

## BOOK REVIEW

# That May Work in Practice, but Will It Work in Theory?

BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES. By Robert H. Mnookin, Scott R. Peppet, and Andrew S. Tulumello. Cambridge, MA: The Belknap Press, 2000. Pp. iii, 354. \$29.50.

JOSEPH B. STULBERG\*

### I. INTRODUCTION

*Beyond Winning* is directed to lawyers in their capacity as negotiators. It is a heralded book<sup>1</sup> and we have much to learn from both its strengths and weaknesses. Its decided strength lies in providing lawyers with the most concrete practical guidance currently available for preparing and conducting negotiations from an interest-based perspective. Its weakness lies at the level of theory, for *Beyond Winning* embraces key bargaining concepts that are decidedly contestable.

### II. CONTEXT

*Beyond Winning*'s primary thesis is that legal negotiators should conduct negotiations in a way that attempts to minimize costs and creates value.<sup>2</sup> This thesis builds on Fisher's and Ury's key concepts of interest-based bargaining and best alternatives to negotiated agreement (BATNAs),<sup>3</sup> and tethers itself to Lax's and Sebenius's distinction between creating and claiming value,<sup>4</sup> Raiffa's strategic claims about bargaining strategies for distributive issues,<sup>5</sup> and Tversky's and Ross's psychological insights concerning framing skills

---

\* Professor of Law, The Ohio State University Moritz College of Law.

<sup>1</sup> The book received the 2000 "Outstanding Book" Award by the CPR Institute for Dispute Resolution.

<sup>2</sup> See ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 6 (2000) [hereinafter *BEYOND WINNING*].

<sup>3</sup> See generally ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40–56, 97–106 (Bruce Patton ed., 2d ed. 1991).

<sup>4</sup> See generally DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATIVE AND COMPETITIVE GAIN* 88–153 (1986).

<sup>5</sup> See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 142–45 (1982).

and anchoring strategies.<sup>6</sup> Readers familiar with those works will recognize many of the early materials and examples in *Beyond Winning*. *Beyond Winning*, however, places these concepts in an engaging context and its authors bring their considerable insights and experience to suggest how lawyers can deploy these ideas in concrete, effective ways.

*Beyond Winning* maintains that there are three concurrent tensions in any bargaining environment. The tensions are between (1) creating and distributing value, (2) assertiveness and empathy, and (3) principal and agent.<sup>7</sup> Balancing the management of these tensions, rather than placing priority on one to the exclusion of others, distinguishes the problem-solving negotiator from the stereotypical adversarial advocate.

*Beyond Winning* asserts that these tensions are always present.<sup>8</sup> To pretend that they are not is wishful thinking. *Beyond Winning* also claims that it is naïve to believe that every negotiator one encounters will behave as a problem-solver negotiator. The challenge, then, is clear: when negotiating the resolution of legal disputes and legal deal-making, how does a lawyer effectively manage these tensions to secure a client's interest?

### III. MANAGING THE TENSIONS

*Beyond Winning* asserts that lawyers operate in a dispute world that consists of two types of disputes: legal disputes and legal deal-making. Legal disputes are those "in which at least one party believes that it has a legal claim to relief."<sup>9</sup> By contrast, legal deal-making operates in an environment that has the following three central characteristics: neither party has a pre-existing legal claim against the other; the alternative to an agreement is for one or both parties to go elsewhere for assistance, but not to court; and the lawyer's contribution is to assist their clients to create legal obligations within the broader framework of their agreement to exchange or allocate assets and services.<sup>10</sup>

The three central tensions permeate both types of disputes. To manage them effectively requires that one understand their respective natures.

---

<sup>6</sup> See generally BARRIERS TO CONFLICT RESOLUTION chs. 1–5 (Kenneth J. Arrow et al. eds., 1995).

<sup>7</sup> BEYOND WINNING, *supra* note 2, at 9–10.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 100.

<sup>10</sup> *Id.* at 128–29.

### A. *Creating and Distributing Value*

Colloquially speaking, negotiating appears to involve at least two types of behavior: sharing and taking. When people share things (information, resources, pleasantries), they seem to be cooperative, if not polite. By contrast, when people take things, particularly a scarce resource, they seem selfish.

