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Journal of  
Legal Education

FROM THE EDITORS

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DISPUTE RESOLUTION

Carrie Menkel-Meadow

Jennifer Gerarda Brown

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Scott R. Peppet

Leonard L. Riskin

Michael Moffitt

Frank E. A. Sander

GENERAL ARTICLES

Michael R. Smith

Monte N. Stewart and H. Dennis Tolley

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# Contents

From the Editors .....	1
Dispute Resolution: Raising the Bar and Enlarging the Canon	
Introduction	
by Carrie Menkel-Meadow .....	4
From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context	
by Carrie Menkel-Meadow .....	7
Insights from Economics	
by Jennifer Gerarda Brown .....	30
Contributions from the Social Sciences	
by Howard Gadlin .....	34
Insights from Cognitive Psychology	
by Chris Guthrie .....	42
Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories	
by Nancy A. Welsh .....	49
The Pervasiveness of Culture in Conflict	
by Pat K. Chew .....	60
ADR Ethics	
by Scott R. Peppet .....	72
Mindfulness: Foundational Training for Dispute Resolution	
by Leonard L. Riskin .....	79
Lights, Camera, Begin Final Exam: Testing What We Teach in Negotiation Courses	
by Michael Moffitt .....	91
Some Concluding Thoughts	
by Frank E. A. Sander .....	115
General Articles	
Alternative Substantive Approaches to Advanced Legal Writing Courses	
by Michael R. Smith .....	119
Investigating Possible Bias: The American Legal Academy's View of Religiously Affiliated Law Schools	
by Monte N. Stewart and H. Dennis Tolley .....	136

## Lights, Camera, Begin Final Exam: Testing What We Teach in Negotiation Courses

Michael Moffitt

Students at more and more law schools have the opportunity to study negotiation. As early as the 1950s, faculty at a few schools experimented with negotiation courses. Most of these efforts were limited in scope, and the courses were not widely offered. Two decades ago only a minority of law schools offered even one course aimed at developing students' skills as negotiators. Today every law school in the United States offers at least one course on dispute resolution, and about half of the schools offer a course entirely devoted to negotiation.<sup>1</sup>

Negotiation courses tend overwhelmingly to be aimed at skills development,<sup>2</sup> unlike many traditional components of a law school curriculum. While they vary in their content and in the instruction method, their basic structure is remarkably similar. The vast majority employ a combination of simulated negotiation exercises, in-class reviews, and a relatively modest amount of reading. These experientially focused instructional methods are consistent with the courses' stated goals: developing skills.<sup>3</sup>

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1. See Robert E. Matthews, A Pedagogical Challenge, 6 J. Legal Educ. 93 (1953); James J. White, The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation, 19 J. Legal Educ. 337 (1967); Carrie Menkel-Meadow, Legal Negotiation: A Study of Strategies in Search of a Theory, 4 Am. Bar Found. Res. J. 905, 908 (1983) [hereinafter *Legal Negotiation*]; Carrie Menkel-Meadow, Mothers and Fathers of Invention: The Intellectual Founders of ADR, 16 Ohio St. J. on Disp. Resol. 1 (2000). The American Bar Association Section of Dispute Resolution conducts periodic surveys of all U.S. law schools regarding their dispute resolution offerings. The most recent survey is available online at <<http://www.law.uoregon.edu/aba/>> (last visited Mar. 29, 2004).
2. As part of the research supporting this article, my research assistants and I surveyed more than 100 law schools' curricular offerings related to negotiation. Among the information collected was the principal objective of negotiation courses. Most of them cite skills development as a primary focus.
3. "[T]o attribute a behavioral change to learning, the change must be relatively permanent and must result from *experience*." B. R. Hergenhahn, *An Introduction to Theories of Learning*, 2d ed., 7 (Englewood Cliffs, 1982). See also Menkel-Meadow, *Legal Negotiation*, *supra* note 1, at 934.

Because the courses focus largely on skills rather than on information, teachers of negotiation face considerable challenges in constructing a workable, fair, and helpful method of assessment and grading. While students in almost all law classes have concerns about the bases for their grades, commonly making accusations of subjectivity (or worse),<sup>4</sup> negotiation courses are particularly suspect, not only because their aim is skills development but also because the skill in question (negotiation) has the additional complication of a dynamic counterpart. One cannot accurately judge a negotiator's actions in a vacuum. A particular statement may be persuasive at one moment in time or with one counterpart, and the same statement may be ineffective with another counterpart or at a different time. In a legal writing class every student may have an identical record from which to build an appellate brief that may fairly be compared with other students' briefs, but it is impossible to create exactly identical situations for students learning to negotiate.

Although negotiation courses are similar in their instructional methods and teaching goals, they vary to a surprising degree in assessment mechanisms. Teachers at one school almost never evaluate their negotiation students in the same way as teachers at another school. In fact, teachers at the *same* law school may use differing methods. Even an individual teacher's practices are not fixed. I have taught negotiation at three different law schools and used four different grading methods. My experience suggests that the grading mechanism affects students' classroom learning experiences considerably and that the teacher's choice of grading method is a significant—and not obvious—decision.

This article examines six common approaches to grading negotiation courses, identifying important strengths and shortcomings of each method. I then describe an alternative assessment mechanism—one that I currently use—and its relationship to other grading methods. My method bases students' grades on their ability to critically assess their own videotaped negotiation performances and those of other negotiators. I suggest that my method has some important advantages over other methods of grading negotiation students, even though—like all grading methods—it is imperfect. I outline some of the concerns I still have, along with some additional steps a teacher might take in crafting an effective grading system. Principal among them is the use of multiple evaluation mechanisms in a single class. I conclude by suggesting that student-analyzed videotapes contribute considerably to an overall evaluation system in negotiation courses.

## I. Common Evaluation Methods

### A. Method 1: Pass/Fail (No Grade)

Many law schools offer negotiation courses on an ungraded pass/fail basis, which can serve a number of important purposes. First, students may be more inclined to experiment. According to most theories of learning, incorporating

4. See, e.g., Douglas A. Henderson, *Uncivil Procedure: Ranking Law Students Among Their Peers*, 27 U. Mich. J.L. Reform 399 (1994); Daniel Keating, *Ten Myths About Law School Grading*, 76 Wash. U. L.Q. 171, 174–75 (1998).

new skills, analytic models, or operative assumptions requires considerable time and opportunity for experimentation, particularly with a multifaceted skill like negotiation.<sup>5</sup> Students arrive in class with established notions about what negotiation behaviors and assumptions are best, and most experience the adaptive process as demanding. Furthermore, "progress" in learning negotiation is seldom a steady incremental advancement; more often it is one step backwards, two steps forward. Although some aspects of negotiating can be reduced to microskills that students can practice and improve in isolation, much of the complexity of negotiation stems from the combination of highly contextual strategic options, structural considerations, and interpersonal skills of the negotiators. In such a complex system, it is unreasonable to expect that a student's every attempted adaptation will yield favorable results. If a student believes the consequences of failure are significant—for example, a reduction in his grade—he is likely to see experimentation as far less attractive. Experimentation benefits not only the individual student, but also the larger class, who can learn from the experimenting student's example.<sup>6</sup>

A second benefit of an ungraded course is that the distinction between evaluative feedback and coaching feedback is more sharply maintained.<sup>7</sup> In almost any model of teaching negotiation, some percentage of the teacher's comments will be suggestions (or coaching) to individual students about ways to improve their conduct in negotiation. Students in graded courses tend to hear virtually all of the teacher's comments as statements of comparative evaluation ("How good am I?") rather than as statements of coaching ("What steps can I take to improve my performance?"). The content of evaluative feedback is often minimal ("That was the third best performance I've seen this week"). When evaluative feedback assesses complex behavior such as negotiating, it contains little helpful prescription beyond the implied message that one should either "do better" or "keep doing well," depending on the com-

