator might owe another a heightened duty of care in a particular context, but failure to disclose even relevant facts in an arms-length negotiation would not constitute unethical conduct.<sup>114</sup>

<sup>112</sup> See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 3, 26–27, 31 (1989).

<sup>113</sup> See, e.g., FRIED, *supra* note 86, at 69.

<sup>114</sup> See, e.g., *id.* at 22.

On the other hand, some deontologists would argue that non-disclosure with the intent to reinforce a false understanding of facts is itself unethical because, like lying, it involves exploiting another for one's own ends;<sup>115</sup> because it undermines the counterpart's ability to exercise fully autonomous choice;<sup>116</sup> or because it undermines the ability of the counterpart to negotiate on roughly equal footing.<sup>117</sup> From any of these perspectives, recognizing an ethical obligation to disclose in some cases can be limited to specific types of circumstances and would not be so sweeping that an ethical person would have time for nothing besides assisting others.

Whether intentional non-disclosure is ethically problematic from a consequentialist perspective is similarly debatable. From a perspective that values only consequences of actions, non-disclosure would seem to raise the same ethical concerns as affirmative lies about the subject matter of the negotiation. Failures to disclose, like affirmative falsehoods, are problematic because they can cause a counterparty to enter into a deal that renders him worse off than an impasse. If the buyer believes the seller's car is in good working order because most cars are, and this one is not, the consequences of the seller's failure to set the record straight seem identical to the consequences of falsely stating that the car is in good working order. If the latter is unethical for the reasons articulated above, it would seem to follow that the former is also unethical.

Arguably, the risk of this consequence actually coming to pass is not as great in the case of non-disclosure, because the lack of any statement does not signal that independent investigation is unnecessary in the way that a false statement does. But even if the counterparty can more easily avoid entering into a Pareto-inefficient agreement in the case of non-disclosure, at the very minimum the failure to disclose material facts relevant to the transaction imposes burdensome and socially wasteful transaction costs on the counterparty in order to uncover information that the non-disclosing party already had and could have communicated at very low cost. If the seller can simply tell the buyer that the car's engine is malfunctioning, or the plaintiff's lawyer can inform the defendant that the plaintiff has recovered from his injury, it is inefficient to force the buyer to hire a mechanic to inspect the car or for the defendant's lawyer to issue discovery requests to or take the deposition of the plaintiff.

On the other hand, legal economists have rightly pointed out that a blanket disclosure requirement might have negative second-order consequences that reduce rather than increase net social welfare. The problem is that if negotiators must disclose information that would otherwise create a negotiating advantage, this could reduce their incentive to invest in the production of socially valuable

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<sup>115</sup> See *id.* at 67.

<sup>116</sup> See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 118–19 (1993).

<sup>117</sup> Cf. KIM LANE SCHEPPELE, *LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW* 3 (1988).

information in the first instance.<sup>118</sup> In *Malon Oil Co. v. BEA*, the Colorado Supreme Court ruled that a buyer of mining rights had no duty to disclose to the seller who owned the property that it had detected coal deposits below ground.<sup>119</sup> If disclosure were required, one could hardly expect mineral companies to develop technologies necessary to learn such information, which would mean the deal in *Malon Oil* would have never been struck and both parties would have been worse off as a consequence.

While this analysis seems right as far as it goes, there is no negative social welfare implication to requiring the disclosure of casually acquired information that does not depend on the conscious investment of time, effort, or other resources. Thus, as Anthony Kronman suggested in a seminal article, social value will be maximized if all negotiators disclose information that comes into their possession without a significant investment of resources<sup>120</sup>—such as, for example, the fact that a seller’s car won’t start in cold weather or a plaintiff’s injury is less serious than it originally appeared—thus saving buyers and defendants the cost of conducting their own investigations without deterring investment in information.

The positive law of disclosure notably fails to track any articulable principle. The Restatement (Second) of Contracts states, unhelpfully, that disclosure is not required except when it is,<sup>121</sup> and the case law is almost completely incoherent.<sup>122</sup> The most famous decision in the field, *Laidlaw v. Organ*, was penned by Chief Justice John Marshall for the U.S. Supreme Court in the early 19th Century. Marshall found that a buyer of tobacco need not disclose to the seller his knowledge that the War of 1812 had just ended, which indicated that the shipping lanes between New Orleans and Great Britain were about to reopen and the price of the crop would certainly rise.<sup>123</sup> But for every *Malon Oil*, approving of a mineral rights buyer’s non-disclosure (and following the rule of *Laidlaw*), there is a *Zimpel v. Trawick*, in which a different court found that a mineral rights buyer who did not disclose his employer’s belief that there was oil under a homeowner’s land had committed fraud.<sup>124</sup> For every decision that a

<sup>118</sup> See Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 15 (1978).

<sup>119</sup> *Mallon Oil Co. v. Bowen/Edwards Assocs.*, 965 P.2d 105, 115 (Colo. 1998) (en banc).

<sup>120</sup> Kronman, *supra* note 118, at 15–16.

<sup>121</sup> RESTATEMENT (SECOND) OF CONTRACTS § 161 (AM. LAW INST. 1981) (“A person’s non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only: . . . where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.”).

<sup>122</sup> See Kimberly D. Krawiec & Kathryn Zeiler, *Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1847 (2005) (finding that some observable factors are predictive of case outcomes, on average, but failing to substantiate any universal theory of disclosure obligations).

<sup>123</sup> See *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178, 195 (1817).

<sup>124</sup> *Zimpel v. Trawick*, 679 F. Supp 1502, 1511 (W.D. Ark. 1988).

homeowner need not disclose a non-obvious insect infestation to a potential buyer,<sup>125</sup> there is a decision holding that disclosure is required.<sup>126</sup> The unpredictable nature of this body of law deprives negotiators of the ability to assert that law has an indirect effect on ethics by creating “rules of the game” that lawyers can follow and stay on the right side of the ethical divide by so doing.

Ultimately, whether disclosure is ethically required depends on one’s view of baseline rights to information, whether derived from deontological moral principles or consequentialist considerations.<sup>127</sup> It is difficult to find any commentators who argue that negotiators are ethically required to disclose the value they place on a deal, presumably because of an implicit presumption that a negotiator’s counterpart has no moral claim to that information. Views about the ethics of not disclosing factual information about the negotiation’s subject matter are less uniform. The substantial moral uncertainty of non-disclosure makes it easy for negotiators to deploy it tactically while maintaining a self-conception of ethicality.

#### 4. *Half-Truths*

A “half-truth” is a statement or set of statements that is literally accurate but omits relevant information in a way that is likely to lead the listener to draw factually incorrect conclusions.<sup>128</sup> The deceptive effect results from the application of generally accepted linguistic conventions.

From a deontological perspective, competing arguments can be made regarding the ethics of half-truths. From one perspective, it seems that a half-truth should be treated the same as a lie.<sup>129</sup> Words lack any inherent meaning. They are functional vehicles for communicating information, and they serve this function not alone, but in conjunction with context and social convention. If lying is wrong because it undermines social trust and interferes with social cooperation, an assertion intended to imply false facts is just as unethical as an assertion that explicitly states false facts.

There is a plausible contrary position, however. One reason given to explain why a lie is morally wrong is because it comes with an implied warranty

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<sup>125</sup> See, e.g., *Swinton v. Whitinsville Sav. Bank*, 42 N.E.2d 808, 808 (Mass. 1942) (house seller not required to disclose termite infestation).

<sup>126</sup> See, e.g., *Weintraub v. Krobatsch*, 317 A.2d 68, 74 (N.J. 1974) (house seller required to disclose cockroach infestation).

<sup>127</sup> See Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. REV. 337, 374–75 (1997) (articulating a deontological view that a negotiator has right to benefit from information that he produces because of what he has done, not because of the good consequences this will create through incentive effects).

<sup>128</sup> See Klass, *supra* note 8, at 712 (observing that whereas lies deceive by commission, half-truths deceive by omission).

