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THE NEW CANON OF NEGOTIATION ETHICS

KEVIN GIBSON*

I. THE BACKDROP TO CONTEMPORARY DISCUSSIONS IN NEGOTIATION CLASSES

Decision-making is at the heart of negotiation, and some of the decisions we make will be value-laden. Negotiators may differ over whether to take advantage of an apparent deficiency in party *x*, for example, or if they should disclose private information to get concessions from party *y*, say something that may not be true, or perhaps craft an agreement that externalizes the costs on to some unwitting third party who is not at the negotiating table, and many other issues. Value-based decisions may be the result of reflective thinking, but sometimes they arise quickly and demand urgent resolution. Therefore it is incumbent upon negotiators to have an ethical stance from the outset of settlement discussions.

The term “ethics” is notoriously vague. In general it has two meanings: first, a set of rules that applies to specific activities. In this sense, there may be the “ethics of poker,” where bluffing is not only encouraged but laudable. It would apply where there is a strong professional role morality, leading to cases, for example, where an attorney may not disclose information from a client, and indeed would be censured for doing so, even though the public might feel they would benefit from it. Thus, an introduction to negotiation ethics needs to include basic legal issues and the appropriate elements of professional responsibility.

The second sense is more philosophical, where ethics is used to describe discussions about morality, or issues involving value judgments about right and wrong, fairness, justice, rights, and the good.

Another distinction that can be drawn in ethics is between “intrinsic” and “instrumental” approaches. Some traditions believe that we should always do the right thing for the sake of goodness alone, without regard for any potential reward.¹ Thus, promises should be kept and obligations met merely because

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1. ROGER FISHER ET AL., *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* 108-13

they are duties which should not be compromised because of inconvenience or greater benefits elsewhere. Instrumental views, on the other hand, acknowledge that we are largely motivated by self-interest, and, therefore, we are likely to act accordingly.² They would interpret apparent altruistic acts, say, donating blood, in terms of greater psychological welfare for the donors or as enlightened, since they are contributing to an institution that they may ultimately benefit from.

II. TEACHING TODAY

Some exercises in negotiation force participants to confront their personal ethics. For instance, in iterated prisoner dilemma games it is often profitable for parties to lie or betray each other. Empirical work shows that some participants will prefer to retain a sense of ethical self-worth rather than compromise their values for instant gain.³ At the same time, many will view such actions as acceptable tactics in a game.⁴ Some writers, such as James White, have advocated that the only constraint on behavior in negotiation should be its legality, since the duty of an attorney in negotiation is to maximize gains for his or her client by whatever legal means possible.⁵ He says: "[T]he negotiator's role is at least passively to mislead his opponent about his settling point while at the same time to engage in ethical behavior."⁶

This reflects a view characterized by Williams as "aggressive."⁷ In contrast to "cooperative" negotiators, aggressors will push the other side as far as it will go, believing that the opponent will stop them if they go too far. In that sense, they do not self-monitor their behavior, but rather rely on their opponents to restrain them, a stance which may stretch ethical boundaries and

(1994).

2. This is not to say that individuals cannot combine both approaches.

3. See generally J. KEITH MURNIGHAN, *BARGAINING GAMES* (1992); David Sally, *Game Theory Behaves*, 87 MARQ. L. REV. 783 (2004).

4. See, e.g., G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* 201-34 (1999) (contrasting deception to integrity).

5. See generally Charles B. Craver, *Negotiation Ethics: How to be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713 (1997); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978); Walter W. Steele, Jr., *Deceptive Negotiating and High Toned Morality*, 39 VAND. L. REV. 1387 (1986); see also MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 9 (1975) ("Let justice be done—that is, for my client let justice be done—though the heavens fall."). Note that legality remains the threshold of acceptable behavior, and thus reliance on misrepresented information, for instance, would still be actionable.

