



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Law Review

Volume 10 | Issue 1

10-14-2022

Ethical Negotiation and Postcapitalist Politics: An Essay for Carrie

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Recommended Citation

Amy J. Cohen, *Ethical Negotiation and Postcapitalist Politics: An Essay for Carrie*, 10 Tex. A&M L. Rev. 135 (2022).

Available at: <https://doi.org/10.37419/LR.V10.I1.8>

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ETHICAL NEGOTIATION AND POSTCAPITALIST POLITICS: AN ESSAY FOR CARRIE

by: Amy J. Cohen*

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I. INTRODUCTION

In a 1983 article, *Legal Negotiation: A Study of Strategies in Search of a Theory*, Carrie Menkel-Meadow took stock of what was motivating a diverse range of scholars to want to reimagine negotiation theory.¹ She described these negotiation scholars as shaped by the exigencies of their own political moments.² Some were lawyers concerned about too much litigation of an unsatisfying quality.³ Many, however, were concerned more broadly about “the general level of hostility in the world,” even haunted by the possibility that nuclear weapons could destroy all of humanity.⁴ Negotiation scholars included “[e]conomists and game theorists . . . concerned that the earth’s limited resources be allocated efficiently and productively,” as well as “[e]thicists . . . concerned that those resources be divided fairly.”⁵ Carrie’s own pioneering work would soon establish that a few of these scholars—including those who cared about ethics—approached negotiation through feminist theory.

In 1984, in a pathbreaking and widely celebrated article, *Toward Another View of Legal Negotiation*, Carrie introduced what she called a problem-solving model of negotiation.⁶ She included a footnote

DOI: <https://doi.org/10.37419/LR.V10.I1.8>

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1. Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. BAR FOUND. RSCH. J. 905 (1983) (review essay).

2. *Id.* at 936.

3. *Id.*

4. *Id.*

5. *Id.*

6. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758 (1984) [hereinafter Menkel-Meadow, *Toward Another View*].

with an argument she foreshadowed in *Legal Negotiation* and that she would develop in subsequent years. Her position was that problem-solving negotiation should enact a feminist ethic of care.⁷ From this perspective, negotiation is not only a set of professional tools but a deeply ethical practice—a means of cultivating self and social relations differently.

In this celebration of Carrie's contributions to feminist theory, I suggest that Carrie's early work in negotiation created an opening for a radically caring and democratic practice of negotiation—one whose underlying feminist values of interdependence and connectedness implicitly and explicitly challenge capitalist logics of competition and accumulation. Speaking broadly, she told her readers that “[t]he goal, rooted in experience, [is] achieving a world without domination.”⁸ Echoing the feminist turn in critical legal studies, of which she was an important part, Carrie called for a world without patriarchal domination but also without domination produced through socioeconomic relations.⁹

Contextualizing this project, I will also suggest that negotiation theory, as it mainstreamed in legal and popular practice and notwithstanding Carrie's inspiration, has not yet embraced the radicalism she envisioned, but rather, in notable ways, has turned away from it. And yet the legacy of Carrie's visionary work as a set of possible prescriptions remains. As offering and as inspiration, Carrie's work awaits interpretations and reimaginings by people shaped by the exigencies of their own political moments. In the spirit of such reimaginings, undertaken in the present tense and as its own way of honoring her work, I read Carrie's scholarship together with the work of J.K. Gibson-Graham, the pen name of feminist Marxist economic geographers Katherine Gibson and Julie Graham, and their collaborators.¹⁰ By means of this reading, I endeavor to show how Carrie's work holds space today for a feminist praxis of negotiation—a praxis organized around the “ethical question of our interdependence with others and its implications”¹¹ rather than the coordinates of “growth” and “distribution” more familiar within the field of negotiation Carrie so vitally helped seek to change.

7. *Id.* at 763–64 n.28.

8. Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61, 84 (1988) [hereinafter Menkel-Meadow, *Feminist Legal Theory*].

9. *Id.* at 69, 73–74, 79, 82.

10. See generally J.K. GIBSON-GRAHAM, *A POSTCAPITALIST POLITICS* (2006).

11. ETHAN MILLER, *REIMAGINING LIVELIHOODS: LIFE BEYOND ECONOMY, SOCIETY, AND ENVIRONMENT* 138 (2019).

II. "A THEORY OF NEEDS"¹²

Everyone in the field of negotiation knows about the wide-reaching significance of Carrie Menkel-Meadow's work. It is hard to do much better on this front than Russell Korobkin's recent offering in his comment on Carrie's *Toward Another View*.¹³ Here Korobkin describes the article's wild success:

We are all problem solvers now. . . . *In the twenty-first century, there really is no competing paradigm at all. . . .* Instead of focusing all of their energy on dividing the gains-of-trade (or "cooperative surplus") that can be generated if parties reach a negotiated agreement, negotiators should try to increase that cooperative surplus by designing agreements in ways that permit both parties to obtain *most* of the value that they seek. Or, to use the popular metaphor, good negotiators focus at least as much attention (and probably more) on expanding the size of the pie rather than dividing the pie. The bigger the pie, the more likely both parties can be satisfied.¹⁴