The conventional view of negotiating is that it is a competitive enterprise; each party takes as much as he or she can from their bargaining counterpart. If a negotiator shares ideas, information, or proposals, the negotiator might be viewed as nice or naïve, but he or she runs a risk that one's bargaining counterpart will not act with reciprocal candor and proceed to take what one has shared to improve his position. If this is what negotiating is, then a lawyer, in order to protect his client's interests, must adopt a competitive approach.

But as *Beyond Winning* and many others note, there are significant costs to negotiating in this manner—personal animosity intensifies; time and money are wasted, and bad feelings sabotage aspects of implementing agreements. However, the most important cost, *Beyond Winning* observes, is that competitive bargainers might not achieve what they claim to be best at, viz. securing the best deal for their client. That is, they might have done better—considerably better—by bargaining with a different approach. How is this possible?

Parties need information and suggestions to assess negotiating possibilities. Negotiating dialogue creates opportunities for resolution. The question for *Beyond Winning* is not whether people have sufficiently talked so that parties are able to strike some deal. The question, rather, is whether they bargained in a way that enhances the possibility for “reaching a deal that, when compared to other possible *negotiated* outcomes, either makes both parties better off or makes one party better off without making the other party worse off.”<sup>11</sup>

The tension between creating and distributing value arises because the behaviors needed to create options can be exploited by persons who, at any point in time, want to claim outcomes. Managing the tension requires that a person be adept at preparing and conducting negotiations in a manner that positions her to enrich settlement options while minimizing her vulnerability to others who may take advantage of her. How is that done? The author's general advice is important: prepare thoroughly, paying particular attention to the possibilities for identifying multiple negotiation issues for

---

<sup>11</sup> *Id.* at 12.

discussion.<sup>12</sup> More specifically, *Beyond Winning* notes that preparation involves identifying client interests (both one's own client and that of one's bargaining counterpart),<sup>13</sup> establishing priorities among issues and interests,<sup>14</sup> and developing concrete reservation prices based upon one's BATNA.<sup>15</sup> Further, the negotiator must consider strategies for discussing negotiating procedures;<sup>16</sup> rather than simply accepting the negotiation minutiae of articulating positions for settlement, *Beyond Winning* counsels that negotiators introduce dialogue addressed to procedural aspects of negotiation beginning with questions of who shall speak and in what order, suggestions for confirming each other's understanding of proposals and interests, and the like.<sup>17</sup> *Beyond Winning*, better than any of its forebears, makes concrete suggestions for transforming an interest-based perspective into practical bargaining conduct.

### B. Assertiveness Versus Empathy

Competitive bargainers have the image of persons who belligerently advance their positions, oftentimes with great histrionics or threats. By contrast, the person who genuinely wants to try to understand what the other person is seeking or needs is frequently characterized as a polite, nice person who is vulnerable to being "taken to the cleaners" in a negotiating setting. *Beyond Winning* proposes that the problem-solver negotiator is one who thoughtfully, and without apology, firmly advocates his client's interests and proposals while simultaneously remaining open to understanding the goals and aspirations of their bargaining counterpart. Striking the right balance, *Beyond Winning* contends, makes one a remarkably strong, effective negotiator.<sup>18</sup>

This, in many ways, is *Beyond Winning's* most significant, important contribution for practitioners. *Beyond Winning* affirmatively demonstrates that being a strong, effective advocate is not synonymous with engaging in the duplicitous, competitive gamesmanship tactics frequently championed by

---

<sup>12</sup> *Id.* at 28.

<sup>13</sup> *Id.* at 28–29.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 33–34.

<sup>16</sup> *See id.* at 39.

<sup>17</sup> *Id.* at 62.

<sup>18</sup> *See id.* at 46–50.

persons such as White<sup>19</sup> or Meltsner and Schrag.<sup>20</sup> But neither is being empathetic synonymous with being 'so accommodating that a negotiator subordinates his client's fundamental interests to the value of not offending his counterpart.

