

In Pursuit of Fairness: Re-negotiating Embedded Norms & Re-imagining Interest-Based Negotiation

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CONTENTS

I.	Introduction	2
II.	Fairness: The Promise of Interest-Based Negotiation.....	4
	A. Defining Fairness	4
	B. Defining Interest-Based Negotiation: The Seven Elements & Fairness	5
III.	A Promise Unfulfilled: Subjective Norms in Objective Criteria	7
	A. Norms Defined	7
	B. Subjective Norms Embedded in “Objective” Criteria	9
	C. Norms, Criteria, and Distribution.....	11
IV.	Embedding Fairness: Re-imagining Interest-Based Negotiation.....	13
	A. Transformative Justice: Identifying the Lineage of Harm	13

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B. Justice and Negotiation: Hinting at the Right
 Answers 18

C. Re-imagining Fairness in Interest-Based
 Negotiation 20

 i. Criteria and the Question of Distribution 20

 ii. Relationship and Communication 24

 iii. Interests and Options 26

 iv. Commitment and Alternatives 27

V. Conclusion 28

I. INTRODUCTION

*“While negotiation as a decision-making process has been around since the beginning of the human story, never has it been so central to human life and the survival of our species.”*²

Negotiation matters. It is, in fact, “central to human life and the survival of our species.”³ At its core, negotiation is a process through which we answer the question of how resources—be they tangible (e.g., money, land, and water) or intangible (e.g., power, access, recognition, and space)—are distributed. However, the question of distribution—who gets how much of a resource—is all too often resolved via violence or coercion. Negotiation, specifically interest-based negotiation, which centers “fairness” in both process and outcome, seeks to provide a means of answering the distribution question peacefully and fairly.

In the pursuit of fairness, the interest-based framework instructs negotiators to answer the question of distribution by relying on “objective criteria.” According to the interest-based framework, objective criteria—often found in traditions, customs, scientific findings, and market valuations—are deemed legitimate so long as they are created by a third party and are accepted by a sizable number of people. These criteria are touted as authoritative benchmarks of what is fair. The central promise of interest-based negotiation is that a fair process based on these “fair” criteria will guarantee a fair distribution, which in turn leads to a fair outcome.

The problem with this promise is that, in part, it hinges its guarantee of fairness on the presumed fairness of the criteria themselves.

2. ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN xv (2007).

3. *Id.*

It presupposes that so long as criteria are externally crafted and generally accepted, they are objective and therefore fair. However, many types of criteria relied upon by the interest-based framework to ensure *objectivity* and *fairness* are themselves animated by norms that are prejudiced and, in fact, unfair. There are countless norms—white supremacy, patriarchy, and classism to name a few—that are *fundamentally premised upon* inequity. They were, in fact, created to be violently unfair.⁴

With the two-fold recognition that norms can become embedded in ostensibly objective criteria and that said norms can be unjust and unfair, the promise of fairness seemingly collapses. In the wake of this collapse, negotiators must be prepared to (1) assess which unfair norms, explicit or tacit, are shaping the dynamics of a negotiation and (2) consider how the pursuit of fairness dictates that the norms themselves be re-negotiated.

It is these (often implicit) norm negotiations that are the most difficult, the most unsettling, the most frightening, and the most important. These negotiations can have long-term systemic implications for *who gets what* and *why*. This can feel, and often is, existential. Consider the following examples. A post-colonial negotiation about land distribution between an indigenous group and former colonizer is as much about land ownership as it is about the white supremacist norms used to justify the initial land theft. Climate negotiations between the global South and the global North are about carbon emissions. They are also, in part, a re-negotiation of the capitalist norms that legitimated extractive economic practices so long as they were executed by industrialized nations. A salary negotiation in which a woman seeks equal pay for equal work is about pay and is also an attempt to disavow the patriarchal norms that devalue women's labor.

In short, if interest-based negotiation is to realize its promise of fairness, sources of legitimacy must be re-imagined. This piece proposes a process for this re-imagination. As such, it is not merely a discursive musing. It is intended to be a call to action.

With that mandate in mind, this article will:

- (1) survey the negotiation discourse writ large, focusing specifically on interest-based negotiation's promise of fairness,

4. See Michael Wheeler, *Swimming with the Saints/Praying with Sharks*, in *WHAT'S FAIR: ETHICS FOR NEGOTIATORS*, at xxxvii, xlv–xlvi (Carrie Menkel-Meadow & Michael Wheeler eds., 2011) (noting that the fairness standards invoked by the authors of *Getting to Yes*—“legal precedent, business norms, and the like”—may not themselves be just).

- (2) examine how unfair norms shape the dynamics of a negotiation, most notably by embedding in supposedly “objective” criteria, and
- (3) consider how interest-based negotiators might use transformative justice practices to identify unfair norms and procedural/distributive justice principles to re-negotiate them.

II. FAIRNESS: THE PROMISE OF INTEREST-BASED NEGOTIATION

A. *Defining Fairness*

While much has been written about fairness in negotiation,⁵ a cogent and widely-accepted definition of the term remains elusive. Much of the struggle to define what is fair stems from the expectation that negotiation is defined by self-interested behavior. The assumption is that negotiations create their own “ethical climates” where a negotiator’s primary purpose is advancing their own agenda.⁶ Often, this agenda is pursued at the expense of other parties and distorts a negotiator’s conception of what is fair or unfair.⁷

Even beyond the bounds of negotiation, defining fairness is immensely difficult. The concept is subjective, contextual, and amorphous.⁸ This article will not attempt to pinpoint what is fair in every dyadic, multiparty, or multinational negotiation that could ever occur, as doing so is likely impossible. Instead, in an effort to re-imagine fairness in the context of interest-based negotiation, this article will rely on a Rawlsian orientation as its guiding principle for determining what is fair.

In *Justice as Fairness*, political philosopher John Rawls highlights a conception of fairness “which relates to right dealing between persons who are cooperating with or competing against one another.”⁹ When such a conception of fairness is achieved in a negotiation, “none [of the parties feel] that, by participating in it, they or any of the others are taken advantage of, or forced to give in to claims which they do not regard as legitimate.”¹⁰ This conception of fairness requires a marked departure from the presumption that a negotiation’s “ethical climate” is characterized by pure self-interest. Striving

5. See generally WHAT’S FAIR: ETHICS FOR NEGOTIATORS (Carrie Menkel-Meadow & Michael Wheeler eds., 2011).

6. See Carrie Menkel-Meadow, *Introduction: What’s Fair in Negotiation? What Is Ethics in Negotiation?*, in WHAT’S FAIR: ETHICS FOR NEGOTIATORS, *supra* note 5, at xiii, xiv (2011).

7. *Id.*

8. WHAT’S FAIR: ETHICS FOR NEGOTIATORS, *supra* note 5, at 367.

9. John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 178 (1958).

10. *Id.*

towards fairness under a Rawlsian conception necessitates that, at a minimum, negotiators consider (1) how all parties feel about the process they are participating in, and (2) whether all parties view the substantive agreement as legitimate.

This conception of fairness does not hone in on a particular measurement to assess what is fair (e.g., fair could mean equality or equity). Instead, it directs interest-based negotiators to look beyond themselves and consider how a procedural move or substantive agreement will affect the perceptions and the positions of *all* participating parties.