In a world suffused with the ideals of mainstream economics, there is no greater compliment that Korobkin could offer than to be honored as someone whose model of problem-solving taught people how to "expand pies" in legal and social interactions. Korobkin made his own intention clear when he wrote: "I can think of no higher praise than this."¹⁵ Carrie, indeed, popularized the idea that people should pursue Pareto efficient trades. As she elaborated in *Toward Another View*, "[t]he 'efficient frontier' or Pareto Optimal Frontier is the locus of achievable joint evaluations from which no further joint gains are possible and is represented by an arc on a two-axis coordinate."¹⁶ If people value different things or if they express different valuations for the same thing, she further explained, then "one party can *increase its utilities* without reducing the other's," describing a process that economists (and negotiation theorists) call value creation.¹⁷

As significant as it is to characterize *Toward Another View* as about proliferating the art and science of value creation, it also stands to miss a double consciousness in Carrie's early writing. To be sure, she leaned into the language of mainstream economics as it came to define the field's understanding of what constitutes a good negotiation. And yet even as her work was at the field's avant-garde in this sense, she was simultaneously deploying feminist theory in ways that transgressed value-creation negotiation theory's basic presuppositions.

12. Menkel-Meadow, *Toward Another View*, *supra* note 6, at 794.

13. Russell Korobkin, *We Are All Problem Solvers Now*, in DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES 55, 55 (Art Hinshaw, Andrea Kupfer Schneider & Sarah Rudolph Cole eds., 2021).

14. *Id.* (first emphasis added).

15. *Id.*

16. Menkel-Meadow, *Toward Another View*, *supra* note 6, at 811 n.220.

17. *Id.* at 800 (emphasis added).

What made this subversion possible is that Pareto efficiency embeds a highly particular kind of sociality: It presumes that value is knowable as a subjective and relational system that can nevertheless be essentialized and expressed via numbers. Carrie's approach to negotiation, however, mobilized a very different social theory of value and different set of beliefs about how people should craft relationships with others. It is worth attending to this.

To elaborate, in the early twentieth century, Italian economist Vilhelm Pareto originated a new understanding of the idea of a utility. He described it as a means of expressing how a person compares different combinations of goods and ranks his preferences among them.¹⁸ In so doing, Pareto helped transform the field of economics: "ordinal" economists stopped asking about how to advance "society's overall utility"—a concept that presumes that there is such an objective thing as total satisfaction or overall utility to be measured.¹⁹ Hence, ordinal economists also rejected the idea that the theory of declining marginal utility could justify, in economic terms, a transfer of wealth among classes.²⁰ Ordinal economists instead asked how individuals understand themselves to be made better off based on their own comparative valuations and, accordingly, whether social systems are maximizing individual preference satisfaction. Here, then, value is essentialized: to be made intelligible, it must be expressed as a numerical index that anchors (and potentially expands) a bargaining range. And value is also subjective and relational: it describes how one person evaluates some package of things compared to some other package *and* compared to some other person's valuations—hence its numerical representation lacks any other kind of substantive meaning.²¹

18. IVAN MOSCATI, *MEASURING UTILITY: FROM THE MARGINAL REVOLUTION TO BEHAVIORAL ECONOMICS* 79 (2019). Moscati explains:

[I]n his *Manual of Political Economy* ([1906/1909] 2014), Pareto showed that the main results of demand and equilibrium analysis can be obtained also in an ordinal utility framework and are therefore independent of the measurability of utility. He was the first to do so. . . . Pareto conceived of utility as a numerical index that expresses the preexisting preference relations between commodities.

Id.

19. See Michele Graziadei & Barbara Pasa, *Happiness Once More*, 14 J. COMPAR. L. 203, 217–20 (2019).

20. Ordinal economists introduced the idea that as a matter of positive science it was not possible for the analyst to make interpersonal comparisons of utilities. In particular, Lionel Robbins famously argued that the fact that "[t]here is no means of testing the magnitude of A's satisfaction as compared with B's" compels "a substantial curtailment of the claims of much of what now assumes the status of scientific generalisation in current discussions of applied Economics. The [Law of Diminishing Marginal Utility] does not justify the inference that transferences from the rich to the poor will increase total satisfaction." LIONEL ROBBINS, *AN ESSAY ON THE NATURE & SIGNIFICANCE OF ECONOMIC SCIENCE* 124–25 (Ludwig von Mises Inst. 2007) (1932) (emphasis omitted).

21. Graziadei & Pasa, *supra* note 19, at 220.

In *Toward Another View*, Carrie mobilized Pareto efficiency as a metaphor for problem-solving—especially for the idea that parties could discover mutually beneficial solutions.²² But the value/price relational system I have described in fact *conflicted* with the kind of sociality that Carrie theorized and prescribed for people in negotiation. Without sharpening this conflict into an explicit challenge, Carrie subtly proposed to use units of coordination and deliberation that were, on the one hand, more universalizing and objective and, on the other hand, more contextualizing and contingent than Pareto’s version of utility—what she called a theory of needs.²³