<sup>129</sup> Cf. BOK, *supra* note 85, at 15 (defining a lie as “an intentionally deceptive message in the form of a *statement*,” a category that seems broad enough to include what I am referring to here as a half-truth).



of truthfulness.<sup>130</sup> A half-truth might imply the same fact as a lie, but perhaps it does not provide the same warranty of the truthfulness of that fact. Under this view, if I say, “I graduated from State U.” when I did not, I am both conveying the fact that I graduated from State U. and warranting the truth of that fact, but if I respond to your question as to whether I graduated from State U. by saying that “I studied at State U. for four years,” I am implying an affirmative answer but not warranting that impression as being true. The implication of this distinction is that a half-truth, much like deceptive non-disclosure, puts you on notice that you should continue to investigate the facts rather than relying on my words.<sup>131</sup>

This reasoning seems to underlie the U.S. Supreme Court’s determination that—despite the fact that the law usually treats half-truths the same as lies<sup>132</sup>—the crime of perjury requires literally false statements; statements that imply a fact that is false to a reasonable listener are not sufficient. In the seminal case, the defendant, Bronston, had been asked, under oath, whether he had ever had a Swiss bank account, to which he responded that his company had had such an account for a six-month period of time. Bronston had personally owned a Swiss bank account for five years.<sup>133</sup> In overturning his conviction for perjury, the Court held it was the interlocutor’s responsibility to probe further, even though Bronston’s testimony clearly implied a negative answer to the question.<sup>134</sup>

It would seem, at first blush, that a consequentialist analysis should conclude that half-truths are as unethical as lies. Whatever the harm caused by any particular lie, a half-truth that creates an identical state of mind on the part of the listener and would seem to cause exactly the same harm.

Here too, though, this conclusion could plausibly be disputed on the grounds that listeners can protect themselves from half-truths at lower cost than is needed to protect themselves from lies. If a buyer asks about the repair status of a car’s engine, and the seller falsely states that “the engine is in perfect working order,” the buyer would have to disregard the seller and hire a mechanic to conduct an independent inspection in order to learn that the engine does not work properly. But assuming that the seller tells half-truths but not outright lies (perhaps stating that “the car was in the repair shop last month and the engine worked perfectly”), the buyer can avoid being deceived merely by being alert to the possibility that the seller is resorting to clever word play and then asking the seller probing follow-up questions. For example, the buyer

<sup>130</sup> See, e.g., FRIED, *supra* note 86, at 67.

<sup>131</sup> See 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, 165–67 (2001).

<sup>132</sup> RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. b (AM. LAW INST. 1981); RESTATEMENT (SECOND) OF TORTS § 529 cmt. a (AM. LAW INST. 1977).

<sup>133</sup> See *Bronston v. United States*, 409 U.S. 352, 353 (1973).

<sup>134</sup> See *id.* at 358–59.

might respond, “that is good to hear, but is the engine in good working order at this very moment?” thus cornering the slippery seller.

From this perspective, the negative consequences of a half-truth more closely resemble those of non-disclosure than those of a lie, because the transaction costs that the counterparty must suffer to avoid Pareto-inefficient results are more like what they would be in the case of the former and less than in the case of the latter.

In addition, there is an important operational distinction between half-truths and lies that might cause a consequentialist to assess them differently. The line between a literal lie and a literal truth, while not always crystal clear, is reasonably stable. In contrast, whether a statement is truthful concerning its subject or only a half-truth because it is incomplete and misleading depends on conversational norms and inferences. The critical question is whether the speaker’s statement X conveys meaning Y, where Y is false. The answer to this question, in turn, requires determining the most reasonable inference to draw from statement X in its particular context.<sup>135</sup> Case law and legal commentary on fraud and deception rarely provide lawmakers with any precise instruction on how to conduct such interpretation,<sup>136</sup> which perhaps belies the difficulty and contested nature of the enterprise.

Linguistic theory can provide some guidelines for understanding when and why statement X might convey meaning Y,<sup>137</sup> but it cannot always help to resolve the riddle of interpretation in a particular case. Thus, it is likely that reasonable people will often disagree as to whether a truthful statement is actually a half-truth. For example, in *V.S.H. Realty v. Texaco*, a purchaser of an oil company’s warehouse alleged that it repeatedly inquired as to whether there were oil leaks on the property (which it later discovered) and that the seller responded by disclosing a leak on an adjacent property that was not part of the transaction.<sup>138</sup> The district court dismissed the complaint, finding that there were no material misrepresentations and that Texaco had no duty to disclose facts in an arms-length transaction,<sup>139</sup> but the First Circuit Court of Appeals reversed, finding that the statement about the leak in the adjacent building provided “some implication of exclusivity.”<sup>140</sup>

As half-truths are contested moral ground, both in theory and as applied, negotiators can easily employ them and maintain a positive self-image.

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<sup>135</sup> See Klass, *supra* note 8, at 717.

<sup>136</sup> See, e.g., RESTATEMENT (SECOND) CONTRACTS § 159 cmt. a (AM. LAW INST. 1981) (“Whether a statement is false depends on the meaning of the words in all the circumstances, including what may fairly be inferred from them.”).

<sup>137</sup> See, e.g., GRICE, *supra* note 113, at 26–27 (describing norms of conversation that require the speaker to provide enough information to satisfy the requirements of the exchange and only information that is relevant to that exchange).

<sup>138</sup> *V.S.H. Realty, Inc. v. Texaco, Inc.*, 757 F.2d 411, 413 (1st Cir. 1985).

<sup>139</sup> *Id.* at 413–14.

<sup>140</sup> *Id.* at 415.

### 5. *The Opacity of Intent*

Puffing, lies about value, non-disclosure, and half-truths are all tactics that reside in ethically murky territory, which suggest that negotiators who wish to think well of themselves and pursue their self-interest are likely to interpret the ethicality of these tactics in a self-interested way when they might provide a benefit. This set of tactics share another characteristic as well: it is usually difficult for observers to determine whether they are intentionally deceptive. Puffing is difficult to distinguish from honest enthusiasm, lies about one's reservation price depend on subjective valuation that cannot be observed, and deceitful non-disclosure and even misleading half-truths usually cannot be distinguished from the speaker simply not possessing relevant information. This means that even when negotiators could agree on the question of what behavior is unethical, there is substantial opportunity for unethical behavior in negotiation that will almost certainly go undetected, or at least defy proof.

This fact is itself problematic because the research suggests that the greater the opportunity for unethical behavior, we can expect actors to adopt looser ethical standards in order to reduce cognitive dissonance between self-interested behavior and the desire to maintain a self-conception of ethicality.<sup>141</sup> That is, the easier it is to act deceptively in negotiation without being caught, the greater the likelihood that negotiators will classify their own deceptive behavior as being ethical. Further, it seems likely that this effect combined with uncertainty about the ethicality of at least some deceptive behavior in negotiation could interact, creating a multiplier effect on the amount of unethical behavior.

### C. *Justifications*

All ethical systems require at least some nuance to take account of varying contextual features. That is, there are situations in which conduct that is usually proscribed is considered permissible. Even assuming *arguendo* that lying about the negotiation's subject matter, lying about value, non-disclosure, and telling half-truths are all generally unethical, might any of these acts be justified in the context of negotiation or in some identifiable subset of negotiations and, in those cases, not be unethical? Two justifications for deception that would otherwise be unethical can be advanced in the context of negotiation. The plausibility of these arguments, whether or not they ultimately should be accepted, is yet another cause of the ethical ambiguity that surrounds the use of deceptive tactics in negotiation.

#### 1. *Negotiation as Game*

The first justification is based on the value of consent and is rooted in the analogy between negotiation and games. Games have rules. When playing a

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<sup>141</sup> See *supra* text accompanying notes 50–54.

game, acting according to the rules is generally considered ethical, even when behaving exactly the same way outside the confines of the game would be unethical. Certainly, if two people agreed to play a game that required them to tell each other lies and they then did so, their behavior would not be unethical.<sup>142</sup>

Building on Albert Carr's famous comparison, in the *Harvard Business Review*, of bluffing in business negotiations to bluffing in a game of poker,<sup>143</sup> James J. White argued that the "rules of the game" of negotiation permit lying about value (although not lying about the subject matter).<sup>144</sup> In fact, White considers lying about value to be the primary method of dividing cooperative surplus between the negotiating parties and thus fundamental to the practice of negotiation.<sup>145</sup> Zamir & Medina argue that, from a deontological perspective, lying about one's reservation price is not unethical for precisely this reason as well.<sup>146</sup> This argument is frequently contested by denying the analogy between games and negotiation, on the grounds that many negotiators do not, in fact, know that any such rule that lying is permitted exists or expect their counterparts to lie,<sup>147</sup> and thus they do not actually consent to their counterpart lying in the way that they consent to their counterpart in a game of poker bluffing.<sup>148</sup>

## 2. Deception as Self-Defense

A second justification is based on an analogy between deception and violence. A common position of deontological moral philosophers is that violence is generally wrong but can be justified when necessary for self-defense. It follows, by analogy, that lies can also be justified when they are necessary for self-protection. A popular example is the so-called "murderer at the door" problem: A murderer knocks on the door and asks the homeowner whether the murder's potential victim has taken refuge inside the dwelling. When only a lie would save the person's life, most philosophers—and non-philosophers, it might be said—believe that the homeowner does not behave unethically if he lies about the victim's whereabouts<sup>149</sup> (although Kant notably disagreed<sup>150</sup>).