5. "The behaviorist would emphasize *behavioral* trial and error; the cognitivist would emphasize *cognitive*, or vicarious, trial and error, that is, thinking." Hergenhahn, *supra* note 3, at 408. A possible exception to this view of experimentation lies in the so-called "programmed learning" model popularized by B. F. Skinner. See *id.* at 410–13. The programmed learning model seems less relevant to a skill like negotiation, since negotiation does not lend itself well to linearly sequenced prescriptions.
6. Some of the most interesting and productive classroom conversations I have witnessed have followed simulations in which a student experimented with an approach that did not produce the result he expected. When students come back to the group to share their experiences candidly, without excessive focus on how the group may assess the strategic decision, the resulting conversation is invariably rich. Why did you think to try this? What impact did it have on the other party? How would you modify it in the future? The classes tend to facilitate themselves, to the delight of the students and me. The level of personal comfort required to report on self-created disasters need not be as high as one might suspect. As long as a student is not graded on the quality of her performance, she has little incentive to be self-promoting. Indeed, in some classes I have gotten the sense that students define their prowess not in terms of their ability to execute a flawless negotiation strategy, but in terms of identifying the flaws in strategies they applied.
7. I draw the labels for this distinction from Roger Fisher & Alan Sharp, *Getting It Done: How to Lead When You're Not in Charge* 160–63 (New York, 1998). See also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. Legal Educ. 75, 105–06 (2002) ("summative assessments" and "formative assessments").

parative assessment.<sup>8</sup> Nevertheless, in a sense, evaluative feedback is louder than coaching. Students tend to hear all forms of feedback—even comments intended as coaching—as evaluative. (“The professor said I should try to avoid framing all of my questions in cross-examination style. Clearly, I’m not getting an A, and I wonder if that’s even worth a B.”) In an ungraded situation students can more easily take coaching statements as coaching, because the evaluative function has essentially been structurally removed from the course.

A third attractive aspect of an ungraded course is that more of the students may be internally motivated, seeking to learn for the simple sake of learning rather than as a means of attaining some external reward, such as a good grade. A paternalistic defense of grading assumes that self-motivated students are too rare to be the assumed audience for a generalized teaching method. But in graded courses both students and teachers reasonably treat the educational experience as primarily driven by the accompanying evaluation. By removing the most obvious external incentive, an ungraded course may encourage more productive and healthier motivations to learn.

A final reason to offer ungraded negotiation classes is simply that this method avoids many of the potential difficulties that any grading mechanism presents. In virtually any grading system some students will complain, legitimately or not, that their grades are arbitrary, subjective, or disconnected from the course materials. Eliminating grades liberates students from inappropriate fixation on the teacher’s evaluation system and may reduce the levels of unproductive (or even damaging) stress that students often experience. Furthermore, an ungraded system removes virtually the entire evaluative burden that would otherwise fall on the instructor. It is much easier to assign grades in a pass/fail class.<sup>9</sup> While a skeptic may see ungraded courses as an informal collusion between students and teachers to avoid the unpleasant work and implications of grading, several pedagogically sound arguments support the rejection of grades in a negotiation course.

While the theory behind ungraded courses is attractive, in practice there may be problems. First, the teacher must still resolve the question about *what* she is evaluating in the course. One must still give a passing or failing grade to each student, and that decision must depend on an examination of *something*. Unless one bases the decision solely on the student’s physical presence during class sessions, any method of assigning “pass” or “fail” assesses the student’s performance and, for reasons set out below, comes with some pedagogical

8. Many of us hesitate to give negative feedback. But for reasons not entirely clear to me, when we *do* give negative feedback, we tend to be more specific and operational than when we give positive feedback. As a result, it is understandable that people think of “useful feedback” or “constructive feedback” as necessarily negative. In practice, positive feedback can be at least as constructive as negative feedback, provided it is similarly specific and operational. To tell a student she “did very well” tells her nothing about what exactly you saw her do, why you think it was good, or what she might do to repeat that aspect of her performance.
9. In my experience, and based on my conversations with faculty at a number of law schools, pass/fail classes today generally mean “pass” classes. Few students fail to receive credit in ungraded courses. This has not always been true. For a fascinating historical account of the once-high rates of attrition in pass/fail law courses, see Steve Sheppard, *An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams*, 65 UMKC L. Rev. 657, 672–76, 687–88 (1997).



cost. A pass/fail system merely restricts a teacher's options to a binary choice rather than a multitiered grading scale, and makes it likely that all students will receive the same passing mark. But reducing the number of options does not eliminate most of the costs associated with grading. And it may simply mean that the teacher provides less feedback to students.<sup>10</sup>

I said earlier that doing away with grades may encourage self-motivation and hard work, but of course the reverse may be true. When the semester gets busy and students perceive the need for homework triage, they are likely to give less attention to ungraded courses. If some students in a class are working hard and others put in little effort, the hard workers may begin to wonder if others' lack of preparation is depriving them of learning opportunities. What can you learn from a simulated negotiation if your counterpart has barely read the facts and offers little or no intellectual resistance? Every law school course has variation in the efforts the students make. An ideal grading system would encourage helpful student behaviors like experimentation and preparation. Removing grades entirely may threaten students' willingness to devote appropriate effort to the course.<sup>11</sup>

#### *B. Method 2: Written Exam*

Several aspects of negotiation lend themselves well to a written final examination. For example, questions related to settlement-promoting statutes and practices can test a student's appreciation of the policymaking tradeoffs in negotiation. A teacher might test students' understanding of the legal constraints within which attorney-negotiators operate. A written exam might test analytic ability—the ability to spot and properly craft trades and value-creating opportunities in a given hypothetical situation. Or it might invite students to develop and articulate strategies for preparing for negotiation. In short, final exams allow an assessment of a student's cognitive understanding of important negotiation issues.

The benefits of using a final exam derive principally from the familiarity of the mechanism, the ease with which it is administered, and the opportunity for anonymous (if not objective) relative assessment. Every student in a negotiation class will be familiar with a time-limited written final exam and can take one without experiencing biases or stresses that might stem from an unfamiliar evaluative mechanism. Written exams also demand relatively little effort to administer and evaluate. Although you might think otherwise at

10. Simple letter grades are surely imperfect vehicles for feedback. Indeed, they may be worse than no feedback at all. But if the grading process forces a teacher to observe and assess some aspect of the student's performance in a way that may prompt a conversation, doing away with grades may mean a lost opportunity.

11. Charles Craver conducted a comparative assessment of students taking the negotiation course for grades and those taking it on a pass/fail basis. He found no significant difference in the results obtained in simulated negotiations. See Charles B. Craver, *The Impact of Student GPAs and a Pass/Fail Option on Clinical Negotiation Course Performance*, 15 *Ohio St. J. on Disp. Resol.* 373 (2000). This suggests, but does not prove, that his students put in similar effort. With outcome-based grading it is impossible to know whether students' results are linked to effort or to some other variable.

bluebook time, grading final exams, compared with many other evaluation mechanisms, involves a relatively modest commitment of time. Finally, written exams allow a teacher to grade an answer without knowing who wrote it. Blind grading removes some of the opportunities for bias that plague teachers and worry students.

But a final exam has some important shortcomings. In most negotiation courses the readings, exercises, and classroom discussions aim to do more than convey information; they aim to improve students' ability to negotiate effectively. While a written examination may test a student's knowledge and analytic ability, an effective negotiator must also possess skills in interpersonal communication and processes, which a written exam cannot test. Many students reasonably adjust their behavior in classes to the teacher's method of evaluation. A student facing a final exam in negotiation can strategically concentrate on aspects of the course an exam is capable of testing, even though other aspects may be more important. In effect, a teacher who gives a written final exam risks emphasizing only *some* of the goals set for the course.<sup>12</sup>

### *C. Method 3: Final Paper*

As in many seminar-style classes, final papers in negotiation courses are generally research papers. Students select a topic early in the semester and spend the remaining weeks exploring an aspect of negotiation practice or policy that interests them. Negotiation has no shortage of issues that lend themselves well to in-depth exploration. Negotiation raises ethical questions, legal questions, strategic questions, analytic questions, and policy questions—almost all of which might reasonably be explored in the traditional format of a law school paper.