When people ask for things from others in a negotiation, Carrie explained, these demands are “actually a proxy for more basic needs or objectives.”²⁴ By drawing attention to basic needs, she wanted negotiation theorists to grapple with metrics of human well-being apart from individual preference. Needs, she later clarified, are “that which [people] require for human flourishing,” things that appear necessary and essential.²⁵ And yet even as Carrie talked about the parties’ *real* needs, she also sometimes put the word *real* in scare quotes. In *Toward Another View*, she wrote that problem-solving negotiation should meet the parties’ “total set of ‘real’ needs . . . in both the short and long term”²⁶—a rhetorical gesture that then can be squared with a certain kind of anti-essentialist stance: “How do we know a real as distinct from a ‘false consciousness’ choice when we see it?” she once asked her readers, calling for “attention to the actual social conditions that formulate not only [people’s] choices, but the places from which the choices are made or even envisioned.”²⁷

Neither the social welfarist idea that there are extant basic needs that must be addressed by people and by social and legal systems—nor the critical epistemological notion that needs are products of social interdependence and inequality and knowable only through social deliberations—was informed by Pareto optimality. To the contrary, Carrie’s subject with needs—a person always already located within a

22. See Menkel-Meadow, *Toward Another View*, *supra* note 6.

23. *Id.* at 794.

24. *Id.* at 795.

25. Carrie Menkel-Meadow, *The Origins of Problem Solving Negotiation and Its Use in the Present* 5 (Univ. of Cal. Irvine Sch. of L., Legal Studies Research Paper No. 2018-40, 2018), <https://ssrn.com/abstract=3182643> (retrospective commentary on *Toward Another View*). This comment was published in a book, albeit without the above quotation. See Carrie Menkel-Meadow, *The Origins of Problem Solving Negotiation and Its Use in the Present*, in DISCUSSIONS IN DISPUTE RESOLUTION, *supra* note 13, at 68 [hereinafter Menkel-Meadow, *The Origins of Problem Solving Negotiation*].

26. Menkel-Meadow, *Toward Another View*, *supra* note 6, at 760.

27. Carrie Menkel-Meadow, *Gendered Justice*, 2 BERKELEY WOMEN’S L.J. 258, 265 (1986) [hereinafter Menkel-Meadow, *Gendered Justice*] (reviewing DAVID L. KIRP, MARK G. YUDOF & MARLENE STRONG FRANKS, *GENDER JUSTICE* (1986)). See generally Menkel-Meadow, *Toward Another View*, *supra* note 6, at 839 (encouraging clients to engage in moral dialogues about needs with their lawyers).

social and economic hierarchy—emerged from her engagement with and practice of cultural feminist theory.²⁸

For Carrie, feminism and negotiation were interconnected projects. Across a series of articles, she wrote about Carol Gilligan's pathbreaking book, *In a Different Voice*, and more specifically about Gilligan's fictional placeholder named "Amy," who proposed to mediate a conflict through a contextual and relational approach to moral reasoning.²⁹ Analogizing from Amy's rejection of deductive, win-lose solutions and her embrace of bottom-up, ethical deliberation, Carrie argued that feminism entails the following processual commitments: that people connected by a shared problem can hold multiple needs simultaneously and deliberate about them together (including the needs of people who are not part of the immediate conversation); that when people deliberate and make choices in this manner, they never do so free from the effects of their relationships and social and material constraints; that people can nevertheless deliberate themselves directly, they need not default to an external authority; and that the methods and practices that people use to confront problems can be as important as the substance of their resolutions (and these methods should be participatory, inclusive, experience-based, nurturing, and facilitative).³⁰ For Carrie, cultural feminism thus meant rejecting strong versions of liberal individualism—and, with it, strong versions of liberal ideals such as autonomy, separation, alienation, competition, and adversarialism—and working to develop, in legal and social practice, methods to coordinate conflict resolution and social action through cooperation.

28. See, e.g., Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*]; Menkel-Meadow, *Gendered Justice*, *supra* note 27.

29. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 25–32 (1982); see Ellen C. DuBois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, & Carrie J. Menkel-Meadow, Transcription, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 40–54 (1985) [hereinafter DuBois et al., *Feminist Discourse*] (moderated by Isabel Marcus & Paul J. Spiegelman); Menkel-Meadow, *Portia in a Different Voice*, *supra* note 28, at 45–48; Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 L. & SOC. INQUIRY 289, 301–02 (1989) [hereinafter Menkel-Meadow, *Feminization of the Legal Profession*]; see also Menkel-Meadow, *Toward Another View*, *supra* note 6.

30. See generally DuBois et al., *Feminist Discourse*, *supra* note 29, at 36–63; Menkel-Meadow, *Portia in a Different Voice*, *supra* note 28; Menkel-Meadow, *Gendered Justice*, *supra* note 27; Menkel-Meadow, *Feminist Legal Theory*, *supra* note 8; Menkel-Meadow, *Feminization of the Legal Profession*, *supra* note 29; Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994) [hereinafter Menkel-Meadow, *Portia Redux*]; Carrie Menkel-Meadow, *What's Gender Got to Do with It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265 (1996) [hereinafter Menkel-Meadow, *Ethic of Care*] (reviewing JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993)).