How does the negotiator strike that balance? *Beyond Winning* offers helpful advice: first, one must know oneself. Are one's own negotiating tendencies inclined to being that of a competitor, accommodator or avoider?<sup>21</sup> Upon such determination, what specific strategies can one adopt to blend that orientation into a more constructive balance? In preparing to negotiate, one must combine an assessment of bargaining issues, interests, and priorities with the psychological dimensions ingredient to the assertiveness/empathy tension, thereby enabling those behaviors to reinforce one another. *Beyond Winning*, most thoughtfully, suggests that the negotiator ask himself—"What is the worst thing the other side could say about you? What is going to be the hardest thing for you to hear?"<sup>22</sup> The reason this is a valuable preparation methodology is that the negotiator wants to be able to respond to the worst thing one could hear in a manner that consistently supports his effort to manage the creating value/distributing value tension. That is, the problem-solver negotiator does not want to respond to the worst thing he might hear by immediately asserting, "That's my bottom line!" thereby undercutting his opportunity to create value because he has responded defensively.

Second, *Beyond Winning* admonishes persons to practice telling one's story.<sup>23</sup> As with any presentation, one often revises and refines one's narrative to make certain that she does not get sidetracked in irrelevant details<sup>24</sup> or that the narrative conveys one's story comprehensively yet concisely. Although *Beyond Winning* does not pursue this insight in the context of a lawyer preparing his or her client for negotiation, its application to that context is straightforward and importantly true.

Finally, and most important, at the table, negotiators should negotiate process protocols as well as substantive exchanges;<sup>25</sup> further, they should be prepared for conflict and disagreement. This advice links *Beyond Winning's*

<sup>19</sup> See generally James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926.

<sup>20</sup> See generally Michael Meltsner & Phillip G. Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259 (1973).

<sup>21</sup> See BEYOND WINNING, *supra* note 2, at 51-53.

<sup>22</sup> *Id.* at 59.

<sup>23</sup> *Id.* at 60.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 62.

recommendations regarding the need to anticipate what might bother one the most to its counsel for managing the first tension; its cumulative impact constitutes perhaps the most important lessons from the book.

### C. *Principal Versus Agent*

This tension addresses the structural conflicts that define the relationship between a lawyer and her client; its complexity, of course, multiplies when one maps out the possible bargaining interactions with the principal and agent of one's bargaining counterparts.

At first, some readers might find this tension surprising. A client who hires a lawyer is securing the services of someone who, arguably, will act in the client's best interests. But, as *Beyond Winning* thoughtfully discusses, even under the best of circumstances, a lawyer has her own professional and personal interests that may or may not be perfectly congruent with her client's interests and goals.<sup>26</sup> *Beyond Winning* notes that there is nothing pernicious or duplicitous about this phenomenon; rather, it is a matter of potential role conflicts. So, the challenge is to identify these conflicts and directly negotiate their resolution.<sup>27</sup>

How might these differences develop? The tensions arise from differences in preferences, information, and incentives.<sup>28</sup> From the client's perspective, each difference presents the identical challenge: how do I know what my lawyer is doing for me? Consider the incentive structure for lawyers. Lawyers want to be paid for their services. What fee arrangement works best for both the lawyer and client? *Beyond Winning* discusses several types of arrangements but notes that all create conflicts. For example, the lawyer working on a contingency fee arrangement may press for an early settlement at a lower value rather than engage in substantially more work in an effort to secure a higher recovery.<sup>29</sup> Does a client who is, presumptively, seeking a high recovery feel comfortable with that? Moreover, how does a client monitor how an attorney works? Does she have access to information about her work habits, diligence, or timekeeping practices?<sup>30</sup> If not, is there a cost effective way of creating a monitoring system?<sup>31</sup>

---

<sup>26</sup> *Id.* at 70.

<sup>27</sup> *Id.* at 70–71.

<sup>28</sup> *Id.* at 75–76.

<sup>29</sup> *Id.* at 83.

<sup>30</sup> *Id.* at 85.

<sup>31</sup> *Id.*

## WORK IN PRACTICE, WORK IN THEORY?

Alternatively, how does a client know whether her lawyer has communicated all proposals that the other side has proffered, or that the proposal, as conveyed, accurately reflects the content and nuance of the proposition? While professional norms dampen lawyer behavior that might operate to a client's disadvantage, such constraints, *Beyond Winning* notes, operate imperfectly at best.<sup>32</sup>

Again, *Beyond Winning* reinforces their theme: tension is part of the fabric of the principal-agent relationship. It cannot go away. So, be candid about it. Discuss it. Negotiate acceptable terms within the context of each person's BATNA.