B. *Defining Interest-Based Negotiation: The Seven Elements & Fairness*

Broadly defined, a negotiation is “the act of back and forth communication intended to reach an agreement.”¹¹ The act of negotiating can occur in countless ways, as “negotiators have no shortage of theories of action.”¹² However, as a theory of action, interest-based negotiation is distinct in its consistent orientation toward procedural and distributive fairness.

Within the interest-based approach, success is not simply reaching an agreement favorable to your side, but reaching a “wise” agreement. A wise agreement “meets the legitimate interests of each side to the extent possible, resolves conflicting interests *fairly*, is durable, and takes community interests into account.”¹³ Necessarily then, this approach compels negotiators to reconceptualize success in negotiation from pure self-interest toward mutual interest. In an interest-based framework, the ultimate goal of negotiation is to *fairly* answer the question of distribution via a *fair and inclusive* process that relies on *fair and objective* criteria. According to Fisher et al.,

[Interest-based negotiation] suggests you look for mutual gains whenever possible, and that where your interests conflict, you

11. WILLIAM L. URY, JEANNE BRETT & STEPHEN GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT* 6 (1993).

12. Michael Moffitt & Scott R. Peppet, *Action Science and Negotiation*, 87 MARQ. L. REV. 649, 650 (2004); *see also* WILLIAM L. URY ET AL., *supra* note 11. A particularly helpful schema for categorizing these theories of action is the “power, rights, interests” model. This model suggests that there are three broad approaches to negotiation and each has its own procedural and distributive principles. In a power-based negotiation, negotiators leverage their power to achieve their desired outcome and coercion generally guides the process. In a right-based negotiation, negotiators emphasize who is right according to what Ury et al. call “independent standards of perceived legitimacy” and adjudication is often the presumed process. *Id.* at 7. Interest-based negotiation is explored throughout this article.

13. FISHER ET AL., *supra* note 2, at 4.

should insist that the result be based on some *fair* standards independent of the will of either side. . . . It enables you to be *fair* while protecting you against those who would take advantage of your *fairness*.¹⁴

Interest-based negotiation centers on fairness and proffers “seven elements” toward achieving a fair outcome: relationship, communication, interests, options, objective criteria, alternatives, and commitment.¹⁵ A cursory review of the seven elements reveals the centrality of fairness to all parties in an interest-based practice. This centrality is distinctive. Other theories of action frame negotiation as an inherently adversarial process in which outcomes are seen as zero-sum—one party can gain only what another loses. Under some theories, parties are implored to leverage power, assert their rights, or push their positions in order to win more than the other parties.¹⁶ By contrast, an interest-based approach assumes that the best processes are collaborative and the best agreements are mutually beneficial.

Among the seven elements, the core element of interest-based negotiation is, unsurprisingly, interests. Throughout their foundational texts, Fisher et al. repeatedly emphasize the distinction between interests and positions. A position is “something you have decided upon,” while interests are “what caused you to decide.”¹⁷ This focus on interests—the fears, concerns, and desires that underlie a stated position—is presumably what allows negotiators to move beyond zero-sum haggling and bargaining based on superficial positions.¹⁸ In an interest-based approach to negotiation, the parties’ interests are viewed not as mutually exclusive but as interlinked. “Negotiation is a two-way street . . . you usually can’t satisfy your interests until you satisfy theirs.”¹⁹ The remit of an interest-based negotiator is to consider *all* legitimate interests of *all* parties, including the interest of being treated fairly in the negotiation itself.

Interest-based theorists suggest that the remaining six elements work in tandem to increase the likelihood of procedural and distributive fairness.²⁰ For instance, a good relationship can allow negotiators to “separate the problem from the people” and work

14. *Id.* at xxvii (emphasis added).

15. Bruce Patton, *Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION 279, 280 (Michael L. Moffitt & Robert C. Bordone eds., 1st ed. 2005).

16. See WILLIAM URY, GETTING PAST NO: NEGOTIATING IN DIFFICULT SITUATIONS 5 (1993).

17. FISHER ET AL., *supra* note 2, at 43.

18. URY, *supra* note 16, at 5.

19. *Id.* at 18.

20. FISHER ET AL., *supra* note 2, at 19.

collaboratively to identify mutual gains.²¹ Communication that strikes an effective balance between intentional inquiry and clear assertion²² may increase the likelihood that parties feel heard and are willing to “dance with their negotiating partner toward a mutually agreeable outcome.”²³ Furthermore, collaborative option generation is a negotiator’s “single greatest opportunity” to ensure that, in total, the final agreement benefits all parties.²⁴

Ultimately, the parties must pick among the options on the table. In the pursuit of fairness, interest-based theorists recommend that negotiators rely on objective criteria, such as relevant customs, laws, market values, precedents, and scientific findings, to dictate how resources are distributed.²⁵ In an interest-based paradigm, the importance of referencing objective criteria, specifically as they relate to the goal of distributive fairness, cannot be overstated. The use of objective criteria is a “measuring stick” with which negotiators ascertain what is “fair.”²⁶ Finally, once the contours of a potential agreement are settled, negotiators commit to the interest-based agreement or go with their best alternative.

The bulk of this article will detail how the interest-based framework has fallen short. Its reliance on unexamined, presumably “objective” criteria and rhetorical calls for collaborative processes do not themselves ensure fair distributive or procedural outcomes. But, despite imperfections with its current instantiation, the interest-based framework is pregnant with possibility specifically because it centers on fairness. The question to be asked, and answered, is how might interest-based negotiation become fairer?

III. A PROMISE UNFULFILLED: SUBJECTIVE NORMS IN OBJECTIVE CRITERIA

A. *Norms Defined*

In the interest-based framework, the promise of fairness relies, in part, on the use of so-called objective criteria to answer the question of distribution. However, a cursory overview of the sociopolitical discourse around norms—the rules and practices that contour human

21. *Id.*

22. See Patton, *supra* note 15, at 284; see also FISHER ET AL., *supra* note 2, at 35–41.

23. FISHER ET AL., *supra* note 2, at 35.

24. URY, *supra* note 16, at 19.

25. *Id.* at 21.

26. *Id.*

behavior²⁷—calls into question the presumption that frequently relied upon objective criteria are even facially neutral.

Norms are “collection[s] of practices and rules” that define “appropriate behavior for specific groups of actors in specific situations.”²⁸ Whether tacit or explicit, norms shape the full spectrum of human behavior—from the mundane to the monumental.²⁹ They dictate where it is appropriate to smoke, when a person ought to wear business casual attire, and whether a nation can justifiably use force against another.³⁰

Norms often begin as individually held beliefs about how specific actors ought to act in a specific context.³¹ However, once widely internalized, norms “acquire a taken-for-granted quality.”³² For example, one person’s belief that smoking should be limited in public spaces, that business casual is appropriate for the workplace, or that a state can employ anticipatory self-defense can, over time, become a widely-accepted axiom. It is at this point that “‘ought’ becomes ‘is.’”³³ As Cass Sunstein notes,

Empirical research documents again and again how people’s ideas about what is good and what “should be” in the world become translated into political reality. People with principled commitments have made significant changes in the political landscape: slavery as a legal institution of property rights has been abolished everywhere on the planet for the first time in human history; women, more than half the world’s population, have full formal political participation in most states of the world; and though war continues to be a horrible human practice, there is no doubt that it is less horrible as a result of efforts by humanitarians to curb the most awful weapons and practices.³⁴

27. James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT’L ORG. 943, 948 (1998).

28. *Id.* However, as Finnemore & Sikkink note, institutions are norms but to scale. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 895 (1998).

29. CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 39 (1997).

30. *Id.* See generally Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992).

31. Finnemore & Sikkink, *supra* note 28, at 891; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996). See also Ann Florini, *The Evolution of International Norms*, 40 INT’L STUD. Q. 363, 364 (1996).

32. Finnemore & Sikkink, *supra* note 28, at 895.

33. Sunstein, *supra* note 31, at 916.

34. *Id.*

In the course of this “ought-to-is” shift, norms embed “in the rules, habits of thought, ‘best practice,’ and standard operating procedures of a community, an institution, organization, profession, or group.”³⁵ They are no longer personal beliefs subject to challenge, but strictures baked into our customs, laws, political systems, informal institutions, formal institutions, and international relations.³⁶

B. *Subjective Norms Embedded in “Objective” Criteria*

While not every type of criterion proffered by interest-based theorists contains embedded norms, many likely do. In an interest-based framework, criteria can include customs, laws, market valuations, precedents, scientific findings, professional standards, expert opinions, efficiency costs, moral standards, or traditions.³⁷ Notably, this list is remarkably similar to the sociopolitical entities that house embedded norms.³⁸ If one concedes that, as norms scholars James March and Johan Olsen suggest, norms embed in the “rules, habits of thought, ‘best practices,’ and standard operating procedures of a community, an institution, organization, profession, or group,”³⁹ then it is wholly unremarkable to presume that norms embed in so-called objective criteria. A custom operates much like a “standard operating procedure.” Laws are, by definition, rules. Traditions are “habits of thought” translated into action. Professional standards are, no doubt, “best practices” for an industry.

This distinction between norms and objective criteria further collapses when examining how these criteria are defined in theory and used in practice. In fact, in an interest-based framework, determining whether objective criteria are legitimate amounts to a tallying of individual beliefs. According to interest-based theorists, objective criteria must be: (1) independent of the negotiators’ will, (2) practical, and (3) legitimate.⁴⁰ In particular, the legitimacy prong merits examination. According to traditional interest-based theorists, criteria are legitimate so long as they are widely accepted by a “great many people.”⁴¹ Resultantly, a criterion’s supposed objectivity in large part hinges

35. James G. March & Johan P. Olsen, *The Logic of Appropriateness*, in *THE OXFORD HANDBOOK OF POLITICAL SCIENCE* 5 (Robert E. Goodin ed., 2011).

36. *Id.*

37. FISHER ET AL., *supra* note 2, at 86.

38. March & Olsen, *supra* note 35, at 5.

39. *Id.*

40. FISHER ET AL., *supra* note 2, at 86.

41. *Id.* at 91.

upon whether “a great many” people are of the opinion that the criterion is acceptable. There is little clarity on how many people constitute “a great many” in the interest-based frame. Still, whether accepted by five people or five hundred, a belief does not morph into fact because some number of people believe it to be so.

As noted above, the defining feature of norms is “oughtness”—that is, they tell people how they ought to act in a certain situation.⁴² In an interest-based frame, objective criteria play a similar role. Criteria are intended to shift “the question from what the parties are *willing* to do to what they *should do* based on independent standards [i.e., objective criteria] and principles of fairness.”⁴³ Criteria, just as norms, are meant to be directive. There is, however, an important distinction: Norms necessarily concede their inherent non-objectivity, while criteria, once explicitly labeled objective, are implicitly deemed fair.

By definition, a norm does not become normative until it is adopted by a “critical mass” of people.⁴⁴ Norms can otherwise be understood as shared beliefs that ultimately matured into widely-followed directives.⁴⁵ Recognizing this allows one to, at a minimum, question what biases, personal opinions, and preferences have shaped a particular norm. Under the traditional interest-based framework, there is no such latitude for questioning what undergirds criteria. Despite the norms likely embedded in them, the traditional conception of objective criteria leaves no room for recognition of their subjective constitution.

The suggestion that customs, laws, professional standards, morals, and markets cannot exist without collective buy-in is generally unremarkable. Traditions cannot sustain unless people uphold them. Laws are hollow edicts unless people believe them to be valid and enforceable. Morals are merely hortatory unless people seek to abide by them. What is notable is the discursive push to label these types of criteria as objective. At present, the interest-based framework’s label of objectivity obscures the subjective nature of objective criteria and, in so doing, perpetuates a failure to interrogate the norms embedded in criteria.

Why is recognizing that norms embed in so-called objective criteria so important? Because once embedded, norms are generally taken

42. Sunstein, *supra* note 31, at 914.

43. Patton, *supra* note 15, at 293.

44. Finnemore & Sikkink, *supra* note 28, at 895.

45. *Id.*

as fact.⁴⁶ And yet, there is no adjudicatory process to determine whether a norm is upright, just, or fair before it achieves fact-like status. Norms often exist simply because a group of people, often those poised to benefit from the nascent norm in question, believe it to be appropriate and subsequently convince or coerce others into compliance.⁴⁷ Indeed, many of the norms that have come to be treated as facts in our daily lives stem from morally abhorrent beliefs. The belief in “whiteness” and white supremacy became an entire socio-legal structure of laws, customs, traditions, and institutions that upheld slavery and upholds America’s racial caste system today. The belief that women ought to be subordinate to cis-gendered men helped cement a web of informal customs and formal institutions that comprise patriarchy. The belief that European nations were destined to have dominion over persons of color legitimated an extractive colonial project that stole an inordinate amount of material and human resources from the Global South.

C. *Norms, Criteria, and Distribution*

Norms are “embedded in resources and the principles of their allocation”⁴⁸ and often determine distribution on a systemic scale. Throughout human history, beliefs in racial, gender, class, and cultural superiority have often come to dictate how resources (e.g., money, land, power, access, and recognition) are distributed. Paula Rothenberg, educator and social justice activist, notes:

The construction of difference as deviance or deficiency underlies the systems of oppression that *determine how power, privilege, wealth, and opportunity are distributed*. We are surrounded by differences every day, but our society places a value on only some of them. By valuing the characteristics and lifestyles of certain individuals or groups and devaluing those of others, society constructs some of its members as “other.” These “others” are understood to be less deserving, less intelligent, even less human. *Once this happens, it is possible to distribute wealth, opportunity, and justice unequally without appearing to be unfair.*⁴⁹

46. March & Olsen, *supra* note 35, at 5 (“A socially valid rule creates an abstraction that applies to a number of concrete situations. Most actors, most of the time, then, take the rule as a ‘fact.’ There is no felt need to ‘go behind it’ and explain or justify action and discuss its likely consequences.”).

47. See Finnemore & Sikkink, *supra* note 28, at 892.

48. March & Olsen, *supra* note 35, at 948.

49. PAULA S. ROTHENBERG WITH SONIYA MUNSHI, RACE, CLASS, AND GENDER IN THE UNITED STATES 99 (10th ed. 2016) (emphasis added).