Carrie infused this cultural feminist sensibility with a radical one—it mattered to her that the ethic of care and relationality which Amy expressed partly reflected how women survive and labor in a world where they have less power than men. Carrie thus de-identified relationality and care from women’s biologies or natures, explaining that anyone of any gender could enact these values and practices. And she re-identified these qualities with women’s marginalized social experiences. “I am reluctant to detach gender from an ethic of care,” she reasoned³¹—a reluctance I read as both a radical feminist sympathy and more broadly as a leftist commitment to thinking with those excluded from power.

What linked cultural feminism and negotiation—and paved the way for Carrie’s cultural feminist negotiation project—was their shared radical potential for transvaluation. Carrie’s theoretical starting point was the practices and values of devalued subjects—namely, care and relationality as they organized and sustained life outside of patriarchy and outside of formal legality. She proposed to superordinate these subjects’ values and practices to create new ways of becoming and new forms of social and legal organization. Thus, she argued: “[E]ven if one’s sense of care and of relationship has developed out of the necessity for survival in the world in which one has been powerless[,] . . . I think it is important to use [those values] as a way of reconstructing all the institutions in which we live at the same time that we reconstruct ourselves.”³²

Carrie peppered her writing with practical examples of the kinds of projects that might follow from this call to reconstruct institutions and people simultaneously: reimagining lawyer codes of ethics so that lawyers had obligations to think about the needs of the opposing lawyer’s clients;³³ encouraging people in conflict to experiment with nonmonetary exchanges that were not governed and analyzed through rules of commensurability;³⁴ and advancing social policies that, for example, enable “collectivized, socially-cooperative childrearing.”³⁵

In such imaginings, Carrie mobilized a critical understanding of power. She did not disavow the social fact that coercion and violence acted upon people and, in particular, upon women. But in arguing for transformative, caring practices of negotiation, she nevertheless refused to mobilize strong structural theories of domination that would determine social and institutional possibilities at the outset of deliberation.³⁶ She was also likewise reluctant—as a matter of principle—to

31. Menkel-Meadow, *Ethic of Care*, *supra* note 30, at 267.

32. DuBois et al., *Feminist Discourse*, *supra* note 29, at 57.

33. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 28, at 50, 59–60; DuBois et al., *Feminist Discourse*, *supra* note 29, at 55–56.

34. Menkel-Meadow, *Toward Another View*, *supra* note 6, at 798.

35. Menkel-Meadow, *Gendered Justice*, *supra* note 27, at 267.

36. Menkel-Meadow, *Toward Another View*, *supra* note 6, at 833–34.

reason too strongly from first principles. To the contrary, she advocated for a deliberative, bottom-up approach to legal morality.³⁷ And she insisted on people's own capacities to act ethically and creatively in negotiation despite inequalities.³⁸

All of this suggests a radically open practice of negotiation as an ethical exercise—one that would require constant practices of self and social transformation to be sustained and strengthened. And one where it would be hard to specify techniques in the abstract beyond articulating certain general ethical commitments and questions for how to make these commitments practical, deliberative, and explicit.

If these features of Carrie's work illuminate negotiation's transformative potential, it was the other aspect of the work's double-consciousness that garnered more immediate attention. As Carrie herself has explained in the register of plain fact tinged with lament, *Toward Another View* "was quickly taken up by both the Big Law bar and forward-thinking CEOs and GCs of major American corporations"—a "somewhat ironic[]" adaptation given how she offered the article as part of a larger social justice project.³⁹

What travelled into law firms and corporations—as Korobkin's praise suggests—was the idea that Pareto optimality was a commonsensical and achievable practice.⁴⁰ Or at least that was the idea that travelled among the professional classes of people exposed to explicit training in value creation. They learned how to expand gains from trade by identifying: parties' different resources; different relative valuations, forecasts, risks, and time preferences; noncompetitive similarities; and economies of scale and scope.⁴¹ What travelled, in other words, was *not* an open-ended understanding of negotiation as the ceaseless engagement with a deeply humanist and cultural feminist question: how to live in common. Instead what travelled was a set of professional tools and techniques designed to *answer* a rather different query—namely, how to advance joint efficiency gains where efficiency presumes the following features for its intelligibility: a decontextualized and essentialized understanding of individual preference, privately owned resource endowments, and competitive markets for their exchange (i.e., the basic features of capitalist systems).

37. See Menkel-Meadow, *Portia Redux*, *supra* note 30, at 110.

38. Menkel-Meadow, *Toward Another View*, *supra* note 6, at 833–34.

39. Menkel-Meadow, *The Origins of Problem Solving Negotiation*, *supra* note 25, at 7.

40. See Korobkin, *supra* note 13, at 57–59.

41. See generally DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986); ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); RUSSELL KOROBKIN, *NEGOTIATION: THEORY AND STRATEGY* (2d ed. 2009).