The final paper has some important advantages. In most paper-based courses, students themselves select a topic and can be expected to perform well with a subject that actually interests them. And final papers encourage students to engage in deep analysis. Final exams, by their nature, demand at least a minimal understanding of everything discussed in the course, but a final paper focuses a student on a single topic. The student can gain a level of understanding that is far more sophisticated (if considerably narrower) than the broader but shallow knowledge that comes from studying for an exam. A third advantage is that the paper-writing process is familiar to law students. Fourth, while final papers plus student conferences may be a greater burden for the teacher than a final exam, they may require less time than other

12. A parallel risk is that teachers who use final examinations as assessment tools may focus their courses on aspects of negotiation that can be descriptively isolated, defended, and ultimately assessed. These easily tested aspects tend to disfavor the prescriptive aspects of negotiation theory. See Bruce Patton, *On Teaching Negotiation*, in *Teaching Negotiation: Ideas and Innovations*, ed. Michael Wheeler, 11–12 (Cambridge, Mass., 2000) (“If your goal is description, the incentive is to focus attention on the most enduring and stable characteristics of the human system you are describing. . . . [T]he goal of description is too easily satisfied: the product need only be ‘true.’ ‘Women live longer than men.’ Prescriptive theory is judged by a sterner standard—it must be useful. ‘To increase your life expectancy by seven years, don’t smoke.’”) [hereinafter *Teaching Negotiation*].

grading methods. Finally, if the course is well designed, students will see ways to apply concepts from class in their writing projects.<sup>13</sup> Many believe that this model of learning, with students building on their existing knowledge and seeking answers to questions raised by self-driven projects, is more likely to produce lasting understanding.<sup>14</sup>

On the other hand, final papers indicate nothing about a student's ability to diagnose negotiation dynamics, to spot opportunities for trades, to assess the relative merits of various negotiation strategies in a given context, or to translate those strategies into persuasive actions. Final papers do nothing to capture the breadth of a student's understanding of negotiation. A student behaving strategically can comfortably ignore all aspects of the course not related to the topic selected for the final paper. Even if students take seriously the simulated negotiations in which they participate, the basis for a student's grade is completely disconnected from the student's performance in the class. Finally, because students choose different topics, the papers present apples-to-oranges problems. Even if a teacher establishes evaluative criteria with which to judge the final papers, many biases may affect the grading process.<sup>15</sup>

#### *D. Method 4: Reflective Journals*

Some negotiation teachers require students to keep journals. While some use these purely as a nongraded teaching tool, others assign grades. The instructional use of reflective journals during skills-based studies such as negotiation has important strengths and is well supported by the education literature.<sup>16</sup> Many negotiation courses explicitly aim to increase students' awareness and understanding not only of others' negotiation behaviors, but also of their own tendencies. By requiring students to reflect carefully on the experiences they have had in class, teachers can significantly enhance the quality and quantity of the lessons extracted from any given simulation. In short, the journaling process can help teach a student to learn about negotiation—a skill that will be useful well beyond the life of the course. Even more than in a civil procedure course, students of negotiation benefit from an ability systematically to learn and improve beyond the end of the course. With

13. This assumes, of course, that the student is actually working on the paper during the course, not just at the end. This is surely not the universal pattern, but a creative teacher can find ways to encourage or require students to work on their papers throughout the semester.

14. See John D. Bransford, *How People Learn: Brain, Mind, Experience, and School* 131–54 (Washington, 2000).

15. For example, I am convinced that a student who chooses a good topic for a final paper is at a significant advantage over a classmate who selects a less suitable topic. If I try to ignore the difference caused by the different topics, I am likely to fail. If I try to address the potential for bias by explicitly rewarding the student who cleverly identified a good topic, I am rewarding behavior that the course did not even purport to teach. I have never taught a course on topic narrowing and research methodology, nor do I expect I would be any good at it. Variation in topic necessarily produces some variation in evaluation.

16. See, e.g., Mary Pat Truhart, *The Use of Journals, in Techniques for Teaching Law*, eds. Gerald F. Hess & Steven I. Friedland, 253–55 (Durham, N.C., 1999).

civil procedure, a student's learning curve is quite sharp and often peaked,<sup>17</sup> but students enter a negotiation course with considerable understanding of negotiation processes—they've been negotiating all their lives. Sustained modifications in behavior and mindset are slower to occur than the mere acquisition of knowledge, and the measure of an ambitious negotiation course ideally should be performance some years later rather than students' performance a mere month or two after they have begun to develop negotiation awareness.<sup>18</sup> Journals are a vehicle for encouraging, if not forcing, the kind of reflection required to make sustained behavioral changes.

Reflective journals are also useful to the teacher because they provide relatively rapid and substantial information about the kinds of experiences and ideas students are having. Instead of waiting until the end of the semester to know which concepts the students grasp and which ones they are struggling with, a teacher who assigns journals can get snapshots of the students' evolving experience. If the journals begin to devolve into weekly what-I-like-and-don't-like-about-this-course essays, a teacher who provides timely feedback can quickly correct or redirect the journaling process, insisting that entries include an inwardly focused analysis of the impact of the students' experiences.

Whether or not to grade the journals is another issue. If the journals are not graded, some students may reasonably infer that they are not what "really matters" in the course. I suspect that those students who would not engage in reflective journaling without specific requirements and incentives are precisely those who may stand to gain most from it. Grading journals may send an important signal about the importance of this reflective process and make students go about it seriously and reflectively.

The grading process, however, is neither simple nor without costs. How does one establish clear criteria for evaluating the journals? Does the teacher consider the quality of the writing? The depth of the analysis? The sophistication of the observations? The progression of the student's understanding over time? The ability to incorporate principles from the readings? Without uniformity of subject matter, any evaluation will be to some degree subjective. Yet one cannot assign narrow topics for reflective journaling without hindering the independent issue-identifying process that is so central to the journals' utility. A teacher who asks her students to write a journal entry about the process design implications of reactive devaluation may create a standard

17. Most students enter Civil Procedure knowing very little about the civil litigation process, and over the semester their understanding may grow quickly. If the student plans her studies well, the level of understanding peaks just around the time of the final exam. Any honest assessment recognizes that her understanding then decreases following the exam. Perhaps this just says something about me and the way I teach Civil Procedure. I doubt, though, that I am alone in the experience that my students are more likely to know the details of the preclusion doctrines just before the exam than they are six months later.

18. See William R. Torbert, *Learning from Experience: Toward Consciousness* 37-61 (New York, 1972); Patton, *supra* note 12, at 16-17; Mary-Lynne Fisher & Arnold I. Siegel, *Evaluating Negotiation Behavior and Results: Can We Identify What We Say We Know?* 36 *Cath. U. L. Rev.* 395, 412 (1987); James R. Elkins, *Writing Our Lives: Making Introspective Writing a Part of Legal Education*, 29 *Willamette L. Rev.* 45, 59 (1993).

focus and thus make it easier to compare students' entries, but imposing a topic jeopardizes the genuinely reflective aspect of journaling, which involves both asking and exploring questions.<sup>19</sup> Without standardized questions, the teacher must establish fair and consistent criteria for comparing apples to oranges.

A further complication is that the purely reflective ideal of journaling is disrupted if students know their journals will be graded. As in many observation and assessment efforts, the phenomenon of "reactivity"<sup>20</sup> threatens the quality of the observation: the journal may begin to feel much less like a journal and more like a short essay. At least some students will ignore the label "reflective journal" and treat the exercise as an invitation to write something the teacher will like. My experience with grading journals is that some of them are transparent efforts at guessing what I want. These are consistently among the most disappointing journals I read.<sup>21</sup> Perhaps some that I give high marks to are also professor-pleasing efforts—just more subtle and successful efforts. I have told my students, and I continue to believe, that writing a journal with me in mind takes far more work than writing with themselves in mind. Nevertheless, graded journals are not equivalent to purely reflective journals because they are written in the shadow of evaluation.