### IV. CONSEQUENCES

These central themes lace *Beyond Winning's* analysis of how one ought to bargain. The remainder of their text focuses on how a problem-solver negotiator applies these insights to the world of legal disputes and legal deal-making. *Beyond Winning* offers detailed advice for both preparing for and conducting negotiations. It addresses the lawyer's practical dilemma of negotiating with someone who is not a problem-solving negotiator (thereby meeting concretely the challenge often posed to Fisher and Ury).<sup>33</sup> *Beyond Winning* references the psychology literature to support its helpful insights regarding constructive ways for framing dialogues<sup>34</sup> and the psychological effect of the anchoring phenomenon.<sup>35</sup> Additionally, it highlights how negotiators can use elementary decision-tree analysis and probability theory to assess the strengths and weaknesses of a bargaining proposal and, through that, evaluate potential bargaining outcomes in an informed manner.<sup>36</sup>

These constitute rich insights for the practicing lawyer. They are an effective response to the cynic who claims that we must accept the world of hard-ball negotiation, because that is the way the world works. But, at a theory level, *Beyond Winning* remains vulnerable.

### V. THEORETICAL VULNERABILITIES

Any theory of negotiation must answer a series of central questions. These include such matters as, What is the purpose of negotiating? Who is a party to a negotiation? What is a bargaining issue, as distinguished from a

---

<sup>32</sup> *Id.* at 86.

<sup>33</sup> *Id.* at 211–23.

<sup>34</sup> *Id.* at 207–11.

<sup>35</sup> *Id.* at 157–67.

<sup>36</sup> *Id.* at 232–40.

non-bargaining issue? What type of information is relevant to making the bargaining enterprise function? What criteria are relevant for determining the success or failure of a bargaining experience? The persuasiveness of *Beyond Winning*'s theory of bargaining depends on the cogency of its account of these and related matters. To limit discussion, I focus on three items.

*Beyond Winning* claims that the central activity in problem-solving negotiation involves a search for value-creating trades that can make one or both parties better off.<sup>37</sup> There are three problems embedded in this observation: first, it assumes an answer to the question, "Why should parties negotiate?," which involves a problematic account of interest-based bargaining. Second, it leads to an account of what constitutes a negotiable issue that is inconsistent with its own version of interest-based bargaining. Finally, it rests on a concept of creating value that is not persuasive.

### A. *What Is the Purpose of the Negotiating Activity?*

Negotiating is a process for resolving disputes. If one could obtain what one wanted without another's cooperation, he or she would simply act unilaterally to secure their goal. *Beyond Winning* alludes to this indirectly when it discusses why some legal cases should not settle.<sup>38</sup> *Beyond Winning*'s answer, which I believe is unassailable, is that parties to some controversies will not, and should not, settle if they have a particular set of *interests* that are better secured or advanced through other processes.<sup>39</sup> Hence, bargaining is interest-based.

So far, so good. But then, one needs a sophisticated account of what constitutes an interest. Here, *Beyond Winning* fares no better than other efforts. *Beyond Winning* posits that an interest "reflect[s] the concerns and needs underlying bargaining positions."<sup>40</sup> *Beyond Winning* further complicates the discussion by noting that "[c]ertain *intangible interests* may be important to some degree in almost every negotiation. The parties may have interests in feeling understood or fairly treated. In business deals, the principals may have interests in not losing face and in strengthening their reputation."<sup>41</sup> This account does not advance our understanding of this critical concept. What are some of the potential complications?

---

<sup>37</sup> *Id.* at 12.

<sup>38</sup> *Id.* at 107.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 28.

<sup>41</sup> *Id.* at 29–30 (emphasis added).