How this closure happened is a story for a different occasion.⁴² What I hope readers will nevertheless appreciate is that Carrie's writing prefigured and continues to hold space for negotiation theory broadly conceived as an ethical way of life and living—one grounded in the endless challenge of negotiating among conflicting needs where needs are both real and shaped by social and economic interdependencies and hierarchies. In the early 1980s, Carrie stood largely alone among her law- and business-trained colleagues in using a feminist theory of needs to reimagine negotiation. In the following decades, she had few collaborators who were intent upon infusing negotiation theory with serious cultural or radical, or for that matter, poststructuralist, feminist thinking. To the contrary, the uptake of feminism in negotiation produced a version of liberal feminist writing concerned primarily with questions of income (and other resource) parity between women and men under capitalism. In this work, cultural feminism did not transform negotiation as much as become transformed by it: for example, scholars suggest that women may appeal to gender stereotypes (e.g., the idea that women are caring) as one technique for successful workplace negotiations.⁴³

What, then, might it be like to catch hold of and amplify Carrie's very different cultural feminist beginnings? Here, I propose contemporaneously to fill in some of the space Carrie's early work pointed to by putting it in conversation with feminist Marxist postcapitalist scholars. I describe some of the ongoing work of the Community Economies Collective, founded in the 1990s by J.K. Gibson-Graham and their collaborators,⁴⁴ and more specifically what they call ethical negotiation, related in a highly particularized way to Carrie's sense of it. I don't attempt to elaborate either the diverse intellectual genealogies or the empirical nuance of community economies scholarship, which emerges from outside of legal academic negotiation theory. I simply emphasize one point of connection and differentiation: feminism again inspires both a transvaluation and turn to negotiation, but now by using Marxist rather than neoclassical economic categories.

III. ETHICAL NEGOTIATION

Ethical negotiation in the tradition of J.K. Gibson-Graham is a method of participating in "postcapitalism." I'll endeavour to explain

42. For one stab at tracing this story, see Amy J. Cohen, *A Labor Theory of Negotiation: From Integration to Value Creation*, 1 J.L. & POL. ECON. 147 (2020). For another, see Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197 (2022).

43. See, e.g., Andrea Schneider, *Negotiating While Female*, 70 SMU L. REV. 695, 715 (2017) ("[F]raming requests for your own salary as part of a concern for others or improving relationships at home or with peers seems to reduce resistance to the request.").

44. See generally CMTY. ECONS., <https://www.communityeconomies.org/> (last visited Oct. 18, 2022).

what this means. Community economies scholars argue that capitalism works partly by “enrolling our desires, habits, and practices . . . and that it is made possible when we live life by its measures and values.”⁴⁵ A “beyond-capitalism becomes discernible” when we break our associations with capitalism as *the* system “synonymous with economy.”⁴⁶ To that end, community economies scholarship relentlessly catalogues other already existing modes of economy, including, for example, commoning, producer and worker cooperatives, social enterprises, and ethical markets.⁴⁷ And this scholarship aims to cultivate the everyday habits and practices of ethical reciprocity and negotiation that sustain these diverse economic systems—practices that do not necessarily reproduce dominant neoclassical systems of measurement and valuation.⁴⁸

Like Carrie does in her early scholarship, Gibson-Graham and their collaborators mobilize both feminism and negotiation to promote new forms of subjectivity alongside new systems. Feminism, they explain, “liberated the category ‘woman’ from its positioning as subordinate to ‘man,’ the stand-in for the ‘universal’ human subject.”⁴⁹ What is superordinated here, however, is not only cultural feminism’s ethic of

45. Stephen Healy, *Communism as a Mode of Life*, 27 *RETHINKING MARXISM* 343, 346 (2015). Healy elaborates:

Gibson-Graham’s project does not deny the existence of the capitalist class process, of repressive and ideological state apparatuses, and of laws, norms, and desires that are assembled as a discourse composed of both ideas that matter and also matter (in the form of everyday practices) that serves to embody ideas. What Gibson-Graham insist upon is that this system is a discourse that coheres in part by enrolling our desires, habits, and practices . . . and that it is made possible when we live life by its measures and values. What they insist upon, following a reading of Marx, is that in every economy, in countries rich and poor, *capitalism is not all that there is*. . . . Identifying the internal differences within capitalist organizations and markets, the location of communist enterprises, and states and social movements that take the commons seriously becomes the basis for a politics in which capitalism is present but is no longer synonymous with economy It is in this sense, precisely, that a postcapitalist politics is enacted, because a beyond-capitalism becomes discernible.

Id.

46. *Id.*

47. See generally J. K. GIBSON-GRAHAM, JENNY CAMERON & STEPHEN HEALY, *TAKE BACK THE ECONOMY: AN ETHICAL GUIDE FOR TRANSFORMING OUR COMMUNITIES* (2013).

48. See, e.g., *id.* at xvii–xix.

49. J.K. Gibson-Graham & the Community Economies Collective, *Cultivating Community Economies: Tools for Building a Liveable World*, CMTY. ECONS. 3 (2018), <http://www.communityeconomies.org/sites/default/files/2019-03/Next%20System%20Project%2C%20Community%20Economies%2C%20Final.pdf> [https://perma.cc/5UCR-PQOY]. This essay was later published as part of a book. J.K. Gibson-Graham, Jenny Cameron, Kelly Dombroski, Stephen Healy, Ethan Miller & Community Economies Collective, *Cultivating Community Economies: Tools for Building a Liveable World*, in *THE NEW SYSTEMS READER: ALTERNATIVES TO A FAILED ECONOMY* 410 (James Gustave Speth & Kathleen Courrier eds., 2021) [hereinafter Gibson-Graham et al., *Economies*].