And grading journals requires considerable time and effort. A typical three-credit course might meet twenty-five times during the semester. If a student wrote four journal pages after each class, a teacher with only twenty students would have to grade 2,000 pages. A stack of reading that size at the end of the semester might daunt even the most energetic teacher. More significantly, for journals to be most effective, students should receive frequent feedback; the teacher should read them every few weeks. Consider what that means. Typically I teach two sections of Negotiation, each with twenty-four students and two meetings per week. If I asked my students to journal after each class, I would have almost 100 journals every week. Even if a piece took only ten minutes to read and grade, I would spend sixteen hours grading. Few teachers

19. This is particularly true when considered through the lens of sustained practice. After the negotiation course, no one will be around to tell a student what he should reflect on following a particular experience. Ideally, a student will have sufficient practice recognizing the internal and external cues in negotiations to know when significant learning opportunities present themselves.

20. See Joseph A. Maxwell, *Qualitative Research Design: An Interactive Approach* 91 (Thousand Oaks, 1996); Carl G. Jung, *Aion: Researches into the Phenomenology of Self*, trans. R. F. C. Hull, 2d ed., 226 (Princeton, 1975).

21. The least pleasant of these journals can be summarized: "Everything we have talked about is brilliant—even the things that contradict other things we have talked about." When I took my first law school course in negotiation, my grade was based on reflective journals. One of my teachers, a coauthor of *Getting to Yes*, told me, "The easiest way to get an A in this class is to write a solid critique of *Getting to Yes*. Don't just talk to me about what's already in there." Having read several hundred students' journals over the years, I tend to think that thoughtless critique is just as tedious as shallow praise, but I can easily understand the concern that motivated my former teacher's comment. See Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving In*, 2d ed. (Boston, 1991).

can afford to devote two days a week to evaluation, but reducing that workload risks diluting the benefit of the journaling process.<sup>22</sup>

Finally, useful though they are, journals capture only a small part of what actually happens during negotiations. Indeed, good journaling focuses on a very limited part of the negotiation, as a means of thorough analysis.<sup>23</sup> And journals may or may not be accurate. The reader must hope the student remembers correctly—a difficult task even if a grade were not riding on the “recall.” Perceptual biases inevitably skew our memories of complex interactions.<sup>24</sup> Even if most students would not intentionally falsify their account, the combination of perceptual filters and the impact of self-selected segments means a significant gap between the negotiation and the journaled account of it. So it is difficult, if not impossible, to use a journal to evaluate anything except the purely introspective aspects of negotiation. A teacher could not, for example, use a journal to evaluate a student’s ability to consistently translate theory into persuasive practice. If reflective journals are the sole method of grading, students may think performance and outcome are not important.

#### *E. Method 5: Negotiation Outcomes*

For many years, teachers have commonly based students’ grades on the substantive outcome they achieve in the assigned negotiations. As many as four decades ago, James J. White structured his experimental negotiation course around the principle of duplicate bridge. Students assigned to one of two roles in a simulation negotiated (in pairs) with students representing the opposite side of the case. The outcome each student pair achieved was then compared with the outcomes achieved by all other student pairs representing the same side of the case. The highest grades went to the students who achieved the best substantive outcome.

This is a system with some obvious advantages. The explanation of the outcome-based grading system involves a simple syllogism: Negotiation courses are supposed to teach students to be better negotiators; better negotiators achieve better results by being better practitioners; therefore, the best test of a negotiator’s practices is the examination of the negotiated results. The easiest way to administer this kind of grading system is to assign point values to various possible outcomes. For example, one might create a collective bargaining simulation in which the party representing the union would receive

22. Once, earlier in my career, I adopted this grading method while teaching two sections of Negotiation. I can hardly overstate the time burden my course structure created. Since then I have experimented with less frequent journals, with ungraded journals, and with optional journals—all in an effort to reduce the time demands. Honesty compels me to report that all of these efforts were both easier on me and less effective for the students. Someone recently suggested that I might consider grading only a random selection of journals, thus creating some incentive while reducing the time spent grading.

23. Among the most tedious journals to read are those that attempt to provide coverage akin to a shallow newspaper story—recounting who said what each step of the way, but analyzing very little of what occurred.

24. See Scott R. Peppet, Teaching Negotiation Using Web-Based Streaming Video, *Negot. J.*, July 2002, at 271; Chris Argyris, Teaching Smart People How to Learn, *Harv. Bus. Rev.*, May-June 1991.

20 points for achieving a multiyear deal, 10 points for keeping the current seniority system in place, 5 points for each quarter-percent increase in base salary, and so on. Comparing students in such exercises involves nothing more than arithmetic. Recognizing that scored games present the possibility of skewed and occasionally unrealistic negotiation dynamics, other teachers compare written outcomes in the more robust form suggested by each case. If the case involves drafting a lease clause, the teacher compares the negotiated clauses, assigning points based on his assessment of how well each clause satisfies the interests of the student's client.

Outcome-based grading can also increase students' incentives to take the simulated negotiations seriously. In most law school classes an ill-prepared student injures only herself, but in a simulated negotiation an ill-prepared student deprives his counterpart of at least part of the learning opportunity. Grading outcomes creates a powerful incentive for preparation.

Furthermore, outcome-based grading can occur throughout the semester, providing students with feedback (such as it is) as they go along in the course and allowing them to adapt their behavior in light of the signals they receive. Of course, feedback from a simple score—absent any larger discussion or review of the experience—has very little obvious prescriptive content. (I scored well; should I wear the same shirt again for my next negotiation? I scored poorly; should I be meaner or nicer?) Nevertheless, for those who believe that students can get useful prescriptive information from comparative evaluation, the promptness of scored negotiation outcomes is a benefit.

At the same time, the outcome-based model has several important shortcomings. First, students may experience inconsistency between the behavior encouraged by the teacher's words and the behavior rewarded by her grading system. The outcome-comparison methods that are easiest to administer also tend to produce unwanted behavioral incentives. Because scoring tends to focus on the easily quantified short-term aspects of a deal, students negotiating under a scored method may miss potential value-creating opportunities and engage in unproductively competitive behavior. For decades, legal negotiation theorists have cautioned against both.<sup>25</sup> Almost all legal negotiations involve clear distributive issues (e.g., who gets how much money) and opportunities to create or destroy value (e.g., by expanding the scope of the agreement to include other terms). Many legal negotiations also involve complex ongoing relationships (e.g., joint venture agreements or parenting plans between divorcing spouses). Most negotiation courses aim to present students with a broader range of practices than mere "manipulative skill,"<sup>26</sup> for example by seeking to develop students' problem-solving skills. A method of scoring outcomes that creates incentives for students to adopt short-term approaches to negotiation produces a troubling gap between negotiation

25. See Menkel-Meadow, *Legal Negotiation*, *supra* note 1, at 933; Fisher & Siegel, *supra* note 18, at 401; Gerald Williams, *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 J. Legal Educ. 307, 311-12 (1984).

26. White was unapologetic about his belief that the appropriate negotiation skill to measure is "the lawyer's role as person manipulator." White, *supra* note 1, at 350.

theory and rewarded practice. To some extent, this difficulty can be overcome with a scoring mechanism that is more robust, but assessments beyond simple scoring raise concerns about both subjectivity and administrative burden.

Outcome-based grading can also create potentially unhelpful learning opportunities regarding the ethics of bargaining. Questions of disclosure are inherent in almost every legal negotiation. Responsible teachers expose students to the tensions many negotiators feel between wanting to hide information (in order to exploit or to avoid being exploited) and wanting to share information (in order to find potential trades or to uphold an ethical duty). Disclosure questions are not merely intellectual matters, to be confined to courses on the legal profession and perhaps cursory examinations of fraud in a first-year torts class. Ethical dilemmas are experiential and may be most profoundly felt in negotiations. A negotiator who focuses on the distributive aspects of the bargain may choose to conceal information (or perhaps even distort information) to gain a greater percentage of the available value. Students whose grades ride on the largely distributive calculation conducted after the negotiation will experience this tension significantly. That can be pedagogically helpful if the tension is coupled with structured and guided reflection. But a teacher who only reads outcomes cannot know how students reached a particular negotiated agreement. Did this student reach a good deal by being well prepared and creative, or by lying?<sup>27</sup> One possible response is that the reputational market within the classroom will correct for any misconduct over time; lying will gain a student a better outcome in a single case, but eventually the lying student's reputation will cause others to be wary and the student will be less able to lie. This argument is not entirely convincing for at least two reasons. It assumes a functional public reputational market and enough negotiation iterations to cause the remedial student-imposed sanction. Perhaps even more important, it explicitly rejects any normative component of negotiation instruction. A negotiation course presents a real opportunity for students to wrestle with questions beyond "What can I get away with?" Letting them avoid deeper examination may perpetuate the values-based crises so many law students and practicing lawyers experience. At a minimum, a teacher who bases grades on negotiated outcomes, without any consideration of appropriate behavioral boundaries, misses an opportunity to influence the development of students' ethical compasses.