Fisher and Ury make the bold suggestion that negotiators should constructively address “legitimate” interests;<sup>42</sup> this presumes that some interests are legitimate while others are illegitimate but they provide no guidance for distinguishing the two from one another. Others use the terms “needs” and “interests” interchangeably, as though they were synonymous. But that is not persuasive; for instance, in negotiating a salary, is an employee’s financial interest identical to her need for shelter or security? Still others, such as Joel Feinberg, thoughtfully propose a distinction between basic welfare interests and ulterior interests.<sup>43</sup> Do proponents of interest-based bargaining embrace that distinction? If so, what are its consequences? Finally, what principle enables one to identify a particular interest? When *Beyond Winning* speculates as to the interests of Digital and Intel in their litigation, it identifies interests ranging from statements of significant generality (financial interest) to targeted and specific items (interest in finding a buyer for the Merced chip).<sup>44</sup> This is clearly ad hoc categorizing. It underscores our need for a better framework for distinguishing interests from other matters. Stated bluntly, we need to identify the criteria against which to assess whether or not we have accurately identified a person’s interests. If the identification is in error, then interest-based bargaining proceeds upon a base of quicksand. Not surprisingly, all evidence points to this challenge as being a remarkably complex task implicating theories of language and value.

Assuming one can accurately identify appropriate interests, what can theorists say about how people prioritize their interests? *Beyond Winning*, to its credit, notes that persons must establish a priority-ranking among their various interests.<sup>45</sup> But what implications does that have for reaching a resolution? Part of the appeal of interest-based negotiation stems from its capacity to highlight how, by focusing on interests, one can generate a range of possible outcomes that might not be considered by positional bargainers. But will the same flexibility—opportunity for brainstorming—obtain if a negotiator, having identified priorities among his interests, states that he has no desire to brainstorm possible options for lower priority interests but wants to focus discussion exclusively on his high priority ones? Does this convert interest-based bargaining to power-based positional bargaining?

---

<sup>42</sup> See FISHER & URY, *supra* note 3, at 40–56.

<sup>43</sup> JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 37–38 (1984).

<sup>44</sup> *BEYOND WINNING*, *supra* note 2, at 246.

<sup>45</sup> *Id.* at 256–58.

## B. What Is a Negotiating Issue?

*Beyond Winning* provides guidance for lawyers to act in two basic settings: legal disputes and deal-making.<sup>46</sup> Recall that *Beyond Winning* defines a legal dispute as one “in which at least one party believes that it has a legal claim for relief.”<sup>47</sup> This is familiar territory for lawyers. But a subtle shift occurs in the subsequent analysis. How do distributive bargaining theorists identify a bargaining issue? They define it as a topic that has a zero-sum character, so that one party’s gain is another party’s loss. We can ask *Beyond Winning*, what is a negotiating issue? *Beyond Winning* only hints at a response, but it is suggestive. *Beyond Winning* posits, “The core of most legal dispute resolution is assessing and shaping both sides’ perceptions of the expected value of proceeding to court.”<sup>48</sup> There is pay-off in lawyers engaging in hard bargaining to influence the other side’s perception of the potential cost it will incur by going to trial.<sup>49</sup> All of this suggests the difficulty of engaging in problem-solving negotiation in the context of negotiating a legal dispute. But the conceptual inconsistency is revealed when *Beyond Winning* examines, in the context of legal deal-making, the structure of trades between various terms. It states, “With respect to any one term, bargaining is distributive.”<sup>50</sup> But that, of course, is not consistent with promoting interest-based bargaining. If each term in bargaining is distributive, interest-based bargaining cannot get started. What has gone awry? The answer is straightforward, at least conceptually: bargaining issues are more appropriately characterized as being items that can be related to or connected with some interest. For instance, the bargaining issue of salary is related to an employee’s interest in financial security or success. The negotiating issue of a proposed closing date for a business transaction is related to a party’s interest in obtaining favorable financing arrangements, minimizing debts, or the like. Thus, contrary to the impression that *Beyond Winning* advances that it is the number of issues, and their potential for trade-offs, that creates the possibility for problem-solving bargaining, conceptually, one can get to interest-based bargaining even if there is only one negotiating issue in dispute. It is not the number of issues that opens the door but the manner in which people choose to frame the negotiating issue.

---

<sup>46</sup> *Id.* at 100–01.

<sup>47</sup> *Id.* at 100.

<sup>48</sup> *Id.* at 125.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 145.

