Contrasting "principled negotiation" with the adversarial model

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This paper explores the differences between principled negotiation and the adversarial model of dispute resolution by reference to three key questions. The object of the paper is to outline the ethics, applicability, and aims of principled negotiation as distinct from the form of advocacy typically used in litigation.

I INTRODUCTION

The model of "principled" or "problem-solving" negotiation is advanced by Fisher and Ury[1] and elaborated on by Menkel-Meadow.[2] This model implicitly criticizes the single-minded "zealous advocacy" ethic, whcih is commonly accepted as control to the lawyer's proper duty to the client within adversarial litigation. It is a form of advocacy often pursued in competitive and equally adversarial negotiation. According to this "standard conception" of the lawyer's role, the lawyer must maximise the likelihood that the client's interest will prevail within the limits of the law. Whilst the lawyer may not knowingly use perjured testimony, make a false statement of law or fact, create evidence known to be false or assist conduct known to be fraudulent, she or he is otherwise not legally or professionally accountable for the means used or ends achieved. Thus the lawyer must represent a morally reprehensible client, cross-examine and if necessary impeach truthful witnesses, decline to admit adverse evidence against the client, and present evidence in ways personally felt to be inaccurate[3]. The New Zealand Law Society *Code of Ethics*[4] provides no general guidelines on the limits of the lawyer's duty to the client. It incorporates the International Code of Ethics which, in paragraph 6.10 states, that "The loyal defence of a client's case may never cause an advocate to be other than perfectly candid" - but this is of doubtful authority in New

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* This essay was submitted in completion of a requirement in the course on Negotiation and Mediation, Victoria University, 1988

1 R Fisher and W Ury *Getting to Yet* (Houghton Mifflin, Boston, 1981).

2 C Menkel-Meadow "Toward Another View of Legal Negotiation: The Structure of Problem-Solving" (1984) 31 UCLA LR 754.

3 M Schwartz "The Professionalism and Accountability of Lawyers" (1978) 66 Calif LR 669, 671-674.

4 New Zealand Law Society *Code of Ethics* 1978.

Zealand in light of the qualification in paragraph 6.21 which was added by the New Zealand Law Society:

> In New Zealand a practitioner may not without good cause refuse to accept any instruction in his field of practice-subject however to payment of a proper fee and his commitments.

This paper is based on the assumption that this is the standard conception of the lawyer's role in New Zealand. Thus, while something like cross-examination procedure is irrelevant to negotiation, yet "zealous advocacy" within adversarial negotiation demands if anything a *lesser* standard of ethical conduct in that, beyond the most general admonition against pursuit of illegal purpose, negotiation process is so unregulated as to be a virtual free-for-all. Rubin, for example, laments the enthusiastic exposition in leading texts of bluffing (ie lying), rejecting agreements and being irrational[5]. There seem to be few safeguards to protect the weaker (less powerful or skilled) party. Principled negotiation, on the other hand, advocates the pro-active and legitimate satisfaction of the interests of all parties by way of a technique designed to circumvent competitive exploitation: by both parties inventing a new "ethos" of the aims of negotiation and suggesting tactics to frustrate the opponent who "won't play".

This paper will explore the contrast between principled negotiation and the adversarial model (as manifested in negotiation and litigation) by reference to three different sorts of question:

1 What is a proper standard of ethical conduct in regard to the pursuit of a client's interest in negotiation and how adequately does principled negotiation address this issue? Recourse will be had here to critiques of zealous advocacy both within negotiation and litigation.

2 Is conflict likely to arise in practice between the pursuit of a client's interest and the legitimate interest/s of the other party/ies? A negative answer to this question would suggest that zealous advocacy in negotiation is counterproductive, if not redundant.

3 How different are the aims of principled negotiation from those of zealous advocacy within negotiation and adjudicated disputes? Reference will be had here to the debate between McThenia and Shaffer on the one hand, and Fiss on the other.

It is hoped that the result will be a clearer understanding of the ethics, applicability and aims of principled negotiation.

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5 A Rubin "A Causerie on Lawyers' Ethics in Negotiation" (1975) 35 Louisiana LR 577, 581.