A third shortcoming is the prospect of inconsistent, and perhaps overly subjective, assessments. In all but the simplest of deals, negotiators will structure agreements with different provisions, not easily comparable. Even if the terms to be negotiated are fixed, teachers must account for the possibility of legitimately varied relative valuation. One student may have believed that

27. A further complication of disclosure questions has to do with the scoring a teacher assigns to an agreement secured by less than full disclosure. If a student committed fraud in some detectable way to secure his outcome, then any effort to simulate the real world would suggest that his score should be reduced to reflect the agreement's being rescinded or reformed. But legal ethics and the common law of fraud currently permit a considerable degree of deception, and distinguishing permitted deception from prohibited deception is troublingly difficult.



term X was more important than term Y, by a factor of Z. If the simulation does not provide strict quantification of the tradeoffs, then that student's performance is at risk if his initial assessment differs from the teacher's. Another issue is how to weigh drafting as opposed to substance. At one level, a teacher might reasonably consider the terms of the deal to be the ultimate indicator of a negotiator's strength. On the other hand, a student's ability to engage in advanced contract drafting is a skill distinct from (though obviously complementary to) negotiating. Unless the teacher spends time in class on contract drafting (presumably in lieu of teaching more about negotiation), to base a student's grade on how well she drafted a contract creates a troubling disconnect between instruction and evaluation. Further complicating the consistency of the assessment is the fact that a student's performance in a negotiation is based in part on the behavior of another student. A fair grading system does not punish a student for having the bad fortune of randomly drawing an atypically skilled counterpart.

Outcome-based grading also risks creating a learning environment at odds with sustained behavioral development. Put simply, grading outcomes inhibits the experimentation so necessary to robust learning. If students never try new approaches to bargaining, fearing that their grades will suffer, they miss the opportunity to develop a richer repertoire of negotiation practices.

Finally, focusing exclusively on outcomes may mean ignoring the procedural, analytic, or skills-based reasons *why* students are achieving what they are achieving. A simple analysis suggests that a student who achieves an unsatisfactory outcome should change his behavior. But most outcomes are a product of a complex set of behaviors, many of which are difficult to isolate. Even more important, over the long run a student is unlikely to change behaviors because of one small piece of data (such as a bad score) suggesting that the behavior was suboptimal in a specific context. Rather than focusing attention exclusively on outcomes and immediate behaviors, negotiation courses should help students to identify and question the assumptions and analysis that led to their questionable behaviors. The prospects of lasting long-term modification are much greater with assessments that go beyond simple outcome analysis.<sup>28</sup> If a teacher evaluates only outcomes, the message that students should be doing otherwise rings hollow.

#### *F. Method 6: Evaluated Performance*

A sixth mechanism, which I label "performance-based," is to observe students (either live or on videotape) as they conduct negotiations and then apply an established set of criteria in assessing a student's performance. The data evaluated under a performance-based system are distinct from those evaluated in an outcome-based system. In evaluating outcomes, a teacher looks only at the terms of the agreement. (Is the agreement's contingent clause clear and enforceable? How much money will this client receive each

28. See Chris Argyris et al., *Action Science* 80-102 (San Francisco, 1985); Michael Moffitt & Scott Peppet, *Action Science and Negotiation*, 87 Marq. L. Rev. 649 (2004).

month?) In evaluating performance, one looks at the actions the student took while negotiating. (Did the student ask good questions? Did he make a persuasive norms-based argument on this issue?) One can imagine scenarios in which a student would do well under the outcome-based evaluation and poorly under a performance-based evaluation, or vice versa.<sup>29</sup> Performance-based evaluation focuses on the behaviors students demonstrate during a simulated negotiation.

The most significant strength of performance-based evaluation is the direct link between the classroom activity and the grade. In most classes students are trying to develop their practice skills in negotiation, and this method of grading assesses precisely those skills. For example, many negotiation courses seek to improve students' communication skills through exercises focused on listening, framing, or asserting. Those exercises are likely to seem unimportant if students know their grade will be based on a written final exam that cannot test such skills. With performance-based grading, a teacher can assess how well a student translates the communication lessons into practice, reinforcing for students the relevance of skills-building classroom activities.

Evaluating performance has the additional benefit of being based on unfiltered data. Instead of relying on students' self-reporting, the teacher uses his own observation and judgment to assess the full set of available information. That reduces possible distortions stemming from unintended self-serving biases or intentional misdescriptions.

Grading on the basis of observed performance has three significant shortcomings.<sup>30</sup> First, it assumes that a teacher has the ability to distinguish effective from ineffective negotiating behavior. But a teacher cannot know a negotiator's purpose at any given moment. Imagine that a student negotiator leans across the table, shakes her fist, and says to her counterpart, "I won't stand for you threatening my client. One more outburst from you, and we're walking." What sort of grade should she receive? Was her comment effective? The answer, of course, depends on what she was trying to do. If her purpose was to appear tough in front of her client, set boundaries, or signal growing discomfort, her performance might score relatively well. If her purpose was to model productive communication, it might score badly. If the student's purpose was to ease tension in the room, evaluating her actions is more difficult. Perhaps her comments were utterly unskilled and would simply cause an escalation in the fight. Or perhaps the other side was not responding to gentler suggestions about communication dynamics and the negotiator judged that a more forceful intervention was required. Some negotiating actions may be so clearly

29. To the dismay of many negotiation students, no silver bullets of negotiation strategy exist. Some behaviors tend to produce more favorable results than others, but sometimes one may do everything right and not persuade the other side. Similarly, one may occasionally stumble clumsily into an extraordinarily favorable deal.

30. A fourth potential shortcoming depends on the frequency of evaluation. If a teacher evaluates only one student performance, at the end of the course, her assessment system provides no feedback that would allow students to change their behavior. On the other hand, if she evaluates every student performance, students' freedom to experiment appropriately may be inhibited.

destructive that no set of purposes would justify them,<sup>31</sup> and some may be universally helpful, regardless of context.<sup>32</sup> But most have no intrinsic value. They are valuable or useless depending on the negotiator's purpose at that time in that context. A teacher can only speculate about their purpose and so cannot evaluate with certainty.

A second difficulty is the limitation of any negotiation system with fixed assessment criteria. For example, the ABA annually runs interschool negotiation competitions in which judges are instructed to evaluate the negotiators based on five performance criteria, a self-analysis, and an outcome assessment.<sup>33</sup> Competitors know the criteria, and it is reasonable to expect that they will fit their behavior to them. Any set of evaluation criteria will constrain a negotiator's range of choices artificially. If the criteria focus on negotiating from a problem-solving orientation, as do those in the ABA competition, students will refrain from certain tactical distributively focused behaviors—even if they believe that those behaviors would achieve a more favorable result for their clients in the immediate circumstance. Similarly, if the criteria focus on the degree to which a student advances her arguments and engages in advocacy, students will refrain from exploring value-creating trades, demonstrating empathy, or addressing relational aspects of the interaction. Having criteria is better than having no criteria, of course. If a student is told nothing more than "I will observe you and assign a grade based on how well you perform," the grade provides no useful feedback. But any stated criteria distort the negotiation dynamic in important ways and may create a disconnect between the skills learned, the skills tested, and the skills ultimately useful in practice.