6. James J. White, *The Pros and Cons of "Getting to Yes,"* 34 J. LEGAL EDUC. 115-16 (1984).

7. Gerald R. Williams, *Style and Effectiveness in Negotiation*, in *NEGOTIATION: STRATEGIES FOR MUTUAL GAIN* 172-74 (Lavinia Hall ed., 1993).

leave other parties feeling “steamrollered.”⁸

Contemporary teaching will likely reflect both views: It is useful for students to reflect on their own moral “bottom line”—that is, whether there is a point where they will refuse to compromise their principles to achieve gains.⁹ Negotiation teachers may also make students aware of the tricks of the trade such as bluffing, non-disclosure, and bait-and-switch.¹⁰

III. ETHICAL IMPLICATIONS OF INTEREST-BASED BARGAINING

Interest-based bargaining is a form of negotiation that promotes mutual problem solving in order to maximize the welfare of all parties to a negotiation.¹¹ It encourages parties to disclose information to each other and develop a degree of trust, in contrast to the adversarial posture of traditional positional bargaining. As Michael Watkins suggests, “truth-telling, fairness, and balanced representation of parties absent from the table present the biggest challenges.”¹² Recent empirical work in sociobiology and game theory indicates that cooperative approaches are optimal over repeated encounters.¹³ Doing good by not lying, building a reputation, and cooperating may, in fact, lead to doing well.

Although the aggression and competition of gamesmanship may lead to short-term gains, it has two major drawbacks in an interest-based

8. Empirical testing based on personality types found that cooperative people believe there are cooperative, neutral, and competitive people in the world, whereas people with a more neutral disposition felt there were neutral and competitive sorts, and competitive individuals felt that everyone was exclusively competitive too. H. Kelly & A. Stahelski, *Social Interaction Basis of Cooperators and Competitor's Beliefs About Others*, J. PERSONALITY & SOC. PSYCHOL. 66-91 (1970).

9. Phyllis Beck Kritek makes the point well when she says that negotiators need to be aware of their own core values but ought not to try to impose them on others lest they are rejected by the other bargainers and the dynamic in the negotiation changes to a power struggle over the acceptability of that particular set of values. PHYLLIS BECK KRITEK, NEGOTIATING AT AN UNEVEN TABLE 215 (2002).

10. There is a considerable literature on the ploys of so-called “hard” bargaining. See generally HERB COHEN, YOU CAN NEGOTIATE ANYTHING (1980); VICTOR GOTBAUM, NEGOTIATING IN THE REAL WORLD: GETTING THE DEAL YOU WANT (1999); ROBERT J. RINGER, WINNING THROUGH INTIMIDATION (1974); MICHAEL SCHATZKI & WAYNE R. COFFEY, NEGOTIATION: THE ART OF GETTING WHAT YOU WANT (1981). Cohen, for example, advocates the “floor-model technique” that involves walking up to a refrigerator and muttering that you notice a blemish. “What if there are no multiple blems on the refrigerator? You can always make blems.” COHEN, *supra*, at 33-34 (emphasis omitted).

11. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN (2d ed. 1991).

12. MICHAEL WATKINS, BREAKTHROUGH BUSINESS NEGOTIATION: A TOOLBOX FOR MANAGERS 111 (2002).

13. See ANDREW COLMAN, COOPERATION AND COMPETITION IN HUMANS AND ANIMALS (Andrew M. Colman ed., 1982); FRANS DE WAAL, PEACEMAKING AMONG PRIMATES (1989).

environment. The first issue is that reputation counts so that any immediate benefit will be negated by the inefficiencies imposed by distrust¹⁴ and the opportunity costs of foregone future transactions.¹⁵ Withholding information effectively narrows the positive bargaining zone and limits the possibilities for settlement. Developing effective relationships for optimal settlements may involve initially risky moves, such as promoting trust or conciliatory initiatives.¹⁶

Following Fisher and Ury, some forms of integrative bargaining are referred to as “principled bargaining” since agreement is based on an appeal to an independent principle or criterion. These principles will often be value-laden, for instance, with notions of fairness and justice.

In short, contemporary negotiation scholarship would be remiss to not deal with three ethical elements: the student’s personal moral stance; issues which arise from treating negotiation as mutual problem solving, such as trust, disclosure, or beneficence; and the wider ethical considerations of justice, rights, equality, or welfare.