II A PRELIMINARY PEEP AT PRINCIPLED NEGOTIATION

Before embarking on a discussion of the first question it is useful to offer, by way of background, a summary of the essentials of principled negotiation and perhaps to highlight areas where further clarification would be useful.

The objective of principled negotiation is the "wise agreement" - one which is efficient in terms of transaction costs, meets the legitimate interests of each side to the greatest extent possible, resolves conflicting interests fairly, is durable, takes community interests into account and improves or leaves intact the relationship between the parties[6]. The first thing one is trying to achieve is a better way to negotiate, a way that avoids a choice between attaining what one deserves, and being decent[7]. Central to this technique is the concept of being partners with the "opposition" in a hardheaded search for a fair agreement advantageous to all sides[8]. Searching for common interests[9] and the exploitation of different interests[10] go hand in hand with a genuine respect for the needs, values and perceptions of the other parties[11] - which are not to be frustrated by an absorption with immediate self - interest[12]. A utilitarian justification for this is stressed - your satisfaction depends to a degree on the other side being sufficiently content to want to honour the agreement[13]. In sum, the agreement must be legitimate - fair, legal and honourable[14]. Recourse to objective, principled criteria becomes particularly necessary when there arises a conflict of interest unresolvable by the problem-solving method. These criteria are to be legitimate and practical[15] and agreed upon jointly, such agreement being enabled by a mutual openness to reason[16]. "Dirty tricks" thus fail the test of legitimacy in their lack of reciprocity[17], to be foiled by proceeding "independent of trust"[18]. Inequality in bargaining power is supposedly met by the development of a "best alternative to negotiated agreement" (BATNA), which determines at what point it is no longer worth continuing with the negotiation. However, negotiation power depends on how attractive this alternative is. Thus in strictly utilitarian terms there may seem little to compel a far more powerful opponent to adhere to principled criteria where a direct, irresolvable conflict of interest arises. In general, it seems that conciliation is not to be to a degree that compromises the client's own best interests[19]. Nor is disclosure of information to be so full as to

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6 Above n1, 4.
7 Above n1, 154.
8 Above n1, 39.
9 Above n1, 43.
10 Above n1, 75.
11 Above n1, 53.
12 Above n1, 82.
13 Above n1, 75.
14 Above n1, 81.
15 Above n1, 87.
16 Above n1, 92-94.
17 Above n1, 134.
18 Above n1, 137.
19 Above n1, 56.

compromise these same interests[20] - less than full disclosure is, apparently, not deception[21]. This is probably a fair and practical reflection of the fact that people doing business are not there solely to reach the most objectively just agreement but to make a good deal. In any event Fisher and Ury's emphasis is on revealing interests, rather than finding every relevant fact (eg, how much one can afford to pay).

Menkel-Meadow asks a question which illuminates an apparent ethical vagueness in principled negotiation. Should the zealous advocate pursue a gain for the client that would cause loss to the other side?[22] Earlier she discusses questions of fairness purely in terms of client's needs of which fairness might be one[23]. After posing the above question she notes the absence in the American Code of Professional Responsibility of any prohibition against acting unfairly. She suggests that lawyer and client discuss whether pursuit of gain at the expense of others is likely to adversely affect the result,[24] continuing the utilitarian analysis along lines centring even more explicitly on self-interest. She goes on, however, to ask whether considerations of justness or fairness take primacy over a simple needs analysis and states that Fisher and Ury place greater emphasis on the importance of an objectively fair agreement than on meeting the parties' needs[25]. (Note that "parties" is in the plural, so that the question of precedence is over needs in general rather than those of one's client in particular - although Menkel-Meadow's whole contention seems questionable given Fisher and Ury's emphasis on preserving clients interests[26]).

Menkel-Meadow remains undecided as to whether such primacy of fairness derives from the duties and obligations of the legal profession or of our humanity, and muses on the embedded nature of moral judgment in contexts and relationships rather than abstract principle,[27] in which case the canvassing of a richer set of needs would be helpful[28]. She concludes, somewhat ambivalently, that there is nothing in the problem-solving model which necessarily compels parties to consider the justice of their solution - although there is no reason why "rightness" should not be a component of client satisfaction. She accurately correlates justness of process with solution[29]. On the contrary, as the following will elaborate, a legitimate result seems central to the whole ethics of principled negotiation - although it remains to be seen whether "legitimate" always equates with "justice" in the adjudicatory sense of the word.