A third shortcoming is that evaluating performances takes a lot of time. A teacher might address this problem by reducing the number of simulations a student does during the semester, but educational theory suggests that students greatly benefit from multiple opportunities to practice, experiment, revise, and

31. The number of actions that fall into this category is extraordinarily low. Beyond, perhaps, conduct prohibited by the common law or by ethical constraints, what is universally, uncontextually "bad" negotiating behavior? Pounding one's shoe on a podium to make a point? Casting public personal insults at one's counterpart? Irrevocably precommitting to an extreme position? A vast body of behavior admittedly carries high risk, but negotiation advice that begins with "always" or "never" tends to be shallow and/or highly suspect.

32. The text perhaps most misread as including universal prescriptions is *Getting to Yes*. The authors make their best case for the "principled negotiation" approach—"focus on interests, not on positions," "separate the people from the problem," etc. But they dismiss the universal application of these principles, recognizing that in some situations other approaches may yield more satisfactory results. See Fisher et al., *supra* note 21.

33. The five performance criteria are negotiation planning, flexibility in deviating from plans or adapting strategy, teamwork, relationship between the negotiating teams, and negotiating ethics. In assessing outcomes, judges are directed to consider seven separate factors. See The American Bar Association Law Student Division, Rules and Standards for Judging (2002–2003). The seven outcome-assessment factors are drawn from Roger Fisher & Danny Ertel, *Getting Ready to Negotiate* (New York, 1995). While the ABA asserts that the standards are "based on the premise that there is no one 'correct' approach to effective negotiation in all circumstances," the categories of considerations clearly reward student negotiators who adopt an integrative, problem-solving orientation.

incorporate what they learn into their repertoires.<sup>34</sup> Too few simulations will have little long-term impact. Still, a teacher cannot employ a teaching and evaluating method that leaves too little time for other responsibilities.<sup>35</sup>

## II. A Seventh Option: Student-Analyzed Negotiation Videotape

### A. Background

Videotaped negotiations play a central role in my negotiation classes throughout the semester. One of the foundational skills my course aims to develop is the ability to observe, describe, and analyze negotiation dynamics. From the very first day of class we observe nonstudents negotiating on film. Soon after the first class, I begin to videotape students as they conduct their simulated negotiations, and I use the tapes as a supplement to the normal reviews of those simulations. Over the course of a semester, each student negotiates twelve to fifteen separate cases with one or more classmates. Students know from the outset that some but not all of their negotiations will be recorded,<sup>36</sup> so they come to class not knowing whether they will be videotaped that day.<sup>37</sup> The way I use the videotaped simulations depends on the structure of the negotiation and on my pedagogic goals for the exercise in question. In some cases I review portions of the tapes with the entire class immediately following the simulation. In others I save the tapes for use later in the semester. On those occasions when I do not review the tapes in class, the students have my standing offer to meet with them in small groups to review the tapes out of class.<sup>38</sup> By the end of the term, my students have had considerable experience viewing themselves and others negotiating on videotape.

Videotapes as an instructional tool have some risks and some tremendous advantages. Reviewing their own performance on videotape can be emotion-

34. See, e.g., Allan Collins et al., *Cognitive Apprenticeship*, in *Knowing, Learning, and Instruction*, ed. Lauren B. Resnick, 480-83 (Champaign, 1989); Hergenhahn, *supra* note 3, at 408.

35. This assertion may be descriptively inaccurate and/or normatively disappointing. I can speak only from the perspective of a yet-untenured junior faculty member. I have the strong impression, however, that if I were to spend all of my professional time grading my negotiation courses, my tenure-free status would persist in frustrating ways. Nothing I have seen among senior faculty suggests that the calculus changes later in one's career. Put simply, there are only so many hours in the day for instruction. Any teaching and grading method must recognize these constraints.

36. Because I have sufficient technical resources, I could choose to videotape all of my students' negotiations. My students know this, so they cannot be certain whether they are likely to be selected for videotaping in any given exercise.

37. I regularly conduct review sessions with my students after I've turned in their grades as a means of learning about my instructional methods. Not surprisingly, students almost universally report that the prospect of being videotaped increases their incentive to arrive in class fully prepared to negotiate each day. My concern in adopting this method was that I might be introducing unhelpful anxiety into the students' learning experience, but to my surprise students have consistently praised the effects of this pressure to prepare.

38. I was initially nervous about making such an offer, fearful that I would spend all of my waking moments watching videotaped negotiations with my students. But students' demands for additional personalized feedback have been manageably modest. Recently I have begun to experiment successfully with the use of teaching assistants in the video-review process.

ally difficult for some students; many experience at least moderate vulnerability. Some writers have suggested that this vulnerability demands that teachers make their feedback "positive and encouraging."<sup>39</sup> I disagree. Students' vulnerability demands that teachers carefully craft both the purpose and the forum of any videotape feedback, but it does not require that one offer only compliments. When I ask students to observe themselves on tape and comment, they often produce extraordinarily helpful and accurate insights. Some, of course, are prone to focus primarily on less-than-positive aspects of their own performance while others, surprisingly, review their own performances with uncompromising admiration.<sup>40</sup> With appropriate modeling, supportive questioning, data-focused reasoning, and explicit guidance, one can help students to discover and articulate aspects of their performance they might otherwise have missed. Occasionally I can point out dynamics—more and less effective—that the students appear not to have noticed. Wholly aside from the eventual use of a final videotaped negotiation as part of the grade, the use of videotape is well supported by the educational literature, and my experience with it has been overwhelmingly positive.<sup>41</sup>

### B. Mechanics

1. *Final negotiation simulation.* At the close of the semester I give students instructions for their final negotiation. I use a relatively complex simulation for the final exercise, but the nature of the case and the format of its instructions are consistent with what the students have been doing throughout the semester. A robust case with complex, quantifiable, and unquantified considerations allows students to be self-directed in their preparation and research. A scenario featuring multiple potential negotiation dynamics not only serves to reinforce the lessons of the semester, but also permits students to demonstrate adaptive capabilities.

2. *Two-on-two negotiation.* I have students negotiate their final simulation in teams of two, so that four negotiators are present for the exercise. The case is

39. Mary Holmes & Judith Maxwell, *The Use of Role Play and Video in Teaching Communication Skills to Law Students*, 1 J. Prof. Legal Educ. 151, 157 (1983).

40. There are at least three possible ways to explain why students may not articulate calibrated analyses of themselves on videotape. First, many students simply lack the tools, frameworks, or ability to observe well. Negotiation courses can offer a tremendous amount to these students. Second, some students may see dynamics in a balanced way, but may choose to articulate only one aspect of what they observe. For example, one student may voice only her negative observations because she is fearful that she will otherwise sound defensive or arrogant, while another student may voice only positive observations, out of concern that the group will judge her to be incompetent if her performance is less than perfect. Finally, some students have profound psychological issues that make balanced self-observation all but impossible. Given that law students tend to be in their twenties, a time when certain psychological disorders tend to manifest themselves, all law teachers should be aware of some of the relevant warning signs. Those (like negotiation teachers) who encourage personalized experiences such as role-playing and self-observation should be particularly aware.

41. For a very useful summary of one method of incorporating videotaped negotiation simulations into negotiation instruction, see Peppet, *supra* note 24. See also Charles Steinmetz, *The Effect of Videotape Feedback on the Development of Presentation Skills*, 11 J. Police Sci. & Admin. 343 (1983); Greg Kearsley, *Training Media and Technology*, in *Training for Performance: Principles of Applied Human Learning*, ed. John E. Morrison, 233-37 (New York, 1991).

a two-party case; the partners receive identical instructions.<sup>42</sup> This structure permits—or perhaps requires—the pair to coordinate their preparation, and it presents the possibility (indeed the likelihood) of intrateam negotiations. Because I limit enrollment in each section to twenty-four, six separate groups negotiate the final case.

3. *Logistics.* Coordinating with our technical services, I identify a week for the final negotiations. I divide the available days into time slots of two hours each.<sup>43</sup> Once students know the identities of their counterparts, each group of four is responsible for signing up for a time to conduct their final negotiation. Students are instructed to begin the negotiations on camera, but they are not required to complete their negotiations within two hours. The case I have been using for the final exam is such that many students have taken longer to reach an agreement. Even if the students do not complete their negotiations on videotape, two hours of video provides more than enough information.