There are, of course, patterns to this resource distribution. Certain classes of people have continually benefited from the prevailing norms and the attendant customs, traditions, laws, and institutions. Rothenberg notes that in this normative framework, “being white, male, cisgender, European, heterosexual, and prosperous confers the highest forms of status and privilege” and all others are considered “less worthy” and less deserving of resources.⁵⁰ What is particularly pernicious is that once norms have embedded, they are propagated without question. The result is a series of seemingly uncontested norms embedded in our language, laws, customs, and traditions which can come to dictate a person’s presumed social, political, and economic desert.⁵¹

If norms are not neutral, neither are the criteria in which they embed. This is a fundamental problem for an interest-based framework that relies upon these criteria to help answer the question of distribution in a way that is principled and fair.⁵² Once the veil of objectivity is pierced, the presumption of fairness is called into question. One can no longer assume that dutiful reliance on tradition, custom, or legal precedent to answer the question of distribution will lead to a fair outcome.

It was not long ago that defining marriage as only between a cis-gendered man and a cis-gendered woman was “tradition.” “Custom,” in the not so distant past, dictated that women were to be subservient to men in both the public and private spheres. And, in recent history, *Dred Scott v. Sandford*—the United States Supreme Court decision which deemed black Americans a “subordinate and inferior class of beings”—was authoritative precedent in American law.⁵³ If, in the course of a negotiation, one such tradition, custom, or precedent was employed as an “objective criterion,” could a negotiator presume that the outcome would be fair? Certainly not. Going forward, practitioners must understand that the standards interest-based negotiators invoke to answer the question of distribution “may not themselves be just.”⁵⁴ Objective criteria *often* host embedded norms which, upon examination under a Rawlsian orientation, reveal themselves to be unfair.

50. *Id.*

51. See March & Olsen, *supra* note 35, at 5.

52. Patton, *supra* note 15, at 293.

53. 60 U.S. (19 How.) 393, 404–05 (1857).

54. Wheeler, *supra* note 4, at xlvi.

IV. EMBEDDING FAIRNESS: RE-IMAGINING INTEREST-BASED NEGOTIATION

Acknowledging that norms may embed in criteria begets a two-fold conclusion: First, many of the criteria previously presumed to be objective and fair cannot be relied upon to guarantee a fair distributive outcome. Second, negotiators should question whether unfair norms similarly taint other elements of an interest-based negotiation. Might embedded norms also influence negotiators' relationships, communications, and efforts at option generation? One cannot assume that fairness—whether in distributional outcomes or in the processes used to reach these outcomes—can be passively achieved.

Given that fairness is a core remit of interest-based negotiation, the approach should also provide negotiators with the tools necessary to begin identifying and potentially redressing unfair norms at play in a negotiation. The current framework provides no such tools. While recognizing this deficit in the current framework is not a wholesale repudiation of interest-based negotiation, addressing the deficit does require a re-imagining of the framework. In this re-imagining, fairness cannot be presumed. Instead, negotiators must assume the omnipresence of embedded norms, question the fairness of said norms, and be prepared to proffer fairer alternatives.

In seeking a way to actualize this reimagining, transformative, distributive, and procedural justice discourses and principles present fruitful avenues. Together, they can assist interest-based negotiators to (1) assess what unfair norms, explicit or tacit, are contouring a negotiation and (2) consider how fairness dictates these norms be re-negotiated. The remainder of this article will explore how interest-based negotiators can turn to transformative justice practices in order to identify unfair norms and procedural/distributive justice principles in order to re-negotiate them.

A. *Transformative Justice: Identifying the Lineage of Harm*

Transformative justice is distinctive as an approach for addressing harm in that it offers a “liberatory,” as opposed to punitive, response to violence.⁵⁵ Central to this liberatory approach is the

55. GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE COMMUNITY VIOLENCE 1 (2007), http://www.usprisonculture.com/blog/wp-content/uploads/2012/03/G5_Toward_Transformative_Justice.pdf [<https://perma.cc/P3BC-J743>]. See also Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORM HARM, <https://transformharm.org/transformative-justice-a-brief-description> [<https://perma.cc/B2JM->

pursuit of both “individual justice and collective liberation.”⁵⁶ In a transformative justice paradigm, when someone harms another, the query is not “how do we punish the offender?” Instead, it is, “what are the needs of the person who has been harmed *and* what social, political, and economic structures led to this harm?” The form this practice takes depends on the nature of the harm and the context in which the harm occurred. Still, be it an intimate circle process between impacted parties or a nation-wide reconciliation effort, the goal remains the same: account for the needs of the harmed and transform the “contexts that produced or shaped” the harm.⁵⁷

Transformative justice’s dual focus speaks to a central thesis: The interpersonal cannot be decoupled from the structural. Transformative justice does not interpret violence as a singular act but as part of a lineage of harm. Accounting for this lineage means identifying the nodal points between interpersonal harm and structural violence.⁵⁸ Structural violence is the tapestry of “isms” and phobias that legitimize systemic inequity.⁵⁹ Medical anthropologist Paul Farmer succinctly notes:

[Structural violence is the] social structures—economic, political, legal, religious, and cultural—that stop individuals, groups, and societies from reaching their full potential Disparate

R4DD] (last visited Feb. 8, 2020); Gaurav Jashnani, RJ Maccani & Alan Greig, *Challenging Men, Changing Communities: Reflections on Male Supremacy and Transformative Justice*, TRANSFORM HARM, <https://transformharm.org/challenging-men-changing-communities-reflections-on-male-supremacy-and-transformative-justice> [<https://perma.cc/2R2K-XDBL>] (last visited Feb 8, 2020); Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73 (2002); Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice*, 8 INT’L J. TRANSITIONAL JUST. 339 (2014).

56. GENERATION FIVE, *supra* note 55, at 5.

57. Mariame Kaba & Erica R. Meiners, *Arresting the Carceral State*, JACOBIN (Feb. 24, 2014), <https://www.jacobinmag.com/2014/02/arresting-the-carceral-state> [<https://perma.cc/L386-ZTQR>].

58. Adrienne Maree Brown, *What Is/Isn’t Transformative Justice?*, ADRIENNE MAREE BROWN (July 9, 2015), <http://adriennemareebrown.net/2015/07/09/what-isisnt-transformative-justice> [<https://perma.cc/L386-ZTQR>]. See also Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nassar Was Not ‘Transformative Justice.’ Here’s Why*, THE APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why> [<https://perma.cc/EV2Q-P8WU>] (noting that harm “originates from situations dominated by stress, scarcity, and oppression” and that ending violence requires that we collectively “make sure that people have support to get the things they need”).

59. See Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167 (1969).

access to resources, political power, education, health care, and legal standing are just a few examples.⁶⁰

The veiled nature of this violence makes it particularly insidious. Farmer later notes:

Structural violence is often *embedded* in longstanding “ubiquitous social structures, normalized by stable institutions and regular experience.” Because they seem so ordinary in our ways of understanding the world, they appear almost invisible.⁶¹

Herein lies the nexus between interest-based negotiation and transformative justice: recognizing the violence embedded in seemingly ordinary social structures is akin to finding the unfair norms embedded in purportedly objective criteria. In fact, structural violence is often “represented through cultural norms.”⁶² Critically, structural violence is but another name for the myriad social structures that legitimize and perpetuate inequity. One such structure is the norms that “determine how power, privilege, wealth, and opportunity are distributed.”⁶³ The two are symbiotic. And, as such, efforts dedicated to redressing the violence embedded in our social structures can be helpful in identifying similarly embedded norms.⁶⁴

In order to identify and redress structural violence, transformative justice practitioners adopt an orientation that is both reparative and progressive—reparative in that it reflects on the harm that occurred and the context which midwifed this harm and progressive in that it demands atonement be interpersonal and systemic. This orientation can be distilled into three guiding directives: (1) center the needs of the person who has been harmed, (2) identify the “broader context” (e.g., the economic, political, and social infrastructure) that led to this harm, and (3) consider how this context should be transformed or “changed so that this harm is less likely to happen again.”⁶⁵ Together, these demands require that practitioners find and address the lineage of harm.