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20 Above n1, 37.
21 Above n1, 139.
22 Above n2, 813.
23 Above n2, 802.
24 Above n2, 814.
25 Above n2, 816.
26 Above n1, 56.
27 Cf Carol Gilligan *In a Different Voice* (Harvard U P, Cambridge, Mass, 1982).
28 Above n2, 816-817.
29 Above n2, 817.

It might be concluded that while principled negotiation passionately advocates "creative, enriching, empowering human interaction"[30], in which ideally the needs of all are met, there is doubt as to the precise degree of loyalty which is required to a client's interest, and as to the primacy of fairness for its own sake. Fisher and Ury do not provide direct answers. They suggest a good faith standard of "would I do this to my family?"[31], but say it is up to each party to decide on their own standard (though this may only be an acknowledgement that Fisher and Ury cannot actually tell people how to behave - only suggest). There is doubt also as to how thoroughly principled negotiation prevents exploitation of the weaker party. Answers are available by reference to the "should" (drawing on ethical arguments) and to the logical internal consistency of principled negotiation.

III PRACTICAL ETHICS AND A HUMAN MORALITY

Principled negotiation clearly has an inherently ethical content in its concern for the interests of others and in its recourse to principled criteria when conflict arises, although it is uncertain to what degree this is utility-based and as to whether the lawyer's first duty is ultimately to the client. To what degree should a client's needs come first in negotiation, and how insulated should the lawyer be from moral accountability in pursuit of that interest? These questions arise particularly in that grey area of principled negotiations where it is impossible to maximise a client's "gain" (so called) without recourse to unfair means in pursuit of an exploitative result.

Zealous advocacy, with its correlative moral non-accountability within the adversary system, is traditionally justified by reference to an impartial adjudicator working within formal rules of procedure and governing substantive law, whose role it is to discern the justice and truth of the opposing side's argument[32]. Of course, as Rubin points out, the truth does not always come to light[33] and it might be further noted that the outcome will often depend on the quality of representation and the client's power within the system. In negotiation, where there is no independent arbiter to ensure "fair play", there seems even less justification for non-accountability. It is irrelevant in this context that the goals of negotiation and adjudication may differ. The concern in both cases is that the result, whatever the purpose of the process, be a fair one. If the advocate is not to be accountable for conduct so long as it lies within the letter of the law, there must be good reason.

Two sources will be drawn on to argue that the negotiator should be morally accountable at a higher standard than the litigator. First, there are those who address directly the question of negotiator accountability[34]. Secondly, there are those arguments criticizing non-accountability within adversarial litigation as being itself of too low a standard. If they can be sustained in the case of the litigator, then they apply also,

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30 Above n2, 763.
31 Above n1, 148.
32 Above n3, 672.
33 Above n5, 585.
34 See Schwartz and Rubin, cited at nn 3 and 5.

perhaps even more so, to the negotiator who in non-adjudicated proceedings should build into her or his own conduct at least some of the restraints absent in litigation. Further, these arguments provide insights into the nature and purpose of morality and moral discourse which are generally applicable. Of course, parties will often use negotiation precisely in order to circumvent intervention by the courts which thye expect will be inadequate to serve their needs. Perhaps, for example, they are seeking a resolution or reconciliation beyond what the (sometimes restrictive) justice-serving rights framework can offer. Yet it is this lack of public scrutiny which compels standards to ensure that at the very least the process and/ or result is not blatantly unjust and exploitative. This may seem an intrusion into a purposively private realm of activity. Nevertheless, without even attempting to canvass the philosophical arguments, it is here merely assumed that society has a legitimate interest in preventing individuals being "ripped off" by the powerful and manipulative.