4. *Assignment 1: preparation materials.* Before the negotiations, I have each student submit a set of preparation materials. Virtually all scholars in the field agree that good preparation is important, though many disagree on its precise content. I give my students multiple opportunities to engage in structured preparation, reinforcing the importance of preparation and allowing them to develop their own preparation practices, just as they develop their own negotiation styles. Consistent with this classroom emphasis on preparation, I base part of the final grade on the quality of a student's preparation in advance of the final negotiation.<sup>44</sup> I permit paired students to submit their preparation materials jointly, as a means of encouraging thorough preparation together.

5. *Taping and formatting the video.* I take extraordinary precautions to assure myself that the videotapes all have functioning sound and video. Regardless of the format of the tape, the video should contain a very clear time stamp on the screen itself, so that a viewer can navigate the tape without being at the mercy of inconsistent time or frame counters on different video machines. The advent of relatively inexpensive digital video cameras has made it possible to streamline taping and formatting. With digitized videotapes, one can use the Web to resolve potential distribution challenges. A digital video, with time stamp, can be translated fairly easily into a file format capable of being posted on the Web through streaming video;<sup>45</sup> students (and teachers) never need to

42. While one might reasonably include a genuinely multiparty negotiation at the close of the course, I judge that the additional complexities involved in additional parties become quickly too overwhelming to form a useful basis for the analysis I am asking of my negotiation students.

43. For schools with the capacity to tape only one negotiation at a time, the logistics are still not terribly complicated. A time slot can contain only as many negotiation groups as the school can tape at once. Even if that number is one, a work-week of regular work-hours offers at least twenty time slots for only six groups.

44. The grading of preparation materials is, of course, not technically part of the student-analyzed videotape process. As I suggest in section III below, I believe that multiple assessment measures are the most effective and appropriate way to grade negotiation students.

45. Streaming involves a method of delivering digital video files without requiring the user to download the entire file before she can begin viewing. Once a portion of the file is downloaded into a buffer, the video can begin to play. While it is playing, the remainder of the file is downloaded. This format makes viewing video files easier and more efficient.

worry about setting up a system of copying tapes or checking out tapes or coordinating the handoff of tapes.<sup>46</sup> Students can access the videos from wherever they like, simply by downloading a file from a Web site.<sup>47</sup>

6. *Assignment 2: self-observation report.* Once the videos are available, students review the video of their own final negotiation. By this point in the semester, after frequent videotaping, most students are beyond the initial shock, discomfort, or delight of seeing themselves on videotape. I ask each student to identify a short (no more than a few minutes) significant segment of the videotape—some time when she did something important (either with or without success)<sup>48</sup> and write a brief analysis (about five pages) of the exchange. The focus of the analysis is not evaluative (“I was great/awful”), though students often assess their performance. Instead, the analysis tracks the kinds of lessons the course aims to teach. Students identify the negotiation dynamic(s) they view on the tape. They provide contextual background for the segment, so that the comments will not be viewed as isolated decisions.<sup>49</sup> They also describe the purposes they had in mind at that moment. Many report what they recall feeling, and a significant number articulate gaps between what they *thought* they were saying and what they actually said.<sup>50</sup> The written assessment allows students—at least those who were purposive and prepared—to demonstrate the depth of their understanding and effort. At the same time, the self-observation assignment is unstructured enough so that

46. As described below, each taped negotiation is viewed by eight students. If there is only one tape, the coordination problems among the eight students become considerable.

47. A fast Internet connection remains important, even when using streaming video. Fortunately such connections are becoming increasingly available to students. Not all commercial Web sites, including specialized teaching Web sites, will permit the posting of these video files because the files are quite large. For example, Web sites for The Westlaw Education Network (TWEN) and for the Lexis-Nexis Web Courses currently both have file-size limits too small for posting streaming video files. To avoid these problems I post the files directly to a password-protected area of my faculty Web site.

48. Because students' self-analysis is not based only on their memories, these self-observations differ from the reflective journals described in section I.B. above.

49. A feminist critique of traditional negotiation simulations is that they tend to reduce the complexity of negotiation situations—often omitting the relational and nonrational aspects of the situation. Even beyond the generalized critique of simulations' brevity, “behavior observed and interpreted in isolation will produce very different findings from that which is examined in light of the context in which it occurs.” Elaine M. Landry & Anna Donnellon, Teaching Negotiation with a Feminist Perspective, in *Teaching Negotiation*, *supra* note 12, at 111, 113.

50. It is common for students' assessments of their own performances to shift once they see themselves on videotape. In many cases their assessments will become slightly less positive, and slightly more consistent with outsiders' observations, if they have access to videotape. Stated differently, students who do not have access to videotapes of their performances tend to report more favorably on their performances than outsiders would. The process of seeing one's own performance on tape has been described as “self-confrontation,” suggesting that the tape may present information the viewer would not expect (or welcome). See, e.g., Roger D. Martin, Videotape Self-Confrontation in Human Relations Training, 18 *J. Counseling Psychol.* 341 (1971).

students can perform quite well in their analysis even if the moment captured on tape was not a shining example of negotiating skill.<sup>51</sup>

7. *Assignment 3: other-observation report.* Shortly after viewing his own videotaped final negotiation, each student is assigned to watch the videotape of a different foursome's final negotiation. Because all students negotiate the same case, they need no additional preparation, information, or material. Invariably, of course, the negotiations progress quite differently. Each student's assignment, as with the self-observation piece, is to identify one short segment of the negotiation in which something significant occurred. They then write an analysis of the dynamic observed in the room, commenting on the contributions each of the negotiators may have made to the creation of that dynamic (whether positive or otherwise). Students often spot missed opportunities: "What these two negotiators might have done at this point is . . . ." Other students focus on the surprises they saw on tape: "Given their constraints, I am not sure what they were trying to accomplish by . . . ." As with the self-observation report, students can write very good analyses of negotiation dynamics whether the behavior on tape is impressive, confusing, or filled with apparent errors.

8. *Grading.* Before reviewing a student's report, I watch the segment of the video identified as the moment of interest and develop my own observations, attributions, assessments, and analysis so that I can read the report with some sense of what the student is likely to emphasize. I then watch the selected segment again and evaluate the student's analysis. I look for evidence of several things:

- The degree to which the student is carefully observant. A core principle of negotiation holds that one who can spot negotiation dynamics will be better able to make choices about how to respond than one who woodenly applies the same approach to all circumstances. The ability to assess a circumstance from various perspectives is critically important.
- The degree to which the student demonstrates an ability to apply the frameworks and ideas from the course to analyze an actual negotiation. A course will almost always offer one or more theoretical constructs designed to aid students' understanding of negotiation dynamics or choices. The student should demonstrate fluency in the relevant framework(s).
- The degree to which the student can critically assess the impact of negotiation behaviors. A student who knows all the theory, but is unable to see that a theoretically sound approach is producing no benefit, has not truly learned the important lessons of the class. I look at the student's normative assessment of the negotiation

51. While performance on tape often reflects a student's degree of preparation, awareness, and skill, some of the highest-scoring self-assessments have been thoughtful, reflective critiques of performances that included a significant shortcoming. We have all said some things less well than we might have wanted. The most talented and aware among us recognize those moments quickly and both adapt short-term behavior and assess the underlying causes of the difficulties.



segment. I want more than "This approach was good/bad." A good report critically assesses the merits of the approach and specifies the bases for its evaluative conclusions.

- The degree to which the student analyzes the dynamic and considers specific alternatives. What options did this negotiator have at this point? What could she have said next to be most effective, given the current dynamic? A good report shows that the student can imagine parachuting into the moment and can craft one or more strategically sound interventions.

Each written report receives a score based on the above criteria. The scores are then translated into grades. With other factors discussed below, these form the basis of a student's final grade.<sup>52</sup>

### *C. Advantages*

This videotape approach to grading has several important strengths. First, it focuses on the student's ability to do the kind of critical observation, analysis, and strategy selection that are central to the course. It does not feel dramatically different from the activities the students have been engaged in—and receiving feedback on—throughout the semester. By minimizing the gap between what is taught and what is tested, a teacher can strengthen the student's appreciation for the core materials and classroom activities.