60. Paul E. Farmer et al., *Structural Violence and Clinical Medicine*, 3 PLOS MEDICINE 1686, 1686 (2006).

61. *Id.* (quoting JAMES GILLIGAN, *VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC* 306 (1997)).

62. Stephanie Rose Montesanti & Wilfreda E. Thurston, *Mapping the Role of Structural and Interpersonal Violence in the Lives of Women: Implications for Public Health Interventions and Policy*, 15 BMC WOMEN'S HEALTH 1, 8 (2015).

63. ROTHENBERG WITH MUNSHI, *supra* note 49, at 99.

64. *See generally* Farmer et al., *supra* note 60.

65. Hayes & Kaba, *supra* note 58.

To translate this orientation into action, these directives can be converted into a set of guiding questions.⁶⁶ To ascertain the needs of the harmed, one must first ask, “who has been harmed?” In order to identify the broader context, one must question “what components of the existing economic, political, and social infrastructure caused this harm?” To transform this context, one must consider “what component of the existing economic, political, and social infrastructure must be transformed to ensure that this type of harm does not occur again?” These questions will not guarantee a transformative process, nor are they all encompassing, but they are a place to begin.

In the context of interest-based negotiation, these questions can provide a useful frame for analyzing embedded norms. Negotiators eager to pinpoint embedded norms can use the skeletal questions proffered above to craft multiple lines of inquiry (see chart below), which can guide potential norm negotiations. The theory being that if these questions help transformative justice practitioners root out structural violence, they can also help negotiators unearth embedded norms. For instance, the question “who was harmed?” might lead a negotiator to consider which stakeholders were given an unfair share of resources. An assessment of the broader sociopolitical context might raise the question of what unfair norms are shaping a negotiator’s procedural and distributive choices. A call to transform unfair structures could lead negotiators to ask what procedural and distributive norms must be re-negotiated in the interest of fairness.

66. See generally HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (2012). Zehr, in the context of restorative justice practices, recommends that practitioners center three questions: Who has been harmed? What do they need? And who is responsible?

TABLE 1: QUERIES FOR FAIRNESS-ORIENTED NEGOTIATORS

<u>Transformative Justice Principle</u>	<u>Threshold Inquiry</u>	<u>Queries for a Fairness-Oriented Negotiator</u>
<p>Center the needs, concerns, and restoration of the person or persons who have been harmed.</p>	<p>Who has been harmed?</p>	<p>What person, group, or community will be impacted by the outcome but has been excluded from, or underrepresented in, the negotiation process?</p> <p>What person, group, or community has insufficient decision-making power in light of how they may be impacted by the negotiated agreement?</p>
<p>Identify the broader context—the economic, political, and social infrastructure—that caused the harm.</p>	<p>What components of the existing economic, political, and social infrastructure caused this harm?</p>	<p>In general, what components of the existing economic, political, and social infrastructure are shaping this negotiation?</p> <p>What norms, embedded or explicit, are being used to answer the question of distribution?</p> <p>What norms, embedded or explicit, are being used to shape the negotiation process?</p>
<p>Identify how this context should be changed so that this harm is less likely to happen again.</p>	<p>What components of the existing economic, political, and social infrastructure must be transformed to ensure that this type of harm does not occur again?</p>	<p>In general, what components of the economic, political, and social infrastructure does this negotiation legitimate/ delegitimate or uphold/dismantle?</p> <p>What distributive norms might be re-negotiated to facilitate or help ensure a fair distribution?</p> <p>What procedural norm(s) might be re-negotiated to facilitate or help ensure a fair process?</p> <p>What alternative norm(s) might facilitate or help ensure fairness in outcome or process?</p>

B. *Justice and Negotiation: Hinting at the Right Answers*

If transformative justice proffers a set of potential questions, justice and negotiation scholarship provides possible answers. The lines of inquiry outlined above point to a central query: does the interest-based framework's promise of fairness require a re-negotiation of certain procedural and distributive norms? If an unfair norm is to be re-negotiated, there must be a fairer alternative to supplant it. Otherwise, principled negotiation cannot proceed. This need raises the following question: assuming fairer procedural and distributive norms do exist, where might negotiators look for them? Here, the procedural and distributive justice principles presented by the justice and negotiation discourse are particularly probative.⁶⁷

Central to scholarship on justice and negotiation is a recognition that “fairness concerns extend from the negotiation process to the outcome and into the implementation stage.”⁶⁸ A just process requires negotiators be hyper-intentional when deciding who is present, what is on the agenda, and how decisions become final.⁶⁹ A just distribution requires a clear-eyed deliberation as to how the “benefits and burdens” of a final agreement are allocated.⁷⁰ Lynn Wagner and Daniel Druckman note:

[N]egotiation analyses need to take justice and related moral/ethical norms into account, rather than focus primarily on interests and power. A full understanding of group decision processes will be incomplete if justice and fairness issues are not considered alongside issues such as power distributions and alternatives to an agreement.⁷¹

67. See, e.g., Karen S. Cook & Karen S. Hegtvedt, *Distributive Justice, Equity, and Equality*, 9 ANN. REV. SOCIO. 217 (1983); John M. Darley & Thane S. Pittman, *The Psychology of Compensatory and Retributive Justice*, 7 PERSONALITY & SOC. PSYCH. REV. 324 (2003); Ethan B. Kapstein, *Fairness Considerations in World Politics: Lessons from International Trade Negotiations*, 123 POL. SCI. Q. 229 (2008); E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (2013); Lynn Wagner & Daniel Druckman, *The Role of Justice in Historical Negotiations*, 5 NEGOT. & CONFLICT MGMT. RSCH. 49 (2012); Daniel Druckman & Lynn Wagner, *Justice and Fairness in Negotiation*, 26 GRP. DECISION & NEGOT. 9 (2016); Lynn Wagner & Daniel Druckman, *Drivers of Durable Peace: The Role of Justice in Negotiating Civil War Termination*, 26 GRP. DECISION & NEGOT. 45 (2017) [hereinafter Wagner & Druckman, *Drivers of Durable Peace*]; Cecilia Albin & Daniel Druckman, *The Role of Justice in Negotiation*, in HANDBOOK OF GROUP DECISION AND NEGOTIATION 109 (D.M. Kilgour & C. Eden eds., 2010).

68. Druckman & Wagner, *supra* note 67, at 9.

69. See Cecilia Albin & Daniel Druckman, *Equality Matters: Negotiating an End to Civil Wars*, 56 J. CONFLICT RESOL. 155, 156 (2012).