The analogy might be used to justify lying (or other forms of deception) in negotiation when the likelihood is high that one's counterpart will lie, either because lying is rampant (even if not consistent with the understood "rules of the game") or because the risk of detection is low. The question often arises in

<sup>142</sup> See, e.g., FRIED, *supra* note 86, at 72.

<sup>143</sup> Albert Z. Carr, *Is Business Bluffing Ethical?*, 46 HARV. BUS. REV. 143, 145 (1968).

<sup>144</sup> James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 921 AM. B. FOUND. RES. J. 926, 934 (1980).

<sup>145</sup> See *id.* at 934–35.

<sup>146</sup> ZAMIR & MEDINA, *supra* note 81, at 280–81.

<sup>147</sup> See, e.g., BOK, *supra* note 85, at 87–88, 130–32; Wetlaufer, *supra* note 94, at 1248.

<sup>148</sup> See Wetlaufer, *supra* note 94, at 1249 (calling the imagined consent on which this argument implicitly rests "wholly fictitious").

<sup>149</sup> See, e.g., BOK, *supra* note 85, at 39.

<sup>150</sup> See *id.* at 41.

the context of lying about valuation, where both of these predicates often exist, although it is not limited to that context. If negotiation is mostly a contest of lying about valuations, as White maintains, the consequence of being among the few not to lie will often be ceding most of the available cooperative surplus to liars.<sup>151</sup>

Is protecting oneself from ceding cooperative surplus to a liar sufficiently important that it justifies one's own lies? The deontologist ethicist Sissela Bok says no, conceding that "self-defense is one thing," but "to admit that one lied in order to get more rent from a tenant is quite another . . ." <sup>152</sup> Bok argues that the difference is one between preventing harm on one hand and gaining a benefit on the other,<sup>153</sup> but this distinction seems to beg the difficult question of what, precisely, is the appropriate baseline entitlement for a negotiator. Ultimately, this argument, if it is to be convincing, must be rooted in a view of fair distribution that assumes some particular division of cooperative surplus between the parties.<sup>154</sup> If a landlord has a moral claim to some amount of the total cooperative surplus that an agreement will create, and if the tenant's anticipated lies will compromise that entitlement, one can at least make a plausible argument that responsive or even pre-emptive lying is justified.<sup>155</sup> If the landlord lacks any entitlement to part of the cooperative surplus, then it is difficult to justify lying in order to ensure that she is able to capture some of the cooperative surplus as a form of self-defense.

A consequentialist might plausibly claim that, in a second-best world, welfare maximizing exchanges are more likely to be promoted if there is some degree of parity in the dishonesty of negotiators. If ethics require a level of honesty or integrity that everyone doubts their counterpart will display, one might choose to avoid negotiating altogether. Thus, the use of deception as self-defense against exploitation might be justified as making negotiation, and the mutual gain that it can produce, possible.

A justification of self-defense might also be raised when the counterpart attempts to obtain information without having a moral claim to that information. Alan Strudler defends the morality of lying about value to combat a counterpart's attempt to obtain information about the negotiator's reservation price based on his presumption that this is "proprietary information, . . . about which

<sup>151</sup> See Wetlaufer, *supra* note 94, at 1246.

<sup>152</sup> BOK, *supra* note 85, at 80; *see also id.* at 144 (distinguishing between "deceiving a kidnapper" and "deceiving adversaries in business").

<sup>153</sup> *See id.* at 80.

<sup>154</sup> *See id.* at 81 (noting that appeals to excusing behavior to promote fair distribution "have a long history of special status in philosophy").

<sup>155</sup> Wetlaufer claims that a negotiator can achieve the same benefit as he would by lying about his reservation price by saying nothing about his reservation price and using other tactics, but the tactics he suggests (such as making a strong demand) can work only if they imply a better reservation price than the speaker actually has; Wetlaufer then seems to concede, in any event, that those who follow his recommendations may "do less well" than a liar. *See* Wetlaufer, *supra* note 94, at 1246–47.

[the counterpart] has no right to know.”<sup>156</sup> Strudler concedes that self-defense is ethical only when unavoidable, but he contends that when a negotiator is questioned about his reservation price, any response other than lying (including refusing to answer) will often create an inference that will provide the counterpart with at least some of the improper advantage that he seeks.<sup>157</sup>

### III. THE AGENCY ROLE OF LAWYERS

The most fundamental institutional feature of *legal* negotiation is that lawyers negotiate as agents on behalf of principals (clients), rather than as principal parties themselves. The findings of behavioral ethics suggest that this feature is more likely to increase unethical negotiating behavior rather than decrease it. This Part provides four reasons to fear this result and then considers (and rejects) one argument that could potentially cut in the opposite direction.

#### A. *Justification and Ethical Fading*

Research in behavioral ethics finds that, contrary to the prediction that follows from rational choice theory, people are more likely to engage in clearly unethical behavior when the benefits are shared with a third party rather than inuring only to themselves. As an example, consider Scott Wiltermuth’s experiment, in which subjects earned money by self-reporting their ability to create words out of jumbles of letters.<sup>158</sup> The fact that some of the letter sets could not be reorganized into a word that any pre-test subject was able to identify made it easy to identify the subjects who falsely claimed to have solved those puzzles.<sup>159</sup> Wiltermuth found that subjects were more likely to report solving an unsolvable puzzle if the payment was to be split with another person, whether that person was a friend chosen by the subject or a randomly selected stranger, than if the subject kept the full amount.<sup>160</sup> Gino and colleagues similarly found significantly higher rates of lying when third parties received a portion of the gains.<sup>161</sup>

The implication of these results—that people find lying for someone else’s benefit less ethically troubling than lying to line only their own pockets—

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<sup>156</sup> Alan Strudler, *Deception and Trust*, in *THE PHILOSOPHY OF DECEPTION* 139, 146 (Clancy Martin ed., 2009); see also FRIED, *supra* note 86, at 75 (claiming that a defense attorney is justified in lying if a prosecutor asks whether she believes the defendant is guilty because he has no right to that information).

<sup>157</sup> See FRIED, *supra* note 86, at 77 (agreeing that lying is only justified when failure to speak would imply an answer); Strudler, *supra* note 156, at 144–45.

<sup>158</sup> See Scott S. Wiltermuth, *Cheating More When the Spoils are Split*, 115 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 157, 160–61, 163 (2011) (Studies 2 and 3).

<sup>159</sup> *Id.* at 161.

<sup>160</sup> *Id.* at 161–64 (Studies 2 and 3).

<sup>161</sup> Francesca Gino et al., *Self-Serving Altruism? The Lure of Unethical Actions That Benefit Others*, 93 *J. ECON. BEHAV. & ORG.* 285, 291 (2013).

seems intuitively plausible. As the philosopher Bok observed, unethical behavior appears more defensible when it benefits a third party.<sup>162</sup> Wiltermuth's study provides more direct support. Subjects assigned to solve puzzles only for themselves rated the act of overstating their puzzle-solving results as more unethical than subjects assigned to share the benefits with another person, and the difference in the rate of overreporting was eliminated by controlling for the ethical ratings.<sup>163</sup>

This experimental result suggests that anyone acting in an agency role will find it easier to rationalize deceitful behavior when the benefit is shared, but there are reasons to fear that the effect might be even more pronounced when the agent is a lawyer. Unique professional norms could enable lawyer-agents to view the decision of whether to engage in deception through the prism of particular ethical duties of lawyers to their clients, causing the question of whether non-disclosure, obfuscation, or trickery toward one's negotiating counterpart is unethical to fade from consideration.

Lawyer-agents are steeped in the profession's dedication to the ethic of zealous advocacy—a “foundational trope” of the legal profession practically enconced in its DNA.<sup>164</sup> This trope is so central to the legal profession's self-conception that it is enshrined in the preamble to the Model Rules of Professional Conduct.<sup>165</sup>

The duty of zealous advocacy is formally justified by the assumption that a third-party adjudicator is most likely to reach the best decision in a dispute if both parties present their case as fervently as possible,<sup>166</sup> so it is far from clear

<sup>162</sup> See BOK, *supra* note 85, at 80 (“Are we not quicker to accept—or at least sympathize with—the lie for the sake of another?”).