A second strength is the tremendous incentive for students to take the work seriously. Knowing that their videotape will be examined by the teacher and by classmates gives them reason to devote an appropriate amount of energy to the final simulation. (They would have a reputational interest in performing decently even if no grade was in question.) Knowing from the outset that their final will be a videotaped negotiation, students have a real incentive to get comfortable with the process. If you know that your final grade depends on your ability to spot dynamics on a videotape, you are likely to want a lot of practice spotting dynamics on a videotape. My method encourages seriousness not just at the end of the semester, but also throughout the term.

Third, the student-analyzed videotape reinforces the importance of multipositional awareness in negotiation. In the self-observation reports students explore their experiences, emotions, and perceptions of the dynamic as it existed. The reports capture some of the important value of reflective journaling. At the same time, because the student also views the videotape from a different perspective, she can explore the gap between her intentions and the impact she may have had on others. The other-observation report supplements these two perspectives well, allowing a student to demonstrate an ability to assess negotiation dynamics she did not create or influence.

A final benefit is that the exam itself can be an important learning experience. For the typical law school exam, a student's task is to demonstrate understanding that he already possesses. With the videotapes, a student's

52. I do not base a student's entire grade on the student-analyzed videotapes. In section III I describe other factors I include in the final grades.

existing understanding is tested along with his ability to learn. No student can know ahead of time what the videotapes will reveal. The best students consistently find surprises—things happening on tape that challenge some of their assumptions. At a minimum, students will better understand themselves after this final exam because the process of self-observation is educative.<sup>53</sup> Because negotiation is a life-long skill, any evaluation method that can reinforce the importance of continued learning is a benefit to the student.

#### *D. Shortcomings*

As with any method of grading, the student-analyzed videotape has some shortcomings. One is the time required. Reviewing dozens of videotapes and student reports takes more time than reading papers, exam answers, or negotiation outcomes. However, my experience so far with the experiment has been that the difference in time commitment has not been as significant as one might fear. The student reports are manageably short, and the video clips are only a few minutes long. Furthermore—and in my mind this is even more important—reviewing these videos and reports has been *fascinating*. I gladly devote a little extra time to a grading method from which I think I learn as well as the students.

Then there are the technological and logistical requirements. I am fortunate to teach in a law school with state-of-the-art facilities. All of my classrooms have advanced video projectors. All of my students have been required to buy high-powered laptops, and all have access to high-speed Internet connections throughout the building. The school has eight high-quality digital video cameras on site, and a dedicated technical support staff I can call on for help in taping, editing, and posting. Given all these advantages, the actual requirements for implementing this grading method are relatively modest. In truth, a teacher would need only the capacity to make a video recording of a negotiation. Everything else involved makes the process easier and smoother, but it is not required. Most law schools' technical resources lie somewhere between having one camera and looking like a Hollywood set. Technology makes my method easier, but very little technology is actually required to make it work.

A third concern is the pressure the evaluation method places on students. Any final exam creates some degree of stress, and for some students the addition of videotape raises the level of anxiety. I have tried to address this by making the videotape aspects explicit in my course description, by introducing videos early in the course, and by using them often. My hope is that video reviews will begin to feel more "normal" and that students will feel less and less discomfort with video.

53. Some evidence suggests that students are more accurate with videotape observations and assessments when they have adopted a fictional persona during a role-play than when they have been playing themselves. Stated differently, students viewing themselves on videotape when they have not been instructed to assume a persona other than their own may be less effective at accurate self-observation than those with assigned roles. See David A. Kipper, *The Differential Effect of Role-Playing Conditions on the Accuracy of Self-Evaluation*, 45 *J. Group Psychotherapy, Psychodrama & Sociometry* 257 (1977). Even if a student's observations are not entirely accurate, the process of observing is filled with potential benefit.

Finally, evaluating student analyses of videotape is not an exact science. To some degree, the accuracy of the method depends on the extent to which I see the same dynamics my students see in the videotapes. I may miss something the student believes is significant, or simply see the dynamic differently. But the method is at least partially self-correcting because the students' written reports let me know what they believe to be important. Criteria such as those listed above further assure that the grading is not arbitrary. Having used videotape as a means of *instruction* for more than a decade, I have at least a developing sense of what one may discover using the medium. Still, using it for *evaluation* presents some challenges.

### III. Multiple Evaluation Mechanisms

Teachers of negotiation need not choose a single grading method for the entire course grade. Most of the methods listed above, except of course for the pass/fail option, might be combined—with some obvious benefits. Multiple measures permit a teacher to evaluate a broader range of student performances. One teacher might, by combining reflective journals with a final paper, assess the depth and breadth of a student's reflection. Another might combine a self-critique with outcome-based evaluation in order to test both students' observation and their ability to achieve certain results. A third might combine a final exam with teacher-evaluated performances to test both students' cognitive understanding and their ability to translate theory into practice. Using multiple evaluation methods is consistent with the educationally sound practice of using multiple instructional methods. Linking evaluation with multiple instructional methods assures that the students will not experience evaluative efforts as entirely distinct from the learning process. The fundamental attraction of using multiple evaluation methods is that no single method captures all of the aspects of a student's performance a teacher might want to measure.

But adopting multiple mechanisms carries several costs. First, and significant, is the time burden for the teacher. Most of the grading systems I have listed take considerable time to implement, and they do not become easier or quicker when combined with other mechanisms. The time a teacher has for any given course is not infinite, and time spent grading is time not spent doing something else that might have more instructive impact.

Just as multiple evaluation methods may demand too much of the teacher, they may create too great a burden for the students.<sup>54</sup> Most courses require only a final exam or a final paper. If a teacher of negotiation really tried to test all of the important aspects of students' performances—researching, reflecting,

54. Even if the multiple evaluative mechanisms do not create too great a workload, students who operate under many methods of assessment may suffer from evaluation fatigue. In a sense, being graded all of the time, for everything one does, causes the fact of evaluation to lose much of its importance and impact. If every word out of my mouth or my pen counts for a tiny fraction of my grade, at some point—in addition to being annoyed—I will stop noticing or caring about the tiny marginal differences in evaluation.

observing, analyzing, performing—students would quite reasonably complain that the demands of the course were too onerous for the credit received.<sup>55</sup>

Despite these risks, I remain convinced that the best evaluation system includes a combination of different approaches. My current practice combines class participation scores,<sup>56</sup> graded memoranda to clients,<sup>57</sup> graded preparation materials, analytic problem sets, and the student-evaluated videotapes described in this article. I recently dropped a series of required reflective journals out of concern for the students' time. Quite frankly, I miss the journals, because they gave me insight into aspects of my students' evolving understanding in ways unavailable from the remaining methods. I also believe the journals fundamentally improved some students' understanding of negotiation and of themselves as negotiators. Still, with the addition of the quasi-reflective aspects of the student-analyzed videotapes, the balance is reasonable. While I have every expectation that I will continue to experiment and learn about grading mechanisms in negotiation courses, I am increasingly convinced that adopting a range of creative assessment mechanisms is important.

55. Any of my former students who read this section may find a certain irony here. In each of the three schools where I have taught negotiation, at least a few students have complained that my course demands greater work than the course credits suggest. I am not entirely convinced that they were wrong, but I have not abandoned the use of multiple evaluative mechanisms.

56. I am hardly alone among negotiation teachers in including a subjective assessment of students' performances as part of their final grade.

57. A few times during the semester, after a simulated negotiation and before in-class review of the experience, I have each student write a memorandum to his client explaining the outcome he achieved and outlining the next steps. The students receive a grade based on the content of the memos rather than the content of the deal they struck. Awful deals are difficult to describe and defend to a client, of course, just as excellent deals are easier to explain. Nevertheless, I consistently receive some model memoranda from students who achieved only moderately successful deals, and I receive some surprisingly disappointing memos from students who achieved good deals. My observation has been that these memoranda test and reward students' attention to attorney-client relationships and clients' interests more than any other aspect of the course. For that reason, and others, I favor their use as part of a grading system.