70. *Id.*

71. Druckman & Wagner, *supra* note 67, at 16.

Accordingly, this scholarship has sought to isolate the components of procedural and distributive justice by distilling each into four principles. In the case of distributive justice, these principles are equality, proportionality, compensatory justice, and need.⁷² The principles of procedural justice are transparency, fair representation, fair treatment and fair play, and voluntary agreement.⁷³ Justice and negotiation scholars posit that when these principles guide procedural decisions and distributive outcomes, agreements are more just, durable, and stable.⁷⁴

According to Wagner and Druckman, equality in a distributive outcome is marked by an “equal distribution of resources or burdens.”⁷⁵ A proportional distribution would allocate resources “relative to negotiators’ inputs.”⁷⁶ Compensatory distribution would indemnify “one or more parties for undue costs or burdens.”⁷⁷ Distribution based on need would allocate resources according to “the strength of one or more party’s needs.”⁷⁸ Turning to procedural justice, procedural transparency indicates “an openness and accessibility to information related to the decision-making process and its outcomes.”⁷⁹ Fair representation requires that “relevant stakeholders have a voice in the negotiation process.”⁸⁰ Fair treatment and fair play demand that once parties are at the table, they “have the opportunity to influence the process.”⁸¹ Finally, a voluntary agreement is one that is “freely accepted” by all parties.⁸²

This list of justice principles is powerful not because it is exhaustive but because it is prescriptive. Should negotiators endeavor to renegotiate unfair norms, these principles provide them with a menu of fairer alternatives from which to choose. This menu, like the list of questions stemming from transformative justice discourse, is an entry point for negotiators seeking a fairer process and distribution.⁸³

72. Wagner & Druckman, *Drivers of Durable Peace*, *supra* note 67, at 55.

73. *Id.*

74. *See* Druckman & Wagner, *supra* note 67, at 16.

75. Wagner & Druckman, *Drivers of Durable Peace*, *supra* note 67, at 55.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Note that this menu is not proffered as a panacea. It must be employed with intentionality and must not limit the creativity of fairness-oriented negotiators. There is a risk that such a menu of principles could be co-opted, improperly applied, and used to further legitimate processes and outcomes which would be considered unfair under a faithful application of justice principles.

C. *Re-imagining Fairness in Interest-Based Negotiation*

How then, in practice, would an interest-based negotiator marry the queries provided by transformative justice with the principles articulated by justice and negotiation scholars? While identifying the final contours of a fully modified framework is beyond the scope of this article, such a modification would invariably require a reconceptualization of the seven elements. Negotiators would employ justice-oriented queries to identify unfair norms present in the execution of a particular element. If such norms are found, negotiators would look to procedural and distributive justice principles to determine what a fairer process or distribution would entail. This process can, and should, be imagined as a negotiation in and of itself in which the traditional negotiation around process (how the negotiation will be conducted) and distribution (who will get how much of what) is preceded by an explicit (re-)negotiation of formerly implicit norms.

The remainder of this article will explore this re-imagining. A foundational assumption of the existing framework is that so-called objective criteria are indeed objective and can therefore be relied upon to fairly answer the question of distribution. This article squarely challenges that assumption and as such, much of its exploration will be dedicated to the element of criteria. However, the framework's promise of fairness is notably not limited to producing fair distributive outcomes based on objective criteria. Therefore, the following also touches on how an interest-based negotiator might re-orient the remaining six elements toward fairness.

i. *Criteria and the Question of Distribution*

As discussed above, the recognition that embedded norms muddy the objectivity of so-called objective criteria casts doubt on the guarantee that even the well-intentioned use of objective criteria will necessarily lead to distributive fairness. In order to keep interest-based negotiation's promise of fairness, negotiators must therefore identify embedded norms and, when necessary, re-negotiate them. In their efforts to unearth embedded norms, negotiators can begin with justice-oriented queries.

Instead of accepting that a given criterion will lead to a fair distribution, a negotiator might ask:

- When using a proposed criterion, what person, group, or community might receive/has historically received an unfair allocation of resources?

- What norms, implicit or explicit, are being used/have been used to answer the question of distribution? Are these norms fair?
- What distributive norms should be re-negotiated to facilitate a fair distribution?
- What alternative norms might ensure a more equitable outcome?

At the core of this inquiry is a presumption not of objectivity, but inequity. This presumption is key. Presupposing inequity, instead of even-handed objectivity, puts the interest-based negotiator on alert. An increased alertness subsequently increases the likelihood that a negotiator will identify unfair embedded norms that might otherwise go unquestioned.

Once unfair norms have been identified, they can be re-negotiated. A fairness-oriented negotiator should then consider alternative norms to create a more equitable outcome. The distributive justice principles—equality, proportionality, compensatory justice, and need—proffer potential alternatives. In a re-imagined framework, an interest-based negotiator would always endeavor to assess the context of a negotiation and determine the fairest distributive norm available. The quest is not for criteria that are “objective” but for distributive norms that are fair.

For instance, in certain salary negotiations a fairness-oriented negotiator might challenge the use of salary history as criteria. Salary history is often interpreted as an indication of the value of an individual’s work product, efficacy, skill, or merit. However, this purportedly objective precedent often reflects a myriad of patriarchal and racist norms. In the context of patriarchy and white supremacy, the labor of women of color, white women, and men of color is often deemed less valuable than that of cis-gendered white men.⁸⁴ The result? A massive gender, race, and ethnicity pay gap.⁸⁵ Salary history does not come to be in a vacuum; it is not created objectively. Instead, it is a direct reflection of certain persons having their work undervalued. As an entry point, a negotiator might ask themselves, “if I use salary history as a criterion for pay, would a person, group, or community receive an unfair allocation of resources?” This inquiry—even if negotiators have not determined *ex ante* what distribution of resources would be fair—invites the negotiators to consider gender and racial wage disparities and note the subjective nature of salary history.

84. INST. FOR WOMEN’S POL’Y RSCH., *THE GENDER WAGE GAP: 2017* (2018), https://iwpr.org/wp-content/uploads/2020/08/C464_Gender-Wage-Gap-2.pdf [<https://perma.cc/G86T-4P73>].

85. *Id.*

If reliance on certain precedents has been shown to exacerbate inequality, a fairer distributive norm might be equality. The equality principle calls for an equal distribution of the benefits and burdens of a negotiated agreement. In the context of a salary negotiation, a negotiator might ask, “all other factors being equal, what is the average pay for cis-gendered white men in this position?” Using this salary range to guide distributive decisions could lessen the effect of patriarchy and white supremacy. The resulting negotiated agreement would likely be fairer than one based on the precedent of an individual’s specific salary history.⁸⁶

Similarly, in a negotiation over housework it might be imprudent to rely on tradition as criteria. In a two-parent household with a cis-gendered man and a cis-gendered woman, traditional divisions of labor are embedded with patriarchal norms. One such norm is that women are subservient to men. Another is that women are expected to do the lion’s share of domestic work—a trend which has continued even as women’s work outside of the home increases.⁸⁷ Negotiators seeking a fair distribution might ask, “would using tradition as criteria lead to an unfair allocation of domestic tasks?” This query necessarily compels negotiators to explore the patriarchal norms that inform the traditional allocation of domestic work. Should a negotiator determine that tradition cannot dictate distribution, they might consider adopting a compensatory norm. Compensatory distribution indemnifies parties for bearing undue costs or burdens. Reliance on such a norm could lead to a distribution of domestic labor that accounts for the “triple shifts”—labor in the home, labor outside of the home, and emotional labor for the family unit—many women already work.⁸⁸

Or consider a negotiation between a rich nation and a poor country seeking debt relief. It may seem logical to rely on public international law to dictate how and on what terms money is distributed.