The quest for the proper standard of conduct in negotiation can be rephrased as an inquiry into the "right" of the client to the undivided loyalty of the lawyer in pursuit of all that the law will allow. Schwartz thus deals with both these questions as two sides of the same ethical coin. Noting that the lack of an adjudicator moves proceedings away from the theoretical concept of even handed justice, but that the client's expectations remain the same, he asks: What principles of professional accountability should thereby apply?[35] He suggests two different answers - the lawyer 1) must or 2) need not be allowed to pursue the client's objectives if they are unfair, unconscionable or unjust in end or means.[36] He answers objections - that the terms are too vague, that the lawyer becomes the client's conscience (imposing the standards of the elite on segments of the population not represented at the bar), that the client is denied the achievement of legal objectives - at two levels with two standards. First, the lawyer should be prohibited from assisting where the objections, in reference to a substantive body of law, are unenforcable, tortious or unconscionable[37]. Where the means or ends are "merely" immoral, or unjust, he suggests that the immunity enjoyed by the litigator would, in the context of negotiation, have to be justified in reference to some need for technical assistance taking piority over moral considerations. Fried's[38] assertion of the client's rights to autonomy under the law is initially dismissed as deriving from the context of litigation. To deny representation in the adversary system would undercut the important social policy of remitting disputes to adjudication. Nevertheless Schwartz recognises the force of objections to importing a public utility obligation without the protective controls which normally attach, and to the deprivation of one's legal rights. A balance must be struck between the social value of moral responsibility and the political value of not frustrating citizens in the realization of these rights. He concludes with a compromise - the lawyer may still advise that the objectives are not unlawful and can assist without professional liability, but is not obliged to assist and

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35 Above n3, 678-679.

36 Above n3, 679-680.

37 Above n3, 681-690.

38 C Fried "The Lawyer as Friend: The Moral Foundations of the Lawyer - Client Relationships" (1976) 85 Yale LJ 1060.

must be prepared to justify conduct in moral terms.[39] One wonders, however, how this would be enforced outside any formal process. Even admitting that the fair policing of such rules would be difficult in a process out of the public eye, one is not convinced that the client is entitled to all legal (if immoral) rights outside of a publicly administered process. Negotiation is often resorted to as an escape from the sometimes stifling strictures of the law. To then demand all legal rights seems a case of having your cake and eating it. The immoral pursuit of legal rights in litigation is at least open to judicial review and public opinion.

Rubin has no hestitation in denying the permissibility of a result unconscionably unfair to the other party. There must be a duty to tell the truth and to bargain in good faith, in this way reducing the inequality in bargaining power between two parties. Strict legality is not sufficient - much is proscribed which is not illegal - and one must ask whether the resulting injustice is so unbearable that it represents a sacrifice of value that an ethical person cannot in conscience impose on another. One's duty to society suspends that to the client. This may be impractical, but is necessary due to the disrepute in which the bar is held.[40]

Clearly neither Schwartz nor Rubin is prepared to accept total loyalty to the client's interest in negotiation, although Schwartz's eventual, implied standard of "need not assist" for unjust but enforceable objectives is lower than Rubin's outright admonition of unethical behaviour. It remains uncertain whether either standard covers the ticklish question of whether loyalty to legitimate objectives in the abstract, or to the needs of the clients/one's own client (adding a category to Menkel-Meadow's analysis) comes first. Probably Schwartz assumes a residue of client loyalty, though one wonders whether gaining at the expense of the other will not always be unjust and necessarily a result of a process imbued with inequality, be it in bargaining strength or skill of representation. Rubin on the other hand is invoking a high standard of truth to reduce inequality, and in relegating duty to client to below that to society may be leaning more towards loyalty to legitimate objectives.

Does not the real answer lie in the internal consistency of principled negotiation? When both sides pursue the ethic of principled negotiation, comprising concern for the interests of the other party and recourse in conflict to principled criteria, then choice between loyalty to client and legitimacy would provide no conflict. Such legitimacy would by definition satisfy the needs of all concerned. Reference to objective principled criteria may prevent one taking all one asks for, but the reward is a durable agreement. In this sense it may be posing a false dilemma to ask whether loyalty to legitimacy or to the client's/both clients' needs comes first, one serving the other. One's client is not going to be exploited so long as the other party is equally willing to consider one's clients' interests and in general hear one's case. Of course you may be prevented yourself from pursuing a larger piece of the "pie" at the expense of the other party - whether you may do this is the question raised by Menkel- Meadow. It is suggested that both the ethics of principled negotiation and the ethics advanced by Rubin and

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39 Above n3, 691-696.
40 Above n5, 589-592.