<sup>163</sup> Wiltermuth, *supra* note 158, at 163–64 (Study 3).

<sup>164</sup> Carrie Menkel-Meadow, *The Evolving Complexity of Dispute Resolution Ethics*, 30 GEO. J. LEGAL ETHICS 389, 397 (2017); see also Robbennolt & Sternlight, *supra* note 7, at 1125 (noting the “intense tension between the duty to diligently represent one's client and duties to opponents”); Art Hinshaw et al., *Attorneys and Negotiation Ethics: A Material Misunderstanding?*, NEG. J. 265, 278 (July 2013) (observing that “[c]oncepts such as zealous advocacy . . . are emphasized and scrutinized in course after course that teach students ‘how to think like a lawyer’” and are in tension with commitments to justice).

<sup>165</sup> MODEL RULES OF PROF'L CONDUCT pmbl. no. 2 (AM. BAR ASS'N 2019), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/) [<https://perma.cc/ZY9A-3E8Z>].

<sup>166</sup> See, e.g., Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, in WHAT'S FAIR: ETHICS FOR NEGOTIATORS, *supra* note 5, at 329, 331 (arguing that the “zealous advocate model of the lawyer” is justified by the “faith in the ability of the arbiter to reach a correct decision.”); see also Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 710 (1998) (“hardball” behavior of lawyers often legitimized reference to the “adversary game”). The same preamble language in the Model Rules that lionizes “zealous advocacy” also states that, “[a]s negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.” MODEL RULES OF PROF'L CONDUCT pmbl. no. 2 (AM. BAR ASS'N 2019). The term “honest dealings” is not defined.

that this principle is defensible in a negotiation setting characterized by the absence of a neutral arbitrator. But, no matter, lawyers rarely question whether the adversarial ethic is appropriate outside of the adjudicatory context, as this ethic can simplify life and help avoid difficult moral questions.<sup>167</sup> The principle of zealous advocacy can aid a lawyer-negotiator wishing to serve her own interests while also maintaining a self-image as being ethical by not only excusing but perhaps even requiring deceptive behavior in service of a client that would be unethical were the lawyer acting on her own behalf.<sup>168</sup>

The instinct of the lawyer-negotiator to rationalize deceptive behavior might be magnified if the lawyer believes that a client has a particularly strong moral claim to the cooperative surplus available in a settlement or transaction.<sup>169</sup> Wiltermuth found, for example, that the propensity of his subjects to overstate their success in solving puzzles more when they shared the spoils disappeared if the beneficiary was specifically identified as an immoral person (in the experiment, as someone who was prejudiced against racial minorities).<sup>170</sup> Schweitzer and Gibson found that subjects indicated a significantly higher likelihood that they would engage in clearly unethical acts (such as keeping an incorrect overpayment of change by a retail cashier or lying about the number of hours worked on a time sheet), and also rated these acts as more justifiable, if they judged that the other party had otherwise treated them unfairly in the transaction.<sup>171</sup> And Gino and Pierce found that subjects were more likely to lie when reporting the results of another participant in a word puzzle task, even when the lie would reduce their own payout, when the other participant otherwise would have a low income and the lie would increase that person's payout.<sup>172</sup>

### B. *Ethical Cleansing by an Intermediary*

While lawyer-agents are likely to believe ethically questionable behavior is more justified when wielded for the client's benefit, there is also reason to fear that clients might believe such behavior is more principled when engaged in by their lawyer-agent.<sup>173</sup> If so, clients might expect their lawyers to use tactics they

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<sup>167</sup> See Richard Wasserstrom, *Roles and Morality*, in *THE GOOD LAWYER* 25, 29 (David Luban ed., 1983).

<sup>168</sup> See Robbennolt, *supra* note 7, at 82; Robbennolt & Sternlight, *supra* note 7, at 1154–55; Wetlaufer, *supra* note 94, at 1255.

<sup>169</sup> Cf. Robbennolt & Sternlight, *supra* note 7, at 1138 (lawyers evaluate behavior as “being more ethical when we believe that we are acting in response to unfair behavior by another.”).

<sup>170</sup> See Wiltermuth, *supra* note 158, at 164–66 (Study 4).

<sup>171</sup> See Maurice E. Schweitzer & Donald E. Gibson, *Fairness, Feelings, and Ethical Decision-Making: Consequences of Violating Community Standards of Fairness*, 77 *J. BUS. ETHICS* 287, 291–96 (2008).

<sup>172</sup> See Francesca Gino & Lamar Pierce, *Dishonesty in the Name of Equity*, 20 *PSYCHOL. SCI.* 1153, 1157–59 (2009).

<sup>173</sup> Robbennolt & Sternlight, *supra* note 7, at 1128.



would feel uncomfortable employing and even demand that they do so. And lawyers, who will usually wish to be employed, might comply.

In what is known as the “dictator game,” one player (the dictator) decides how to divide an amount of money between himself and a second player (the recipient). The recipient has no choice but to accept the amount (if any) that the dictator provides.<sup>174</sup>

In a variation on the standard game, Hamman and colleagues compared distributions made to recipients over twelve rounds of play by agents, who were selected by principals to play the game and make distribution decisions on their behalf, with a control group of principal parties who made their own distribution decisions.<sup>175</sup> The agents in the experimental group, who earned money based on how often principals “hired” them from a set of available agents (and whose distribution decisions were known to principals in subsequent rounds), gave approximately the same amount of money to recipients as did the principals in the control group in the early rounds.<sup>176</sup> But agent distributions declined and became significantly less than principal distributions as the rounds progressed, and the likelihood that a principal in the experimental condition would switch agents from one round to the next was correlated with the generosity of the agent’s behavior.<sup>177</sup> In other words, principals preferred to hire agents who would treat recipients less generously than principals were willing to themselves, and the agents responded to the principals’ preferences.

In a subsequent version of the experiment, in which agents could “advertise” how much they intended to give recipients, agents gave significantly less money to recipients than principals in the control group gave beginning in the very first round. The vast majority of principals in the experimental condition chose to be represented by the agents who advertised that they would give the recipient the smallest amount of money of those in the selection pool.<sup>178</sup>

A different variation of the dictator game seems to demonstrate that self-interested behavior is more likely to be condoned when executed by agents than by principals. Lucas Coffman provided dictators with \$10 to divide between themselves and recipients and allowed a judge (the “punisher”) to punish the dictator at the end of the game, if the judge chose to do so, by reducing the dictator’s payout to as low as \$0 without incurring any costs.<sup>179</sup> There was a second twist: Coffman’s dictators had the choice of dividing the stake between themselves and the recipients or selling the right to play the role of dictator to

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<sup>174</sup> See Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Managers*, 9 J. ECON. PERSP. 209, 213 (1995).

<sup>175</sup> See John R. Hamman et al., *Self-Interest Through Delegation: An Additional Rationale for the Principal-Agent Relationship*, 100 AM. ECON. REV. 1826, 1829–31 (2010).

<sup>176</sup> *Id.* at 1830, 1832 n.11.

<sup>177</sup> *Id.* at 1831–34.

<sup>178</sup> *Id.* at 1836–39.

<sup>179</sup> Lucas C. Coffman, *Intermediation Reduces Punishment (and Reward)*, 3 AM. ECON. J.: MICROECONOMICS 77, 80 (2011).

another player (the “intermediary”) at a price up to \$10 unilaterally set by the dictator.<sup>180</sup> The price that the dictator charged the intermediary was revealed to all players.<sup>181</sup> In the case of a sale, the intermediary then assumed the dictator role and divided the money between the intermediary and the recipient, with the condition that the intermediary was required to keep as much of the \$10 as the intermediary had been forced to pay to the dictator.<sup>182</sup> Punishers were then given the opportunity to punish the intermediary (who had become the dictator), just as they could do if the dictator did not sell the right to the intermediary.<sup>183</sup>

Whether they acted with or without an intermediary, dictators made the same substantive choice of what fraction of \$10 they would keep, and what fraction they would allocate to their recipients.<sup>184</sup> Yet Coffman found that punishers imposed lesser punishments if dictators kept the same amount of money by acting through the intermediary than if they directly divided the stake between the recipient and themselves.<sup>185</sup> In other words, the punishers seemed to judge self-interested behavior less harshly if implemented through an intermediary.

If self-interested behavior is perceived as being less morally blameworthy when implemented or engaged in by an agent, as this evidence suggests, clients might be likely to urge their lawyer to use negotiating tactics that they would not employ themselves, placing additional pressure on lawyer-agents.