relationality and care of the other.⁵⁰ It is also a way of being and “being-in-common” emergent from poststructuralist feminist theory.⁵¹ The category “woman,” Gibson-Graham argue, stands for something partial, incomplete, a “Lacanian ‘subject of lack.’”⁵² Hence, for them, “woman” also stands for the potential to become a new political being. “To the extent that the figure of woman signals unfixed or incomplete identity,” they argue, “she is the subject to be constructed through politics. Her ‘failed’ identity stands for the possibility of politics itself.”⁵³

Drawing inspiration from the “myriad practices and performances of ‘woman’” unleashed by second wave feminism, Gibson-Graham’s project is about “queer[ing] the economy.”⁵⁴ They analogize gender to capitalism, which they describe not only as a material but also a discursive system with the “power to create the effects that it names.”⁵⁵ Hence, just as feminists in the spirit of Judith Butler have liberated the category “woman” through their own disidentifications and failures to reproduce gender in stable and predictable ways, “we work,” they explain, “to liberate non-capitalist economic activities from subordination to ‘capitalism.’”⁵⁶ And just as feminism has enacted transformative change in people’s lives often through diffuse, non-institutionalized, personal, and horizontal forms of activism, Gibson-Graham see possibilities to change the economy through the “constitutive power of small and local processes that are found the world over.”⁵⁷

Hence their turn to negotiation. Gibson-Graham argue that change cannot depend on “waiting for the multitude to construct a powerful organization” but requires experimentation in the present through creating new practices and languages for ethical decision-making.⁵⁸ By ethical, however, they do not mean a process where people begin with first principles and then attempt to hold their decision-making ac-

50. Gibson-Graham et al., *Economies*, *supra* note 49.

51. GIBSON-GRAHAM, *supra* note 10, at 84. Marc Spindelman observes how the cultural feminist impulse to rework and transvalue subordinated norms repeats in poststructuralist feminism and queer theory, albeit without the cultural feminist’s strong version of normativity. *See generally* Marc Spindelman, *Sexual Freedom’s Shadows*, 23 YALE J.L. & FEMINISM 179 (2011) (reviewing TIM DEAN, UNLIMITED INTIMACY: REFLECTIONS ON THE SUBCULTURE OF BAREBACKING (2009)); Marc Spindelman, *Sexuality’s Law*, 24 COLUM. J. GENDER & L. 87 (2013).

52. GIBSON-GRAHAM, *supra* note 10, at xxxiii.

53. *Id.*

54. *Id.* at xxii, xxxiii (internal quotations omitted).

55. *Id.* at 2 (citing JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF “SEX” 2 (1993)).

56. Gibson-Graham et al., *Economies*, *supra* note 49, at 410.

57. J. K. Gibson-Graham, *Beyond Global vs. Local: Economic Politics Outside the Binary Frame*, in GEOGRAPHIES OF POWER: PLACING SCALE 25, 51 (Andrew Herod & Melissa W. Wright eds., 2002).

58. *Id.* at 53.

countable to these principles.⁵⁹ In this work, ethics serve a function that is far weaker. Ethics provide “coordinates” to ask questions; it gestures toward sites for practice and thinking.⁶⁰

Coordinates of Ethical Negotiation

Here I briefly describe how Gibson-Graham and their collaborators envision ethical negotiation at what they call coordinates of necessity, surplus, production/consumption, and commons, and which they elaborate as the following kinds of deliberations:

1. what is *necessary* to personal and social survival;
2. how social *surplus* is appropriated and distributed;
3. whether and how social surplus is to be produced and *consumed*; and
4. how a *commons* is produced and sustained.⁶¹

Necessity first, and in relation to negotiation. Gibson-Graham envision negotiations that begin *not* by orienting individuals around a desire to “grow a pie.” Rather, they envision negotiations beginning by people deliberating about their needs or what is necessary for personal and social reproduction, for surviving well. This starting point reflects Gibson-Graham’s Marxist, not neoclassical, orientation. They do not use the term value to stand for an individual’s subjective utility calculation. To the contrary, the Marxian idea that persists in their work is that there is some amount of value that *is needed* for producers to reproduce themselves (“necessary labor”), and also some amount of value above and beyond this need.⁶² Hence, they suggest that people might begin ethical negotiations by deliberating about what is necessary, what they need.

And yet in their work, as in Carrie Menkel-Meadow’s work, a *need* is a complex thing. Gibson-Graham bring an anti-essentialist sensibility

59. See, e.g., Ethan Miller, *Community Economy: Ontology, Ethics, and Politics for Radically Democratic Economic Organizing*, 25 *RETHINKING MARXISM* 518, 523–24 (2013). Miller explains that ethical intervention inspired by Gibson-Graham’s framework:

remains posed in profoundly open terms. First, it refrains from constructing any kind of structural critique (e.g., the inevitability of crisis or the necessary drive to accumulate) that might smuggle closures into an open space of ethics. Second, it does not specify what kinds of values or norms are decided upon in the space of negotiation nor what processes and institutions might effectively enact them. It simply demands that such a space be constructed and defended at every possible juncture, and it performatively facilitates such work.

Id.