Schwartz answer this with a clear "no" - be it because of repugnancy to the pursuit of legitimacy, or because such a result must be due to unfair process and thus subject to the strictures of moral accountability imposed necessarily on a process hidden from the gaze of the adjudicating eye. When one faces such aggressive adversarial tactics, loyalty to legitimacy and client's interest again merge and demand the same recourse to principled criteria. Thus it can be seen that ethical standards and the principles of principled negotiation work hand in hand for the same goal, founded on the principle of reciprocity. But what neither the problem-solving model of negotiation nor adjudication can prevent in all cases where an irresolvable conflict of interest arises is exploitation of the weak by the strong. For this, there must be a will over and above what the law demands - an aspiration to principles of justice and fairness which are unlikely ever to be binding.

By examining the ethical objections of Postema and Lehmann to litigatory "zealous advocacy" further arguments can be added to the case against morally non-accountable advocacy in negotiation.

Postema argues that the separation of private and professional personality and morality seemingly demanded by loyalty to client's interest (which may be immoral) jeopardizes the advocate's ability to act in a morally and professionally responsible way. In meekly accepting the given morality of the role and in failing to take responsibility for actions, not only does the zealous advocate impede the freedom to be defined independently of that role[41]; but an identification with a detached stance leads to an uncritical state of mind or, worse, a deep moral scepticism.[42] The personal costs are high - self deception and moral prostitution[43] - and the determination of law is deprived of the moral resources from which arguments regarding legal rights and duty may be fashioned (though one might cynically note that lawyers can often discover a very well developed moral faculty should this suit the client's case). Further, the lawyer is barred from recognizing the client's moral personality - client autonomy and mutual respect is thus jeopardized.[44] All these points apply to negotiation, an institution perhaps even more in need, because of its non-regulation, of a thoroughly responsible moral professionalism. For "determination of law" be might substituted "principled objective" and "legitimate interest".

Postema's antidote appeals to a morality transcending strict legal rights, one which bears interesting similarities to Menkel-Meadow's speculation on moral judgments as being more deeply embedded in the context of moral dilemmas than in abstract principle.[45] Given the inability to develop a general scheme of principles sufficiently specific to cover every situation, Postema continues, the gap between theory and decisions must be bridged by resource to "practical wisdom" - necessitating the ability to take a comprehensive view of the values and concerns at stake. It is not enough to

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41 G Postema "Moral Responsibility in Professional Ethics" (1980) 55 NYULR 63, 74.
42 Above n41, 77.
43 Above n41, 79.
44 Above n41, 80-81.
45 Above n2, 817.

get our "moral sums" right as, for instance, in determining strict legal liability for non-negligently running down a child. Rather, we must be aware of the needs of the child, of the moral costs of our action. Morality is not just a case of getting things right, but of relating to people in a specifically human way.[46] Postema does not advocate a complete merger of private and professional morality: there is a place for the division of social and moral labour.[47] But he stresses the need to draw on a broader moral experience in responsibly exercising professional morality. Thus Postema's theory coincides to a degree with Menkel-Meadow's concept of a "contextual moral judgment"; and his concept of morality as serving more than rights can be compared with the human need - meeting and aspiration to lasting resolution which, in part, legitimates principled negotiation.

Lehman also is keen to attack the concept of zealous advocacy. The ideal of instrumentalism is, he says, a fiction in any case. The client frequently knows neither the substance of the problem nor what to expect from the lawyer; it is up to the latter to define what this relation will be.[48] The lawyer influences the client whether the client likes it or not. Realizing this, it is important to deliver a message which is honest and not intended to manipulate.[49] (This would be an essential task for the principled negotiator prior to negotiation, given that the pursuit of injustice would be incompatible with principled negotiation.) Further, says Lehman, any moral intervention by the zealous advocate is likely to be in reference to the moral dis-utility of the client's action. Utilitarianism is attacked on several points. First, the identification of maximized self-interest with the public good rides on the often false assumption that all people rationally maximise self-interest. Further, utilitarianism provides us with no tools to evaluate morally the outcomes of a particular course. For instance, is greater production actually desirable? And, of course, utilitarianism provides no resolution to competing interests as it is not based on consensus. A prime and related evil of utilitarianism is its assumption that one outcome is particularly desirable, the utility of which is frequently measured on future outcomes. Reason is held supreme as the ally in this project. The result is often a disservice to clients' interests.