### C. *Reciprocity*

The power of the social norm of reciprocity provides yet another reason to fear greater unethicity among lawyer-agents acting as negotiators than principals bargaining on their own behalf. Once someone has done a favor for us, we feel obligated to respond in kind. By retaining the lawyer, the client provides (usually) compensation that allows the lawyer to earn a living and (always) the honor of bestowing trust. The power of the reciprocity norm suggests that it will be an unusual lawyer who does not believe that she owes something to that client in return.

Consider the following experiment, which illustrates how bestowing favor can create a powerful, subconscious desire to reciprocate that might go beyond what is consciously recognized. Subjects were asked to evaluate the quality of artwork from two galleries, one of which had, or so the subjects were told, paid for the study and thus provided generous payments to the subjects for their

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<sup>180</sup> *Id.*

<sup>181</sup> *See id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 78.

time.<sup>186</sup> Pictures of paintings were then displayed with the logo of one of the two galleries in the corner, and subjects viewed them while inside of an fMRI machine.<sup>187</sup> Not only did the subjects report that they preferred the paintings from whichever was the “sponsoring” gallery, their brain scans showed greater activity in pleasure-sensing parts of the brain when the sponsor’s paintings were displayed.<sup>188</sup> Once a client hires a lawyer, the lawyer will be tugged, if only subconsciously, to act in a way that benefits the client, even when doing so should raise ethical concerns.

#### D. Group Norms as Multipliers

There is an additional concern that a tendency of lawyer-negotiators to act deceptively for all of these reasons will replicate itself and become more ingrained over time.

Studies have shown, perhaps unsurprisingly, that when group identity is salient, group norms of dishonesty are likely to be adopted by other group members.<sup>189</sup> Especially given the uncertain ethical status of certain types of deceit in the negotiation context, young lawyers are likely to take their cues of what behavior is appropriate from more senior lawyers with whom they practice, or even lawyers with whom they negotiate. Self-interested negotiating behavior modeled by senior members of the profession is highly likely to be replicated by new entrants.

To make matters worse, lawyers are likely to believe that unethical behavior is even more normal than it actually is. One study of 89 practicing attorneys found that they believed, on average, that their colleagues would rate a variety of ethically questionable behaviors as more ethical than they themselves rated them.<sup>190</sup> Such “pluralistic ignorance” that causes people to believe others are less ethical than they actually are could act as a multiplier of unethical behavior to the extent that actors tend to abide by the perceived social norms of the profession. If the unethical behavior is directed by a lawyer’s superior, the rules of professional responsibility would even protect the subordinate from discipline, at least in ambiguous cases.<sup>191</sup>

<sup>186</sup> See Ann H. Harvey et al., *Monetary Favors and Their Influence on Neural Responses and Revealed Preference*, 30 J. NEUROSCIENCE 9597, 9597, 9600–01 (2010) (Figures 3 & 4).

<sup>187</sup> *Id.* at 9598.

<sup>188</sup> *Id.* at 9598, 9600–01.

<sup>189</sup> Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior*, 20 PSYCHOL. SCI. 393, 397 (2009); Francesca Gino & Adam D. Galinsky, *Vicarious Dishonesty: When Psychological Closeness Creates Distance from One’s Moral Compass*, 119 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 15, 24 (2012).

<sup>190</sup> Jonathon R. B. Halbesleben et al., *The Role of Pluralistic Ignorance in Perceptions of Unethical Behavior: An Investigation of Attorneys’ and Students’ Perceptions of Ethical Behavior*, 14 ETHICS & BEHAV. 17, 23–24 (2004).

<sup>191</sup> Robbenolt & Sternlight, *supra* note 7, at 1146 (Rules of professional responsibility generally do not allow a lawyer to escape discipline for acting unethically at the direction of one’s supervision, but they do allow the subordinate to rely on a supervisor’s “reasonable

*E. Self-Serving Bias and Agents*

Although behavioral ethics offers many reasons to fear that lawyer-agents would employ more ethically questionable negotiation tactics than their principals, there is a feature of agency that could cut in the opposite direction and serve as a counterbalance. As described, behavioral ethics research teaches that actors are subject to a self-serving bias when judging the ethicality of their actions.<sup>192</sup> Perhaps the personal distance that lawyer-agents have from the benefits their clients might enjoy as a result of unethical behavior could enable them to better appreciate the moral consequences of their actions. If so, we might believe that lawyer-agents would be less likely than principal parties to interpret self-interested behavior as ethical, and thus that lawyer-agents would tend to act more ethically.

Unfortunately, the evidence for the conjecture that lawyers will view the world substantially more objectively than would their clients is not encouraging. Experimental data suggests that not only do principal parties suffer from various self-serving biases, agents working on their behalf are affected as well. As one example, Moore and colleagues found that experimental subjects asked to estimate the value of a company provided an amount 30 percent higher if they were told they were the seller's auditor than if they were told they were the buyer's auditor, even when their compensation for participation in the study was based on the closeness of their valuations to those provided by neutral experts.<sup>193</sup>

The evidence concerning lawyers is no more heartening than for agents more generally.<sup>194</sup> Given their commitment to the advocacy ethic, lawyers might even be more subject to bias than other agents.<sup>195</sup> George Loewenstein and colleagues found that subjects asked to assume the role of a lawyer for the plaintiff in a dispute both predicted that a judge would provide the plaintiff with a larger award and believed that a higher award would be fair under the circumstances than subjects assigned to the role of the defendant's lawyer, even though all subjects received identical information about the case.<sup>196</sup>

I have been replicating this finding in my negotiation classes for two decades using a more extensive and realistic litigation simulation. Given an identi-

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resolution of an arguable question of professional duty.”) (quoting MODEL RULES OF PROF'L CONDUCT r. 5.2 (AM. BAR ASS'N 2010)).

<sup>192</sup> See *supra* Section I.A.

<sup>193</sup> See Don A. Moore et al., *Conflict of Interest and the Intrusion of Bias*, 5 JUDGMENT & DECISION MAKING 37, 42–43 (2010).

<sup>194</sup> See ZAMIR & TEICHMAN, *supra* note 12, at 512–16 (reviewing evidence of lawyers' overoptimism and overconfidence).

<sup>195</sup> See ZAMIR & TEICHMAN, *supra* note 12, at 514 (speculating that lawyers might also learn from experience that overoptimism helps to attract clients); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1656 (2015).

<sup>196</sup> George Loewenstein et al., *Self-serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 150 (1993).

cal “discovery file” full of documents and deposition transcripts concerning a construction dispute, students who are told that they will be representing the plaintiff in settlement negotiations have always provided, on average, a more optimistic prediction about the plaintiff’s likelihood of prevailing at trial if the case fails to settle out of court than the students who are told that they will represent the defendant. The finding holds whether the students must conduct their own, independent legal research on the legal issues in the case prior to predicting the likely outcome, or whether all students receive an identical “research memo” about the law.

Although these examples are not precisely on point, because they concern evaluations of facts rather than of ethics, they do demonstrate that bias in perception caused by social role<sup>197</sup> seems to apply to agents as well as to principals. Thus, although possible, there seems to be little basis for the conjecture that lawyers are likely to be more objective than their clients in evaluating whether deceptive negotiating behavior is unethical.

#### IV. INCREASING ETHICAL BEHAVIOR IN LEGAL NEGOTIATION

Although it is often contestable whether specific negotiating tactics should be deemed unethical, promoting honesty and disclosure while discouraging deception would reduce the frequency of unethical behavior, which is a worthy collective goal of the bar and its members. The findings of behavioral ethics research strongly suggest, however, that this is unlikely to be accomplished simply through the usual strategy of increasing fines or other punishment for disfavored behavior. As Yuval Feldman concluded from his comprehensive analysis of the implications of behavioral ethics for law, because unethical acts often occur without the conscious awareness of the actors, improving the quantum of ethical behavior will require us to “move from a command-and-control approach to softer types of regulation.”<sup>198</sup>

The easier it is for people to ignore that a decision has ethical dimensions, to convince themselves that ethical standards are unclear, or to justify what would otherwise be troubling behavior, the more likely they are to behave unethically. Interventions based on the findings of behavioral ethics must be based on the goal of forcing actors to recognize and consciously evaluate behavior that crosses the line into unethical territory,<sup>199</sup> thus placing them in uncomfortable position of choosing either to act pro-socially or to compromise their self-perception of being an ethical actor. Potential interventions fall into three categories: (1) regulatory interventions, in which a state or quasi-state actor incentivizes or encourages more ethical negotiation; (2) dyadic interven-

<sup>197</sup> See Epley & Caruso, *supra* note 43, at 182.