86. In this example, like all others included in this article, fairness could dictate other distributional and procedural outcomes. Here, for instance, fairness-oriented negotiators might note that patriarchal and white supremacy norms have resulted in years of unpaid/underpaid labor. It could be argued that society is, for lack of a better term, indebted to women of color. Perhaps, then, a compensatory distributive norm is more appropriate.

87. Mylène Lachance-Grzela & Geneviève Bouchard, *Why Do Women Do the Lion’s Share of Housework? A Decade of Research*, 63 *SEX ROLES* 767, 767 (2010).

88. Jean Duncombe & Dennis Marsden, “*Workaholics*” and “*Whingeing Women*”: *Theorising Intimacy and Emotion Work—The Last Frontier of Gender Inequality?*, 43 *SOCIO. REV.* 150, 165 (1995).

However, embedded in this prevailing precedent is a web of neocolonial and neoliberal norms. Notably, it has become customary for a nation with more money and military might to extract resources from the less powerful. And, it is often normative for debt to be interpreted as a moral wrong caused by profligate spending.⁸⁹ It is often presumed, therefore, that debtors are to be punished as opposed to forgiven.

A search for embedded norms could compel negotiators to consider “the colonising force embedded within the notion of *sovereign debt*.”⁹⁰ A force, or norm, which has legitimated harmful austerity measures and draconian debt collection.⁹¹ In this context, perhaps a fairer distributive norm would be one which allocates the benefits and burdens of an agreement based on the strength of a party’s needs. In assessing whether it is fair to ask a nation to bear the burden of austerity in exchange for monetary relief, a negotiator might consider a country’s macroeconomic conditions, the need of its citizenry, and inter-country inequality. A needs-based distribution might result in unconditioned aid.

The particular fairness norms proposed to replace objective criteria in the examples above are not meant to be dispositive. The goal, instead, is to examine how an interest-based negotiator might shift from assessing the “legitimacy” of a criterion, defined as whether the criterion is widely accepted by a “great many people,”⁹² to assessing its fairness. As Carrie Menkel-Meadow notes:

Negotiators will seldom agree a priori on what their own standards of fairness are, but merely raising the issue of whether we owe fellow negotiators some consideration of distributional fairness or justice in a negotiation is to raise ethical consciousness . . .⁹³

This proposed re-imagining, at a minimum, compels negotiators to begin answering the question of distribution by first considering what fairness requires. Does fairness require distribution based on need because certain groups—often women of color, white women, men of color, LGBTQIA+ individuals, working people, and people with disabilities—have been historically denied resources? When the

89. Kenneth Dyson, *The Morality of Debt*, FOREIGN AFFS. (May 3, 2015), <https://www.foreignaffairs.com/articles/2015-05-03/morality-debt> [<https://perma.cc/Q5KB-KDYD>].

90. Maria Giannacopoulos, *Sovereign Debts: Global Colonialism, Austerity and Neo-Liberal Assimilation*, 19 LAW TEXT CULTURE 166, 167 (2015).

91. *Id.* at 166–93.

92. FISHER ET AL., *supra* note 2, at 91.

93. WHAT’S FAIR: ETHICS FOR NEGOTIATORS, *supra* note 5, at 367.

labor and lives of a group of people have been consistently under- or un-valued, does fairness require proportional distribution? Does fairness necessitate a compensatory norm to ensure that those who have been asked to shoulder a greater emotional, physical, or monetary burden are rightly compensated? Or, perhaps, does fairness call for a re-examination of what equal distribution truly entails? In outlining these questions and considering possible answers, negotiators can begin to “raise [the] ethical consciousness” of the interest-based framework.⁹⁴

ii. *Relationship and Communication*

The element of criteria, because of how it is defined and how it is employed, seems to lend itself to this sort of re-imagining. As noted above, it is easy to trace norms embedded in criteria because of the explicit overlap in how both are defined. Often, the same entities in which norms are embedded (e.g., laws, traditions, and professional standards) are proffered by interest-based theorists as potential criteria. And, because the current framework explicitly instructs negotiators to answer the question of distribution with criteria, applying distributive justice principles within the framework is simple, (albeit not always easy): instead of blindly relying on criteria to answer the question of distribution, look to the presumably fairer principles of distributive justice.

How this re-imagining applies to the remaining six elements is at once less obvious and arguably more intuitive. Baked into the seven elements is a certain intentionality around process and distribution. Interest-based negotiators, by definition, stretch their practice beyond haggling and consider relational dynamics, communication, and commitment mechanisms. It is fair to say, then, that the framework is predisposed to a certain deliberativeness around process and distribution. How this predisposition manifests beyond the element of criteria merits exploration.

In the case of relationships and communication, the justice-oriented queries push negotiators to assess how both elements are influenced by the surrounding economic, political, and social infrastructure. In a traditional interest-based frame, the analysis around what comprises a good relationship and effective communication is relatively simple. Traditionally defined, a good relationship is “good enough to produce an acceptable agreement,”⁹⁵ while effective

94. *Id.*

95. FISHER ET AL., *supra* note 2, at 22.

communication balances active listening, intentional inquiry, and clear assertion.⁹⁶ A re-imagining of these elements requires a recognition that the nature of negotiators' relationships and communication is influenced as much by broader sociopolitical forces as by interpersonal chemistry and communication. Again, the structural is intimately linked to the interpersonal.

Therefore, when considering relationships and communication in a negotiation, a fairness-oriented negotiator might ask, "what components of the existing economic, political, and social infrastructure are shaping this negotiation?" and "what norms, embedded or explicit, are present?" Such questions invite negotiators to assess their relative positions in the surrounding social, economic, and political structures. Asking these questions pushes negotiators to consider how the structural realities of racism, classism, heteronormativity, and/or sexism shape their relationships and communication with other parties. For those interested in procedural and distributive fairness, this realization is key to promoting behavioral modification.

For instance, after posing these questions, a negotiator may find that as a result of privilege derived from class, gender, sexual orientation, or race, they have had a disproportionate influence over procedural choices and distributive outcomes. Consider a cis-gendered man, who because of patriarchal norms has been socialized to believe that he should dominate interactions, negotiating with a cis-gendered woman who has been socialized to believe the exact opposite.⁹⁷ Perhaps, upon reflection, this cis-gendered man finds he spoke the majority of the time in a recent negotiation. Perhaps he realizes that as a result, his proposed agenda items were more readily adopted. And perhaps as a result, the final agreement was ultimately more reflective of his interests than hers.

In this instance, a procedural principle of "fair treatment and fair play" might help address inequities. This principle is meant to ensure that all negotiators have meaningful influence over process—influence that extends "beyond being invited to the table."⁹⁸ Adopting this principle might lead negotiators to agree on explicit

96. See Patton, *supra* note 15, at 284; see also FISHER ET AL., *supra* note 2, at 35–41.

97. Peter Kollock, Philip Blumstein & Pepper Schwartz, *Sex and Power in Interaction: Conversational Privileges and Duties*, 50 AM. SOCIO. REV. 34 (1985) (finding that, in conversation, "[m]en play a dominant role, controlling the interaction and frequently violating rules of polite turn taking. Women are more submissive, seeking permission to speak, and taking more responsibility for encouraging and supporting other speakers.").