The antidote is to create the fullest opportunity for exploring these interests. Rather than delay, for example, gift-giving for tax purposes, the profound and actual need for human ties, even at the price of apparent rationality, needs to be acknowledged.

Obvious connections can be made between the meeting of real needs by principled negotiation, and Lehman's rejection of the utilitarian, standard conception of clients' interests. Meeting the immediate needs for human ties also coincides with Postema's concept of morality as servicing specifically human relationships, and with a view of principled negotiation as meeting client's true interests by inquiring beyond rights-claims to what those claims really represent. Principled negotiation proudly rests a

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46 Above n41, 68-70.
47 Above n41, 72.
48 W Lehman "The Pursuit of a Client's Interests" (1979) 77 Mich LR 1078, 1084.
49 Above n48, 1091.

good deal of its claim to ascendancy on a form of utility - the maximizing of clients' gains in what will hopefully be a positive-sum solution; and the maintenance of good relations, when conflict arises, by a fair resolution. Yet a concern for the legitimate concerns of both parties largely shields principled advocacy from Lehman's criticisms of blinkered zealous maximization of personal gain. These interests would have to be legitimate in a wider sense than merely non-detrimental to the concerns of the parties involved.

IV ETHICS ASIDE - PRACTICAL ANSWERS AGAIN

Hyman specifically avoids examining the inconsistency between the ethical rules underpinning zealous advocacy and the values of principled negotiation.[50] He avoids likewise the question of whether "good lawyering" should not, if necessary, involve some disadvantage to the client's interest in pursuing the problem-solving method.[51] There is a considerable inconsistency. The pursuit of legitimacy, while precluding exploitation of one party for the extortionate gain of the other, is not only thoroughly consistent with good lawyering in the context of unregulated negotiations, but need not be disadvantageous to a client's interest in any other sense than restraining greed. Recourse to the insights of Postema and Lehman further demonstrates the impracticability of a code of ethics divorced from a wider moral experience and tending towards an unsatisfactorily narrow perception of the client's true interests. The antidotes prescribed by both integrate well with the perceived ethos and ethics of principled negotiation. Thus Hyman's question - "whether the goals of the advocate tied by a fiduciary duty to her client's interests are consistent with what must be done to create a wise agreement?"[52] - is partly answered by asserting that the client's interest is served when both sides are committed to principled negotiation. Hyman himself is able to see that inventing options for mutual gain may well be a better service to the client, in answer to his own concern that zealous advocacy seems compromised by concern for the legitimate interests of others.[53] The sticking point arises when the client could have done better out of a straight contest of strength and skill, thereby satisfying greed rather than legitimacy. Ethics and principled negotiation may preclude the underlying injustice, but the practical question arises for the lawyer - as my client's "hired gun", should I not go for maximum gain?

Again, principled negotiation has a "practical" answer based on utility. Such an agreement is unlikely to satisfy the tests of durability and preservation of relationships. Hyman willingly acknowledges the values of community and goes beyond utility to suggest that honouring the views of others holds an instrinsic worth.[54] Principled negotiation is equally practical in its advice to pull out when you are "being done". Gifford also worries about the lawyer caught between apparently conflicting duties to

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50 J Hyman "Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates be Wise Negotiators?" (1987) 34 UCLA LR 863, 867.