<sup>198</sup> FELDMAN, *supra* note 7, at 13.

<sup>199</sup> See *id.* at 95 (“[I]f bounded ethicality is at issue, the focus should be on eliminating justifications for inappropriate behavior.”); Sezer et al., *supra* note 26, at 78 (promoting ethics requires encouraging actors to use System 2 thinking).

tions, in which negotiation counterparts act in concert to increase ethical behavior in their particular interactions; and (3) individual interventions, in which an individual can act alone to increase ethical behavior. This Part explores potential interventions in each of these categories.

*A. Regulatory Interventions: Legal Rules and Ethical Codes*

The agency role played by lawyers in legal negotiations can encourage unethical behavior by providing several bases for self-justification,<sup>200</sup> but there is potential silver lining to the agency role as well. By virtue of their role as agents, lawyers are more likely than the average layperson to be repeat players in negotiations, and this provides the profession with an opportunity to craft institutional mechanisms that could potentially discourage unethical behavior.

Each state bar association promulgates rules of professional responsibility and backs them with the threat of sanctions up to and including disbarment. Unfortunately, the rules that all lawyers must learn and abide by have quite little to say about negotiation. In the Model Rules of Professional Conduct, the primary rule related to negotiating behavior is Rule 4.1, which proscribes false statements of “material fact.”<sup>201</sup> As discussed above, when ethical requirements are ambiguous on their face or extremely fact-specific in practice, it is easy for actors to interpret them in a self-serving way that enables them to act selfishly while maintaining their self-image of being an ethical person.<sup>202</sup>

A vignette experiment conducted by Feldman and Teichman illustrates how actors can use the ambiguity of law enunciated in broad standards rather than narrow rules to rationalize self-interested behavior.<sup>203</sup> The experimenters told subjects to imagine they had entered into a contract to paint a house using “reasonable materials” and asked them whether they would choose to use a new, cheaper, and lower-quality paint in order to increase profits.<sup>204</sup> Some subjects were told that using the cheaper paint was a clear breach of contract but enforcement in the case of breach was uncertain, while other subjects were told that the contractual ambiguity made it uncertain whether using the cheaper paint would, in fact, constitute a breach.<sup>205</sup> Importantly, all subjects were informed that there was a 10 percent chance that a court would find them in breach and assess damages.<sup>206</sup> Despite the identical net expected material cost of using the cheaper paint, subjects who were told that the law was uncertain were significantly more likely to indicate that they would use the cheaper paint

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<sup>200</sup> See *supra* Section III.A.

<sup>201</sup> MODEL RULES OF PROF'L CONDUCT r. 4.1 (AM. BAR ASS'N 2018).

<sup>202</sup> See *supra* Section III.E.

<sup>203</sup> Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5, 16–17 (2011).

<sup>204</sup> *Id.* at 17.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

than subjects who were told that enforcement was uncertain.<sup>207</sup> Since the expected financial consequence was the same, the difference suggests that at least some subjects were able to find moral wiggle room under an ambiguous legal standard that didn't exist when only enforcement of the law was uncertain.

Bar Associations might be able to create the conditions necessary for an increase in pro-social behavior in the negotiation setting by identifying which types of information described in Part II that are currently subject to ambiguous legal rules lawyers must honestly disclose as a matter of the law of professional responsibility, if not of contract, tort, or criminal law. There would always be boundary cases, which we should expect that lawyers would be likely to interpret in a self-serving way, and the difficulty of detecting deception in many cases means that "bad people" who consciously choose to violate collective, pro-social norms for selfish gain would often never be penalized. But replacing ambiguous standards with clearer rules concerning appropriate negotiation behavior within the legal profession would at least reduce the ease with which lawyer-negotiators who value their self-perception of being ethical could apply a self-serving filter to their actions.

The challenge to more clearly defining the requirements of ethical negotiating behavior is that doing so would require achieving some measure of consensus on highly contested questions. As Part II suggests, the division between ethical and unethical behavior is much less clear in the cases of puffing, lies about value, disclosure, and half-truths, than in contexts studied in behavioral ethics experiments, where ethical responsibilities tend to be clear and violations unambiguous.

Even if consensus could be reached, there is a risk to replacing ambiguous ethical standards that surround much negotiating behavior with a more rule-like law of professional responsibility in this arena. The behavioral ethics literature suggests that imposing sanctions can change a decision's perceived frame from that of an ethical problem to that of a business problem, and thus it could actually increase unethical behavior if lawyers calculate that the risk of sanction is small compared to the likely benefit of self-interested behavior.<sup>208</sup>

In one experiment, subjects were asked to play the role of a manufacturer whose company had promised to reduce toxic emissions at a cost to the company in order to placate environmentalists.<sup>209</sup> Some were told that the company's emissions would be subject to random checks and fines in the case of non-compliance, while others were told there would be no monitoring or sanctions.<sup>210</sup> Subjects in the second group were more likely to choose to abide by the commitment,<sup>211</sup> presumably because they perceived the decision as an ethi-

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<sup>207</sup> *Id.* at 19–20.

<sup>208</sup> *See, e.g.,* Ann E. Tenbrunsel & David M. Messick, *Sanctioning Systems, Decision Frames, and Cooperation*, 44 *ADMIN. SCI. Q.* 684, 684 (1999).

<sup>209</sup> *Id.* at 694.

<sup>210</sup> *Id.* at 694–95.

<sup>211</sup> *Id.* at 696.

cal issue (whether to keep a commitment) whereas subjects in the first group were more likely to view it as a business decision largely devoid of ethical implications.<sup>212</sup> An older study found taxpayers increased payments more when the moral necessity of contributing to important collective goods was emphasized than when the possibility of punishment for non-payment was stressed.<sup>213</sup> A famous study of an Israeli day care center, which found that parents were more likely to arrive after the stated closing time when the center began to impose per-minute fines for tardiness,<sup>214</sup> similarly demonstrates how imposing sanctions may alter the social construction of behavior in ways that have unexpected consequences.

These findings suggest that pro-social behavior might be better encouraged by educating lawyers about ethical norms rather than pricing selfish behavior with fines or other sanctions. By alerting actors to the ethical consequences of their decisions, education can increase the salience of the threat to people's self-conceptions as moral actors, thus increasing the likelihood that they will choose to protect that self-image rather than to maximize their material self-interest, even in the absence of a threat of material sanctions.<sup>215</sup>

Recall the experiment conducted by Mazar and colleagues, in which subjects earned payments based on the number of simple puzzles they could solve. In the primary experimental condition, subjects who had the ability to cheat without detection reported solving more puzzles than control subjects solved.<sup>216</sup> But this gap disappeared when subjects were asked, as part of a supposedly unrelated task, to write down the names of the Ten Commandments that they could recall or sign an acknowledgement that their participation in the study fell under their college's honor code.<sup>217</sup> A similar experiment by Shu and colleagues found that subjects cheated less when reporting the number of puzzles solved after reading about the university's academic honor code as part of what the researchers represented as being an unrelated experimental task.<sup>218</sup> Yet another experiment by David Bersoff found that subjects who were required to deliberate about ethical questions were more likely to return money to the experimenters later when they were (not accidentally) overpaid for their participation.<sup>219</sup>

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<sup>212</sup> *Id.* at 697.

<sup>213</sup> See Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, 298 (1967).

<sup>214</sup> Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 11 (2000).

<sup>215</sup> Chugh & Kern, *supra* note 24, at 93; cf. Robbenmolt & Sternlight, *supra* note 7, at 1158 (“[N]egotiators are less likely to engage in deception when they have recently been reminded of ethical norms.”).

<sup>216</sup> Mazar et al., *supra* note 38, at 635, 637.

<sup>217</sup> *Id.* at 636.

<sup>218</sup> Shu et al., *supra* note 50, at 339. The subjects still reported more puzzles solved than were actually solved by control group subjects, implying that reading the honor code reduced but did not eliminate cheating.

<sup>219</sup> Davis M. Bersoff, *Why Good People Sometimes Do Bad Things: Motivated Reasoning*



A profession, such as law, that requires licensure has the ability to impose educational requirements, as well as the ability to impose legally enforceable rules of conduct. Forty-seven states and the District of Columbia require law students to earn a passing score on the Multistate Professional Responsibility Exam before they can be admitted to the practice of law,<sup>220</sup> which ensures the attention of would-be attorneys to whatever ethical norms the profession cares to highlight. A more expansive and detailed code of ethical principles for the profession that is explicitly *not* backed by a threat of sanctions could increase pro-social behavior in a world in which most lawyers face intense pressure to act only in the interest of their clients but also wish to maintain a self-image of being an ethical professional.