60. GIBSON-GRAHAM, *supra* note 10, at 88.

61. *Id.*

62. As Richard D. Wolff and Stephen A. Resnick explain, for Marx, necessary labor is the period of time that laborers “produce the goods and services that they themselves will consume in order to be able and willing to continue laboring.” RICHARD D. WOLFF & STEPHEN A. RESNICK, *ECONOMICS: MARXIAN VERSUS NEOCLASSICAL* 144 (1987).

ity to Marxian theory.⁶³ In their view, needs “cannot be seen as grounded in the ostensible reality of the body[],” but rather only in “socially embedded ethical decision[s],” as well as in the political and historical struggles that make these decisions contestable and explicit.⁶⁴

Let me illustrate to illuminate the point. Gibson-Graham’s co-author Ethan Miller describes multi-stakeholder negotiations about rural development in Maine.⁶⁵ He observes “a widespread sense” that underlying people’s arguments about “jobs, income, productivity, and market competition, a kind of *essence* is revealed—that which is *necessary*, ‘basic needs’ upon which all else depends and that ultimately drive the dynamics of livelihood.”⁶⁶ Wishing to produce some critical distance from this “essence,” Miller proposes that we think of a need as something that “performatively names precisely that which it asserts: a necessity, an incontestability, those conditions that must be met in order to avoid suffering, undoing, or even death.”⁶⁷ For a post-capitalist project, this performativity of needs is double-edged. On the one hand, when people assert that something is an essential need motivating their positions, say for or against a large rural infrastructure project—we need “jobs,” they need “nutrition”—they can mobilize necessity to speak truth to power, a potentially useful tactic. On the other hand, however, because such assertions naturalize what needs *are* (for example, that individual jobs are necessary for health and sustenance), they may foreclose alternative kinds of negotiations—ones that do not already work within hegemonic understandings of the economy and its categories.⁶⁸

The ethical impulse here is for people to come to understand, through critical deliberation, how the expression of an underlying need is itself a *strategy* that can reinforce or alternatively rearrange commonsensical social and economic relations.⁶⁹ Thus, ethical negotiation shares a practice and ideal in common with value-creation negotiation: namely, there are potentially multiple and diverse strategies and valuations to advance one’s larger ends. But in ethical negotiation, a process of reflection (i.e., digging underneath one’s stated needs to articulate underlying needs) cannot conclude simply with the articulations of an individual “needer” taken at face value, as this process can in value-creation negotiation where one is taught to move

63. See, e.g., GIBSON-GRAHAM, *supra* note 10, at xiii; Gibson-Graham et al., *Economies*, *supra* note 49, at 410–11.

64. GIBSON-GRAHAM, *supra* note 10, at 89.

65. MILLER, *supra* note 11.

66. *Id.* at 209.

67. *Id.*

68. See *id.* at 210.

69. For a similar argument, see Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 L. & SOC. INQUIRY 503 (2008).

from stating her positions to stating her underlying interests.⁷⁰ Or at least this process cannot so conclude if a need is understood as “*that which is necessary given a refusal to question the hegemonic assemblage itself.*”⁷¹ Nor can this process of digging underneath conclude with the articulations of an “ecologically isolated” individual.⁷² Quoting the ecofeminist scholar Donna Haraway, Miller reasons that “[i]f ‘to be one is always to *become with* many,’ then who is to say where the boundaries of the subject of a given articulation of ‘need’ should be drawn?”⁷³ To negotiate at the coordinate of needs, then, is *not* to suggest that the purpose of negotiation is to meet people’s needs.⁷⁴ It is rather to make needs an explicit topic of negotiation: what needs are and who decides, as well as the question of who is a “*needer* who *needs*” and the “community and its boundaries.”⁷⁵

The second coordinate—negotiating about how surplus is appropriated and distributed—closely follows. In value-creation negotiation, surplus is a measure of potential gains from trade—the measure of the bargaining range. Surplus expands when, because of some added negotiation technique, there are more subjective units of value for negotiators to allocate than they otherwise could have accessed without deploying this technique—that is, parties have expanded the pie before dividing it (and they have typically done so by brainstorming different goods and/or different valuations).

In ethical negotiation, by contrast, surplus is understood as that *bit that remains* after needs are addressed.⁷⁶ Hence, what people decide to describe as “needs” versus what they decide to describe as “surplus” is again “an ethical and a political decision.”⁷⁷ Or to put this point differently, ethical negotiation asks people to deliberate about what surplus “is” and, in turn, to deliberate about why resources are privately appropriated rather than commoned. It aims to open up possibilities for contestation—but contestation for the purpose of producing genuine forms of social and economic cooperation. Let me lean again on Miller to elaborate. In a Marxian tradition, he explains:

[S]urplus arises, at least in part, from the *living labor* of those who must work for capitalists in order to live. Despite a widespread notion that each contributor to the process simply gets a fair return (wages to the workers, rent to the landlords, and profit to the capitalists); a Marxian frame suggests that workers are effectively extorted, in the very guise of “individual freedom,” into handing over

70. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, at xii (Bruce Patton ed., Penguin Books 1983) (1981).

71. MILLER, *supra* note 11, at 211.

72. *Id.* at 212.