51 Above n50, 896.

52 Above n50, 867.

53 Above n50, 894-895.

54 Above n50, 899.

the client and to the legitimate interests of others. He resolves this by recasting the advocate in the role of "affiliate" who should seek to reconcile conflicting interests.[55] This however merely seems a discovery of the principled negotiator's role. Again, this role presents no conflict of interests so long as both sides pursue the same principled objectives. Reference to objectively fair criteria seems in some ways to be negotiating "in the shadow of the court", such that preparation toward negotiation strategy may also be useful in litigation. In this respect principled negotiation may seem a cheap substitute for adjudication, applying judicial standards of fairness to a pre-trial process. Yet this overlap need not be negative. If one side has a good case and the other will not listen to reason, the former can always go to trial. If that side does not their motive for negotiating may well be less than legitimate, and thus that side should not be there. The possibility of recourse to adjudicated justice, which it is assumed will refer to fundamentally the same sorts of objective criteria to be agreed on at the "irresolvable conflict" end of the negotiation spectrum, merely assures the further practicality of assessing legitimate interests prior to trial - namely, the saving of a great deal of money on wasted litigation if one's case is weak.

V ASPIRATIONS AND RECOURSE TO JUSTICE

Perhaps the key contrast between principled and adversarial negotiation highlighted so far is that the latter allows for, if not sanctions, the exploitation of the opposite party while the former explicitly does not. Thus, the answer to Menkel-Meadow's question stated earlier has been that zealous advocacy within negotiation is neither permissible, desirable nor necessary. The third question - how different are the aims of principled negotiation from those of zealous advocacy within negotiations and litigation? - has in the process partly been answered. Zealous advocacy is characterized by the single-minded pursuit of individual gain. Principled negotiation in contrast aims for a legitimate result arrived at through co-operation. Further, the aims of zealous advocacy - whcih are a creation of an derive at least some legitimacy from tehjudicially controlled environment of adjudication - have no place within megotiation.

But what of the far-reaching criticism, one which strikes at negotiation in general, not simply at the principled version, that "alternative dispute resolution" (ADR) has little if any place within our legal systems?[56] The debate shifts from an inquiry into the merits of the supremacy of principled negotiation within negotiation as a whole. The defence is now of principled negoitation's dispute resolution role in the face of another model, namely adjudication. This defence likewise requires an evaluation of the aims and roles of both institutions - can they live together?

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55 D Gifford "The Synthesis of Legal Counselling and Negotiation Models: Preserving Client - Centered Advocacy in the Negotiation Context" (1987) 34 UCLA LR 811, 837.

56 Note, however, that this is an attack on only one aspect of "negotiation in general" - dispute resolution.

In his paper "Against Settlement", Fiss accuses settlement of being a truce rather than true reconcilation.[57] If there is an imbalance in power - for example, a need by one party for damages *now*, or an inability to afford litigation costs[58] - justice may not be done. It is at odds with a concept of justice which seeks to reduce inequality through impartial and binding adjudication. This is a curious argument though, in that if the party needs damages now, and/or cannot afford litigation, that party is scarcely likely to come to court either. It has also already been acknowledged that little can save a party with a poor BATNA in the face of a more powerful and exploitative opponent, this applying as much in theory to settlement as to adjudication. Fiss further criticises settlement on the grounds that it will bind the representative only, who may lack authoritative consent to settle, whereas adjudication, deriving its authority from law, has power to bind even those not involved in the case.[59] However, Fisher and Ury deal specifically with the question of checking authority, and Fiss's argument applies equally to most contracts. In sum, Fiss's principal concern appears to be that settlement, excluding judicial participation, will leave justice undone.[60] He perceives the purpose of settlement as being to achieve peace at less cost. In contrast, adjudication, its purpose being to give force to values embodied in authoritative texts, is made to seem a far more attractive alternative.

Two issues arise. Does settlement really, or always, seek peace at less cost? What is the justification for excluding judicial involvement from private disputes (in a sense other than imposing high ethical standards!)? Answering in terms of principled negotiation, a concern for legitimate durability hardly equates with a superficial anxiety for peace. McThenia and Shaffer reply that to the contrary, ADR at its soundest rests on values of religion, community and work place - aiming for reconciliation, confronting rather than avoiding the anger of broken relationships. Justice is drawn from a richer source than merely the courts. Justice is something that people give each other, ideally loving them.[61]

Fiss retorts that it is not surprising judgment is found to be an inept instrument for preserving or restoring loving relationships. ADR, he reasserts, is in fact concerned with efficiency and politics. It addresses situations where there is no chance of reconciliation (an astonishing claim!); thus, to be against settlement is not to be against reconciliation. Anyway, reconciliation does not always work (thereby acknowledging that sometimes it does and thus undermining his last claim.) Sometimes one turns to the courts because one has to, when people will not communicate and when it is necessary for the "trustees of the community", given the power to decide who is right and who is wrong, to bring the conduct of the parties into conformity with community norms[62] (though, in fact, the opposite may happen, as in the upholding of minority rights).