### B. Dyadic Intervention: Honesty Contracts

Deceptive behavior in negotiation is not only a social problem that must be addressed, if at all, through the regulatory intervention of the state or quasi-state actors. It can also be understood as a collective action problem, similar in structure to the “prisoner’s dilemma,” that negotiators themselves have an incentive to solve.<sup>221</sup>

Truthful and complete disclosure—that is, thoroughly pro-social behavior—on the part of both negotiating parties increases the net social welfare of negotiation by minimizing the costs of individually investigating all claims, assertions, and inferences in order to protect against the consequences of the other party’s deception. On the other hand, if both parties lie, obfuscate, and hide information (self-interested tactics that are at least arguably unethical), the parties will often fail to identify and enter into transactions that would have been mutually beneficial and, at the very minimum, negotiations will be more costly. While this suggests a case for pro-social behavior, the problem is that if one negotiator deceives the other by inflating the value of the offer or deflating the counterpart’s estimate of the amount of consideration the negotiator is willing to provide, while the counterpart is honest and forthcoming, the negotiator often can enjoy a better result than mutual honesty will yield. The desire to obtain the best conceivable agreement and the fear of being exploited can cause both parties to adopt self-interested and ethically questionable tactics, even though this will lead to worse results for all, at least on average and over time.

Collective action problems can be solved if there is trust among the parties, defined as confidence that the other party will act for the benefit of the other or

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and *Unethical Behavior*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 28, 33, 36 (1999).

<sup>220</sup> See *Jurisdictions Requiring the MPRE*, NAT’L CONF. OF BAR EXAMINERS, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/H6TC-ZQ8J>] (last visited Mar. 1, 2020).

<sup>221</sup> See DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 38–40 (1986); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514–15 (1994).

the collective rather than in pursuit of his own desires. Negotiators might be willing to extend trust if they believe that a counterpart's violation of that trust would result in legal sanctions, reputational consequences, or a guilty conscience.<sup>222</sup> The findings of behavioral ethics imply, unfortunately, that all three of these potential consequences are less likely to deter self-interested behavior in the context of negotiation than we otherwise might expect, and thus are less likely to promote trust. People who act unethically without realizing it are likely to interpret legally ambiguous behavior as within the law and thus will not fear legal sanction, are unlikely to believe they will face reputational consequences for their behavior and will not suffer internal guilt or shame.

Experimental studies demonstrate that ethical behavior increases when actors are reminded of ethical norms. But even greater shifts have been observed when subjects affirmatively attest that they will abide by the norms. Both Mazar and Shu found that requiring subjects to sign a statement recognizing that participating in a puzzle-solving task for pay is governed by the university honor code virtually eliminated cheating.<sup>223</sup>

Joining forces, Shu and Mazar (and their colleagues) further found reduced cheating when subjects signed a statement attesting to their honesty before being given the opportunity to cheat as compared to actors who signed a statement attesting to their honesty after being exposed to the temptation to act selfishly.<sup>224</sup> In this set of experiments, some subjects reported the number of puzzles solved in an experiment and the amount of reimbursable expenses they incurred to get to the experimental site, which would determine their cash earnings for their participation, while others reported odometer readings from their cars on real automobile insurance applications, which would affect their cost of insurance coverage.<sup>225</sup> All subjects were required to sign a statement attesting to the honesty of their reports, but for some the honesty statement appeared at the top of the information form (before the request for the required information) and for some it appeared at the bottom of the form (after the request for information).<sup>226</sup> In both contexts, the requirement to sign at the top of the form induced significantly more honesty, even though subjects required to sign at the bottom had the ability to go back and change the information provided after affirming their honesty.<sup>227</sup>

This research suggests an opportunity for lawyer-negotiators to increase pro-social behavior in legal negotiations, even in the absence of broader collective actions such as new ethics guidelines or bright-line professional responsi-

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<sup>222</sup> See KOROBKIN, *supra* note 93, at 210–15.

<sup>223</sup> Lisa L. Shu et al., *Signing at the Beginning Makes Ethics Salient and Decreases Dishonest Self-reports in Comparison to Signing at the End*, 109 PROC. NAT'L ACAD. SCI. 15197, 15197 (2012).

<sup>224</sup> *Id.* at 15198.

<sup>225</sup> *Id.* at 15199–200.

<sup>226</sup> *Id.* at 15199.

<sup>227</sup> *Id.*

bility rules. Negotiating counterparts could enter into pre-negotiation agreements to share all relevant private information in a non-deceptive manner.<sup>228</sup>

The collaborative law movement in the field of matrimonial law provides an existing example. Collaborative law agreements are best known for their provision that prohibits either party's attorney from representing them in court, as a mechanism for deterring litigation, but they also customarily include a provision that requires the parties to fully and honestly disclose all information that the other side might believe is relevant to the negotiation, without having to resort to formal discovery processes.<sup>229</sup> There is always the risk, of course, that consciously selfish negotiators could sign such agreements fully intending to violate them, and that the resulting violations will never be discovered. But pre-negotiation "honesty contracts" have the potential to shift the behavior of lawyers who view themselves as ethical actors and desire to maintain that self-image.

Honesty contracts could have secondary benefits as well. To the extent that they reinforce existing legal obligations, honesty contracts can highlight, clarify, and increase the salience of these obligations, which could itself increase ethical behavior. A vignette study conducted by Art Hinshaw and Jess Alberts found that nearly one-fifth of their sample of more than 700 practicing lawyers said that, in settlement negotiations with a party their client was suing for transmitting to him a communicable disease, they would not disclose the fact that their client actually did not have the disease if their client asked them not to do so.<sup>230</sup> The Model Rules of Professional Conduct provide ambiguous guidance concerning many questions related to deception in negotiation, but they are clear that an attorney must disclose facts to the counterparty if doing so is necessary to avoid perpetuating a client's fraud.<sup>231</sup> Yet the study suggested that many lawyers are uncertain about how this disclosure requirement relates to client confidentiality principles.<sup>232</sup> By underscoring disclosure obligations, honesty contracts could reduce the likelihood that lawyers would interpret such arguable legal ambiguities in ways that privilege duty to client over pro-social

<sup>228</sup> In the case of legal negotiation, the lawyer might need to obtain client consent before contracting to disclose information not required by law. See Scott R. Peppet, *Lawyers' Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 492 (2005).

<sup>229</sup> See FORREST S. MOSTEN, *COLLABORATIVE DIVORCE HANDBOOK* 22 (2009); Peppet, *supra* note 228, at 494.

<sup>230</sup> Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 117–18 (2011).

<sup>231</sup> "In the course of representing a client a lawyer shall not knowingly: . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." MODEL RULES OF PROFESSIONAL CONDUCT r. 4.1 (AM. BAR ASS'N 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_4\\_1\\_truthfulness\\_in\\_statements\\_to\\_others/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_1_truthfulness_in_statements_to_others/) [https://perma.cc/XH8Z-NPKE].

<sup>232</sup> Hinshaw & Alberts, *supra* note 230, at 121.

behavior. Honesty contracts could also provide cover to lawyers who otherwise might feel pressured by clients to adopt deceptive tactics during negotiations.

Although honesty contracts could encourage pro-social behavior in legal negotiations, they are unlikely to be a panacea. The range of material such contracts would have to cover necessitates that they would be more standard-like than rule-like; perhaps, for example, requiring the signatories to disclose all “material” information or all information “reasonably likely” to have an impact on the amount of consideration the other party would be willing to provide in order to secure an agreement. As discussed above, ambiguous standards encourage self-serving interpretations of ethical obligations and thus promote unethical behavior.

### C. *Individual Intervention: Avoiding Aggressive Goals*

When facing a collective action problem like reducing deceptive behavior in negotiation, many lawyers will view even unethical behavior as justified as a means of self-defense against exploitation by their counterparts, as described in Section II.C. But others will wish to take steps to reduce the possibility that they will act unethically without realizing they are doing so. One approach that these attorneys might take is to consciously avoid setting aggressive goals for themselves when they enter into negotiations.