73. *Id.* at 213 (quoting DONNA J. HARAWAY, *WHEN SPECIES MEET* 4 (2008)).

74. *Id.* at 210.

75. *Id.* at 210, 213.

76. GIBSON-GRAHAM, CAMERON & HEALY, *supra* note 47, at 65, 72.

77. Healy, *supra* note 45, at 351.

a portion of their life energy to those who claim to own it. Hence a vast, ongoing transfer of resources and wealth from the many to the few, and an obscene accumulation of surplus—and the power that it enables—on the part of these elites. How can this not be a site for widespread and explicit contestation? Because this analysis has been nearly erased from public discourse in Maine, as it has elsewhere in the United States. Beyond a deep, embodied sense that something is *not fair*, how many wage workers in Maine view themselves as producing surplus value that others appropriate while calling it a “fair exchange”? Not many. . . . How many people view the wealth of the “1 percent” as a *collective product*, now uncommoned in private hands? Not enough. Where would anyone have learned these ideas? Hardly anywhere.⁷⁸

When people negotiate about the meaning of needs versus surplus they may come to expand the spheres of economic life subject to democratic decision-making by changing their own collective orientations. When surplus becomes its own subject of negotiation, so do questions about how surplus should be invested and expanded, as well as what levels and kinds of surplus expansion are sustainable and fair—prompting Gibson-Graham’s third coordinate about consumption. Ethical negotiation about consumption invites people to consider “the different ways that surplus . . . might be consumed by both businesses and individuals and the implications this has for human and non-human others.”⁷⁹ It also invites negotiators to recognize that what appears as surplus often comprises resources that people *take* from an environmental commons and from the labor of non-humans—motivating Gibson-Graham’s fourth coordinate for ethical decision-making about collective resource management, and one that infuses Marxism with ecofeminism.⁸⁰

“[T]he term ‘negotiation,’” Miller remarks, “is shown to be true to its Latin roots: the negation (*neg-*) of leisure (*-otium*), the *opposite* of freedom from labor. Negotiation is the hard work of encountering others and attempting to compose a world together.”⁸¹ I am certain that Carrie would wholeheartedly sign onto this definition. From her earliest writings, she has described negotiation, like feminism and as a practice of feminism, as a complex and ceaseless practice of caring for others precisely so that people can themselves create experiences and resolve conflicts in common. What Gibson-Graham add, as I have attempted to illustrate here, is that feminism and negotiation are also both potentially synonymous with composing new postcapitalist economies and through them new worlds.

78. MILLER, *supra* note 11, at 214.

79. See, e.g., Gerda Roelvink & J.K. Gibson-Graham, *A Postcapitalist Politics of Dwelling: Ecological Humanities and Community Economies in Conversation*, 46 AUSTRALIAN HUMANS. REV. 143, 151 (2009).

80. *Id.* at 147–48.

81. MILLER, *supra* note 11, at 144 (footnotes omitted).

IV. CONCLUSION

Over forty years of her career, Carrie Menkel-Meadow has held fast to her animating ambition—of care. She has sought to create social and legal processes so that more people can interact with others in ways “that are creative, enfranchising, enriching and empowering, rather than alienating and conflict-provoking.”⁸² The remarkable breadth of her writing—and more pointedly the breadth of the diverse and heterodox moral, political, social, and economic theories that inform it—make any sort of complete reading that doesn’t flatten out the work’s lived dimensions a distinctive challenge. Indeed, and as Korobkin’s commentary along with my own suggest, even the few texts I have endeavoured to describe hold multiple interpretations.

Recognizing the antagonisms that can arise among interpretations, I wish instead to emphasize how Carrie, through her labor, has gifted us with fields of surplus of meanings—fields and meanings readers can use as we continue to orient ourselves toward finding fresh ways of becoming and new collective conversations about the worlds that writing about, teaching, and practicing negotiation may open. In the later part of her career, Carrie has worked intensely to proliferate a diversity of institutional procedures and modes of social engagement in order to build pluralist theories of justice and democratic deliberation.⁸³ In a similar spirit, I have argued that those of us who wish to sustain—and rekindle—some of the radical ethical and transformative aspects of Carrie’s feminist undertaking may today look outside the familiar canon of value-creation negotiation for diverse conceptual and practical tools to deliver on the possibilities for negotiation theory that Carrie advanced. Possibilities that illustrate that people can, and indeed have, created organizations, workplaces, and firms, as well as systems of resource management, finance, investment, risk-sharing, and exchange based on the ethic of care and interdependence that Carrie has long promoted, an ethic that marks the ever-evolving legacy of Carrie’s feminist negotiation theory.

82. Menkel-Meadow, *Toward Another View*, *supra* note 6, at 763.

83. See, e.g., Carrie Menkel-Meadow, *The Ethics of Compromise*, in *THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 155 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006); Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 *NEV. L.J.* 347 (2004); Carrie Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving*, 8 *UNBOUND: HARV. J. LEGAL LEFT* 79 (2013); Carrie Menkel-Meadow, *Why We Can’t “Just All Get Along”*: *Dysfunction in the Polity and Conflict Resolution and What We Might Do About It*, 2018 *J. DISP. RESOL.* 5.