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57 O Fiss "Against Settlement" (1984) 93 Yale L J 1073, 1075.
58 Above n57, 1076.
59 Above n57, 1079-1080.
60 Above n57, 1085-1086.
61 A McThenia and T Shaffer "For Reconciliation" (1985) 94 Yale LR 1660, 1664-1666.
62 O Fiss "Out of Eden" (1985) 94 Yale LR 1669, 1669-1672.

Fiss's last point is nevertheless a good one. There will be cases where an unequivocal assertion of rights, divisive as this may be, is for the time being at least, the most appropriate response to injustice. Deeper reconciliation can follow in good time. Negotiation in accordance with "objective" principled criteria may reach the same conclusions in theory, but sometimes there is no substitute for the strong enforcing arm of the state, in a forum replete with the necessary resources and process to reach a formally sound judgment. Yet there is also something to be said for drawing broader concepts of justice from a deeper well of community values than the "liberal" individualistic rights framework within which a court is commonly confined. A suit for damages may, as Menkel-Meadow points out, actually be a proxy for more basic needs and objectives.[63] In this context, principled negotiation redefines "justice" in terms of meeting needs which, as Lehman points out, will not always be totally rational in dollar terms.[64] If justice means giving people what they really want, then in many cases a court would not be up to the task. Where this is possible, adjudication may be justifiably excluded. The discovery of the "real" underlying interests may stimulate a creative, durable and much cheaper solution - perhaps even lasting reconciliation. But the more irresolvable the conflict, and the greater the need for a falling back on principled criteria, the stronger the case becomes for ensuring that, through the formal process of law, these criteria are carefully and justly ascertained, since justice in the "rights" sense can be an indeterminately slippery creature.

To conclude on this third main question - advocacy within principled negotiation and litigation do have different aims. The former looks more to justice in meeting needs, the latter to asserting rights at the expense of the other party. It is unnecessary to assert that one mode of dispute resolution is better than the other. It would be pleasing to be able to resolve every dispute by reconciling interests in the fullest and most loving way. Even Fiss would not disagree! But given the less than perfect state in which we live, it seems wise to have a process offering at least the potential for something better than the win/lose equation; with recourse, when all else fails, to an institution whose specialized function it is to consultatively and publicly formulate a minimum standard of justice.

VI CONCLUSIONS

Zealous, unscrupulous, morally non-accountable advocacy within negotiation is neither justifiable nor necessary if one is prepared to "suffer" a legitimate result as defined by the tenets of principled negotiation. Nor is it likely to be a satisfactory service of a client's interest, as one runs the risk of missing out on a creative solution, a durable agreement, a meeting of the client's real needs, or all three. Adherence to a blinkered moral code through detachment from wider sources of moral experience is at the price of a stunted personal development, defective professional moral judgment and flawed law-making. Nevertheless, principled negotiation needs to recognize its limits. It is not a panacea for all social ills. Rather it offers an alternative method for the resolution of some of these ills. There will be instances where the vindication of rights

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63 Above n2, 795.
64 Above n48, 1088.

and the pursuit of truth are more appropriate goals and thus better served by a court of law (though it is a moot point whether zealous advocacy and recourse to narrow moral experience are justified even here). Unfortunately, neither negotiation nor adjudication can totally equalize an imbalance of power between adversaries when the stronger is determined to crush the weaker. Shaffer contends that the greatest advocates of our century have had a unique concern with goodness - of client and opponent - appealing not to power but to conscience: advocacy as moral discourse.[65] The real hope in such circumstances of determined oppression lies not so much with human institutions, but with the likes of Martin Luther King who, at the same time as maintaining a bus boycott, found time to pray for the police.

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65 T Shaffer *On Being a Christian and a Lawyer: Law for the Innocent* (Brigham Young UP, Provo, Utah, 1981) 113.