An extensive literature on the subject of goal setting in a wide variety of settings consistently finds that individuals who set specific and difficult goals achieve better outcomes in the performance of both cognitive and physical tasks than those who set modest goals or no goals at all.<sup>233</sup> This general finding, usually studied in non-competitive settings (such as doing pushups or completing puzzles), has been found to apply to the negotiation setting as well.<sup>234</sup>

Sally Blount White and Margaret Neale assigned experimental subjects to play the role of buyers or sellers in a house sale negotiation. All of the subjects in a given role were provided with the same reservation price (the maximum amount a buyer could pay or the minimum amount a seller could accept), but half of the subjects in each group were given a specific and aggressive price goal and half were provided a specific but more modest price goal.<sup>235</sup> When sellers with modest goals were paired with buyers with aggressive goals, the average negotiated price was significantly lower than when sellers with aggressive goals were paired with buyers with modest goals.<sup>236</sup>

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<sup>233</sup> EDWIN A. LOCKE & GARY P. LATHAM, A THEORY OF GOAL SETTING & TASK PERFORMANCE 51 (1990).

<sup>234</sup> See, e.g., Deborah C. Zetik & Alice F. Stuhlmacher, *Goal Setting and Negotiation Performance: A Meta-Analysis*, 5 GROUP PROCESSES & INTERGROUP REL. 35, 42 (2002).

<sup>235</sup> Sally Blount White & Margaret A. Neale, *The Role of Negotiator Aspirations and Settlement Expectancies in Bargaining Outcomes*, 57 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 303, 309–10 (1994).

<sup>236</sup> *Id.* at 312.

Joe Doherty and I had law students negotiate the settlement of a moderately complex employment discrimination lawsuit, in which subjects playing the role of the plaintiff's lawyer were given a reservation price of \$10,000 and subjects in the role of the defendant's lawyer were given a reservation price of \$60,000.<sup>237</sup> To avoid the possibility of creating a demand effect by assigning settlement goals, we had the subjects determine their own goals prior to negotiating.<sup>238</sup> Holding other factors constant, we found that subjects who set more aggressive goals achieved significantly better outcomes.<sup>239</sup>

The explanation for why negotiators who set aggressive goals reach more advantageous agreements is fairly straight-forward. People often determine how satisfied they are with an event outcome by comparing it to a reference point, rather than just by assessing its absolute value.<sup>240</sup> Outcomes that exceed the reference point generate positive feelings of success, while outcomes that fall short generate negative feelings of disappointment.<sup>241</sup> Because people are generally loss averse<sup>242</sup>—that is, they disvalue losses more than they value equivalent-sized gains—we have the motivation to exert more effort to avoid the former than to capture the latter. Negotiators with aggressive goals that are difficult to satisfy will tend to work harder than those with goals that are easy to meet or with no particular goals at all in an effort to avoid the psychological cost of coming up short and being forced to accept a loss.<sup>243</sup> For this reason, it has become standard advice among experts to recommend that negotiators set specific and aggressive goals when bargaining.<sup>244</sup>

Along with the motivation to work harder, however, aggressive goals could cause negotiators to engage in more self-interested and potentially unethical behavior. Following a well-known corporate scandal in the early 1990s, Sears, Roebuck & Co. settled a lawsuit alleging that its automobile mechanics systematically sold customers unnecessary repair services—that is, they lied about the mechanical status of customers' cars in order to persuade them to agree to pay Sears to perform services.<sup>245</sup> The company's chairman admitted that the

<sup>237</sup> Russell Korobkin & Joseph Doherty, *Who Wins in Settlement Negotiations?*, 11 AM. L. & ECON. REV. 162, 164 (2009).

<sup>238</sup> *Id.* at 170–71.

<sup>239</sup> *Id.* at 175.

<sup>240</sup> See SIDNEY SIEGEL & LAWRENCE E. FOURAKER, BARGAINING AND GROUP DECISION MAKING: EXPERIMENTS IN BILATERAL MONOPOLY 61 (1960).

<sup>241</sup> *Id.* at 62.

<sup>242</sup> See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979).

<sup>243</sup> See Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 36 (2002).

<sup>244</sup> See, e.g., GALINSKY & SCHWEITZER, *supra* note 21, at 258; DEEPAK MALHOTRA & MAX H. BAZERMAN, NEGOTIATION GENIUS 30 (2007); G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 28 (2d ed. 2006).

<sup>245</sup> Joseph B. Cahill, *Sears Is Sued over Bilking Clients of its Auto-Service Center Repairs*, WALL ST. J. (June 17, 1999, 12:01 AM), <https://www.wsj.com/articles/SB929549868636908634> [https://perma.cc/7B9A-59J8].

widespread deception was caused, at least in part, by the company setting extremely aggressive sales goals.<sup>246</sup>

Experimental work suggests that aggressive goals can act as a catalyst for unethical behavior even when achieving the goals have only psychological, rather than financial, consequences. Ordonez and colleagues instructed subjects to create as many words as they could in one-minute increments from sets of seven random letters. Some subjects were instructed to “do your best to create as many words as you can,” while others were told that “[y]our goal is to create 9 words during the allotted 1 minute using these 7 letters.”<sup>247</sup> When asked to report the number of words created, those with the aggressive goal were significantly more likely to falsely inflate their scores, even though this did not affect their compensation: 22.7 percent of subjects in the latter group overstated their scores for at least one round, compared to only 10.5 percent of those in the former group.<sup>248</sup> A third group of subjects who earned more money for each round in which they met the goal lied about their scores slightly more often than subjects in the second group, but the difference was not significant.<sup>249</sup>

Another study in the context of negotiation found that participants assigned to the role of the buyer in a simulated real estate negotiation were significantly more likely to lie about their intended use of the property (knowing that their intended use was undesirable to the seller) if they were warned that they faced a 75 percent chance of “losing” the property than if they were told that they faced a 25 percent chance of “gaining” the property.<sup>250</sup> Yet another study found that subjects were more likely to lie about their ex ante predictions concerning outcomes of coin tosses, which would in turn affect their likelihood of winning a lottery, when more correct predictions would turn a lottery with a negative payoff positive than if more correct predictions would make the lottery payoff either less negative (but still negative) or more positive (but positive in any event).<sup>251</sup> Although neither of these studies manipulated the subjects’ goals, both demonstrate the increased temptation to act unethically when doing so could help to avoid suffering a perceived loss. This is precisely the position that negotiators who set aggressive goals are likely to find themselves in.

These results suggest that lawyer-negotiators who wish to reduce the likelihood that they will engage in unethically deceptive behavior that they might classify as ethical when the situation arises would be wise not to establish ag-

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<sup>246</sup> See, e.g., David Dishneau, *Sears Admits Mistakes, Takes Workers Off Commission*, ASSOCIATED PRESS (June 22, 1992), <https://advance-lexis-com.ezproxy.library.unlv.edu/api/document> [<https://perma.cc/682K-E6HV>].

<sup>247</sup> Maurice E. Schweitzer et al., *Goal Setting as a Motivator of Unethical Behavior*, 47 ACAD. MGMT. J. 422, 425 (2004).

<sup>248</sup> *Id.* at 426–27.

<sup>249</sup> *Id.* at 427.

<sup>250</sup> Kern & Chugh, *supra* note 40, at 380.

<sup>251</sup> Shaul Shalvi, *Dishonestly Increasing the Likelihood of Winning*, 7 JUDGMENT & DECISION MAKING 292, 295–96 (2012).

gressive negotiation goals *ex ante*. Such goals focus effort and create motivation, but they can also overwhelm an objective evaluation of what actions that could help to satisfy the goal would be ethical.

#### CONCLUSION

Research in the field of behavioral ethics suggests that unethical behavior is both more prevalent and less intentional than rational choice theory would predict: cognitive biases and motivated reasoning enable otherwise good people who value their self-perception as ethical actors to behave unethically when doing so is in their self-interest without suffering a guilty conscience. When the requirements of ethical behavior are complex or ambiguous, as is the case in negotiation, we should expect a significant amount of unethical (or at least boundary-pushing) behavior. When principal parties act through agents, as is the case in legal negotiation, we should expect this effect to be exacerbated. Indeed, a behavioral ethicist would not be shocked by the conclusion of noted teacher and scholar Charles Craver that dishonesty is so common among lawyer-negotiators that competent counselors must assume a lack of truthfulness on the part of their counterparts.<sup>252</sup>

There are no simple tactics for increasing the ethical climate of negotiation, but clearer ethical codes (whether or not legally enforceable) and honesty contracts are institutional solutions that could offer some improvements, and individual lawyer-negotiators might improve their ethical behavior by tempering their aspirations at the bargaining table.

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<sup>252</sup> See CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 409 (7th ed. 2012).