### C. Creating Value

The world certainly appears to be a much better place if its actors behave in a way that creates value. But *Beyond Winning* deploys the concept of “creating value” in an importantly stipulated way. It notes:

By definition, whenever there’s a negotiated agreement, *both* parties must believe that the negotiated outcome leaves them at least as well off as they would have been if there were no agreement. *In this narrow sense, any negotiated outcome, if better than your best alternative away from the table, could be said to create value.*<sup>51</sup>

But this is not the sense of creating value that *Beyond Winning* envisions. Rather, it stipulates, “[W]hen we talk about creating value, we typically mean reaching a deal that, when compared to other *possible negotiated outcomes*, either makes both parties better off or makes one party better off without making the other party worse off.”<sup>52</sup> What is the problem with this account?

*Beyond Winning* acknowledges that *any* negotiated agreement creates value.<sup>53</sup> But it denigrates that achievement. I find that doubly problematic: first, claiming that a form of creating value is not noteworthy or valuable must be predicated on a concept of rationality that importantly clashes with significant concepts of party autonomy. Second, in advancing its own notion of creating value, *Beyond Winning* must presume that there is a stable benchmark against which one can assess whether she created value. I consider below only the second problem.

*Beyond Winning*’s stipulated definition for creating value is calibrated only in comparison to other negotiated outcomes; but that succeeds only if, conceptually, there is some negotiated outcome *against which* to make the comparison. Where do we find that comparative settlement? In a legal dispute, it cannot be the projected judicial or jury verdict, for that would be to assess “creating value” in the narrow sense. What other candidates are possible? In fact, there are no tangible points of comparison. One can only create the comparison with other negotiated settlements through a series of post-facto discussions with the negotiating parties in which one tries to assess what other options the negotiators might have been willing to consider had different items of information been known to them. But this is a version of the “Monday morning quarterbacking” that presumes information that is, in principle, not known to the participants engaged in the original transaction.

---

<sup>51</sup> *Id.* at 12 (emphasis added).

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

<sup>53</sup> *Id.*

But if there are no firm comparative points against which negotiations in legal disputes can be assessed, the situation worsens for *Beyond Winning* when one examines negotiations in the context of legal deal-making. The question again is, what constitutes the terms of the originally negotiated agreement against which assessments for “creating value” can be assessed? *Beyond Winning* approaches this challenge by assuming that many deals originate as broad agreements-in-principle<sup>54</sup> made among the parties and that lawyers then enter the picture to transform those agreements into legal obligations and rights. So, presumptively the comparative negotiated agreement is the agreement in principle that the principals have reached. But that is certainly an implausible standard against which to assess whether one has done better. If it is an agreement in principle, one presumes that many details have yet to be worked out. To describe that situation as one in which the parties reached a negotiated agreement at time 1 and another agreement at time 2, and then compare them to decide if the latter deal created value provides a distorted view of the emerging relationship. The more accurate way to account for that situation is that the parties, having reached a *tentative* accord, proceed to work through the details with the stated aspiration that no significant roadblocks will develop. But that does not suggest that the later agreement has created value. It simply means that the agreement in principle provided the structure for trying to hammer out a more thorough, if not comprehensive, agreement.

Everyone applauds *Beyond Winning*'s admonition that negotiators should try to be creative, imaginative, and open to considering options that serve their client's interests. But to claim that one can, in theory, move toward (much less identify) Pareto optimality requires a more stable set of assessment points and references than bargaining theory thus far provides.

## VI. CONCLUSION

There are other elements of bargaining theory that *Beyond Winning*, surprisingly, does not address. *Beyond Winning* does not examine, for instance, whether gender influences the manner in which a negotiator should manage the tensions. While concerns about bargaining in the context of significant power disparities is indirectly discussed, one might have hoped that the authors of *Beyond Winning* would marshal their perceptive insights to provide an analysis of constructive bargaining behavior in those real-world operations in which power disparities affect both a person's capacity to

---

<sup>54</sup> *Id.* at 129.

## WORK IN PRACTICE, WORK IN THEORY?

negotiate as well as his or her visions of the possibilities achievable through negotiation.<sup>55</sup>

But these and other matters constitute an agenda for many to address. *Beyond Winning's* prescriptive advice for actual conduct is perceptive and effective. One cannot put down this book without being convinced that all of us would be better off were people to negotiate in this manner. Empirically, the prescriptions should work; the theory accounting for why that is so has yet to materialize.

---

<sup>55</sup> For a related discussion, see JON ELSTER, *SOUR GRAPES* (1983).