98. Wagner & Druckman, *Drivers of Durable Peace*, *supra* note 67, at 55.

procedural norms that fairly allocate speaking time, prohibit interruptions, and require unequivocal consent before distributive decisions are finalized. Again, the hope is that these queries serve as a fruitful entry point. In sum, negotiators must recognize how structural inequity colors their interpersonal relations in order to redress its effects.

iii. *Interests and Options*

A central tenet of the interest-based framework is the shift from positions to interests. Interests are the “fears, concerns, desires, and motivations” that underlie a stated position.⁹⁹ In the traditional interest-based framework, negotiators are directed to share their interests, identify the interests of the other party, and then craft and consider different options which meet those interests. A re-imagining of interests in line with the above would require negotiators to also consider the interpersonal and systemic ramifications of meeting particular interests, as the current framework does not account for a simple truth: parties can have interests that are unfair, unjust, or outright nefarious. Consequently, selecting an option because it meets these interests might exacerbate inequity on an interpersonal and/or systemic level.

Justice-oriented questions can be used to assess the fairness implications of meeting a particular interest via a particular option. A negotiator might consider: “if this interest is met, would a person or group receive an unfair share of the available resources?”, “did a party have sufficient decision-making authority in light of how a particular option will impact them?”, “what parties that have a significant interest in what is being negotiated are absent from the table?”, or, “what community would be harmed if a particular interest were left unmet?” Such questions force negotiators to assess the interpersonal and structural implications of advancing (or not advancing) certain interests and pursuing (or not pursuing) certain options.

After identifying these implications, fairness-oriented negotiators can adopt procedural or distributive remedies. For instance, a negotiator may realize that a party’s interest in being meaningfully heard can be fairly met by ensuring all impacted parties are rightly involved in the negotiating process (i.e., able to voice dissent, advocate for their own interests, and have decision-making power proportionate to how they will be impacted). Alternatively, a negotiator may realize that meeting a specific interest would, in fact, unavoidably

99. URY, *supra* note 16, at 5.

create an unfair outcome. In this case, a fairness-oriented negotiator should forgo this interest. For instance, after recognizing another party has greater needs, a negotiator might supplant an interest in attaining a disproportionately large share of resources, ignore a very real desire to exclude “irksome” stakeholders, and ultimately agree to an unequal distribution in another party’s favor.

Consider an ongoing land negotiation where, because of white supremacy, people indigenous to the land have historically been excluded from the bargaining table.¹⁰⁰ These indigenous people invariably have an interest in how this land is distributed. It is, after all, their home. Realizing that their absence from the table is (and was) supremely unjust, negotiators must consider new procedural and distributive norms. In this case, fairness might require a process governed by fair representation and fair treatment with a distribution determined by the compensatory norm. Fair representation would guarantee the indigenous peoples were present, fair treatment would ensure that their preferences were centered, and a compensatory distribution would indemnify them for historical injustices.

Further, certain parties to the negotiation who recognize that without white supremacy they would not even be part of this negotiation, would likely *not* pursue certain of their interests. For instance, in hopes of maintaining their dominion, they may in fact want an overwhelming share of the territory. Or, for fear of losing the land, they may want to completely exclude indigenous people from the negotiation. A party being asked to forgo privilege or power likely possesses a myriad of fears, concerns, desires, and motivations that are antithetical to fairness. A re-imagining of interests and options encourages negotiators to acknowledge this reality and modify the process of their negotiations and the norms they rely on accordingly.

iv. *Commitment and Alternatives*

The final step in an interest-based negotiation is determining whether to commit to the agreement on the table or pursue an alternative. The current framework suggests that negotiators should only commit to negotiated agreements that are better than their best alternative.¹⁰¹ A re-imagining of these two elements morphs this final decision point into a type of after-action review. Specifically, fairness-

100. Megan Kate Nelson, *Today’s Republicans Are Like Lincoln in Only One Way*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/opinion/abraham-lincoln-native-americans.html> [https://perma.cc/L3KB-4KUB].

101. FISHER ET AL., *supra* note 2, at 102.

oriented negotiators might use the questions provided by transformative justice to assess the procedural choices they made and the distributive outcomes they settled on. For instance, a negotiator might ask, “did the process ensure that all persons significantly impacted by the outcome were present in the negotiation?”, “did the process also ensure that these parties were meaningfully heard?”, or, “does the final agreement have a certain party taking on a disproportionate amount of benefit or burden?” This type of reflection might drive negotiators to re-negotiate based on principles of procedural and distributive justice. And, should a fairness-oriented negotiator find that their counterpart is unwilling to do so, they can pursue their best alternative.

V. CONCLUSION

Negotiation matters. Even if you are not sitting at the metaphorical table, there is likely someone, somewhere, negotiating something that will determine the contours of your life. A negotiation on carbon emissions can dictate the habitability of your planet. A treaty negotiation can decide the composition of your nation. An agreement negotiated by policymakers can determine the rights you are guaranteed and by extension, the rights of all persons that share your race, gender identity, class, ethnicity, nationality, or sexual orientation. Negotiation matters, and as such, we must seek to do it fairly.

This article, by design, leaves many questions unanswered. These queries seemingly center on the execution and efficacy of the proposed practice. For instance, engaging in this modified practice will require many negotiators to reckon with a web of intersectional privileges (based in race, class, gender, sexual orientation, title, etc.) and, for lack of a better term, forgo them. History suggests that such forbearance is often difficult, especially when scarce resources are at stake. This generates a series of questions. What are the personal, interpersonal, and structural barriers to engaging in such a practice? What personal, interpersonal, and structural tools might help negotiators overcome said barriers? Further, questions remain about the efficacy of the proposed modifications. In practice, will the questions proffered by transformative justice practices help negotiators identify embedded inequity? Can the procedural and distributive justice principles truly craft fairer processes and outcomes? We do not yet know. And that is fine. Success, in this moment, is forcing the questions, not cementing certain answers. The goal is to compel negotiators to ask: “what does true distributive and procedural fairness require?” “What

aspects of interest-based negotiation must be re-imagined?” Plainly, “how do we do better?”

In arguing that objective criteria are not actually objective, norms are never neutral, and the interpersonal cannot be decoupled from the structural, this piece seeks to plant a seed. There is power in unearthing norms that are embedded, often left unseen. When we adopt this posture of curiosity, we can more easily distinguish *what is* from what *ought to be*. Simply put, what “is” today is merely a product of what someone in the past thought “ought” to be. Accepting this, we can assess existing social institutions and consider how they might be re-negotiated. Indeed,

at this point, we have all of the information we need to create change; it isn’t a matter of facts. It’s a matter of longing, having the *will to imagine* and implement something else. We are living in the ancestral imagination of others, with their longing for safety and abundance, a longing that [often] didn’t include us, or included us as enemy, or fright or other.¹⁰²

We are living in the ancestral imagination of others. The suggestion feels at once radical and rudimentary. The social world that we live in and its attendant norms are constructs of those that came before us. The notion that someone created our present and someone else will create the future speaks to the ultimate negotiation: *whose imagining will dictate our future?* Let it be the imagining of those of us who have the will to imagine justice, to imagine equity, and to imagine fairness.

102. ADRIENNE M. BROWN, *EMERGENT STRATEGY: SHAPING CHANGE, CHANGING WORLDS*, at 21 (2017) (emphasis added).