IV. PRESENT DIRECTIONS IN ETHICS

When ethics is presented in professional settings it is often as “plus-one staging.”¹⁷ Lawrence Kohlberg developed a well-known set of moral levels, moving from the pre-conventional, where moral reasoning revolves around the physical consequences of action, to the conventional level, where conformity to social order takes priority, and then to the post-conventional, which focuses on principled reasoning, where the subject looks to moral values and principles with a concern for universality and consistency.¹⁸ Kohlberg’s research suggests that most people are in the conventional level, and plus-one staging challenges individuals to assess their own moral development and think at higher levels with a wider perspective about what they should do.

One manifestation of the notion of the “expanding circle” of moral

14. George A. Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 488-500 (1970).

15. See generally LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* (2001). A recent study at the University of Michigan demonstrated that a good reputation for a seller on E-bay led to a twelve percent increase in profits. Catherine Dupree, *Integrity has its Price*, HARV. MAG., July-Aug. 2003, available at <http://www.harvardmag.com/on-line/070378.html>.

16. Dean G. Pruitt, *Strategy in Negotiation*, in INTERNATIONAL NEGOTIATION 78 (Victor A. Kremenyuk ed., 1991).

17. Janet A. Schmidt & Mark Davison, *Helping Students Think*, 61 PERSONNEL GUIDANCE J. 563-69 (1983).

18. Lawrence Kohlberg & Richard Kramer, *Continuities and Discontinuities in Childhood and Adult Moral Development*, 12 HUM. DEV. 93 (1969).

concern is by the more frequent use of stakeholder analysis.¹⁹ Stakeholders are people or institutions that will be helped or harmed in some way by change, and, therefore, perhaps ought to be considered at the bargaining table even if they are not represented.²⁰ Communitarian theorists also believe that we need to move from thinking of individuals in the world as disconnected atomic units to instead thinking of them as part of a connected web of interactions, in contrast to the traditional enlightenment liberal notion where the individual is sovereign,²¹ and his or her duty is to maximize personal welfare.²²

Kohlberg's work has been supplemented by insights by his former pupil, Carol Gilligan.²³ Gilligan noted that oftentimes when women were confronted with moral dilemmas, they thought about them differently from the men—roughly, they were more concerned about relationships between individuals and why the dilemma arose in the first place. It is not surprising, then, that women (in general) may deal with moral concerns, conflict, and negotiation in ways that have not traditionally been explored in the classroom. There is growing literature, both in ethical theory and negotiation, that challenges the established (male) template of correct action.²⁴

“Framing” is the term used for a conceptualization that has an affect on the listener, so we find that people will react differently if an issue is perceived as foregoing a gain or taking a loss, for example, even if the net result is the same.²⁵ It has become a standard part of the negotiation toolbox. Post-modernist writers view this kind of dynamic in a more radical way with deeper moral implications. They have proposed that we need to look at the

19. PETER SINGER, *THE EXPANDING CIRCLE: ETHICS AND SOCIOBIOLOGY* (1981).

20. There is extensive literature on stakeholder theory in business ethics. See R. Edward Freeman & John McVea, *A Stakeholder Approach to Strategic Management*, in *THE BLACKWELL HANDBOOK OF STRATEGIC MANAGEMENT* 189 (Michael A. Hitt et al. eds., 2001).

21. The ‘Sovereign Individual’ is a term coined by John Stuart Mill. JOHN STUART MILL, *ON LIBERTY* (1859).

22. See, e.g., MARKATE DALY, *COMMUNITARIANISM: A NEW PUBLIC ETHICS* (1994); AMITAI ETZIONI, *THE NEW GOLDEN RULE: COMMUNITY AND MORALITY IN A DEMOCRATIC SOCIETY* (1996).

23. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

24. See, e.g., LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE* (2003); DEBORAH KOLB & JUDITH WILLIAMS, *EVERYDAY NEGOTIATION: NAVIGATING THE HIDDEN AGENDAS IN BARGAINING* (2003); DEBORAH KOLB & JUDITH WILLIAMS, *THE SHADOW NEGOTIATION: HOW WOMEN CAN MASTER THE HIDDEN AGENDAS THAT DETERMINE BARGAINING SUCCESS* (2000). See generally ALISON M. JAGGAR & IRIS MARION YOUNG, *A COMPANION TO FEMINIST PHILOSOPHY* (1998); MARILYN PEARSAL, *WOMEN AND VALUES: READINGS IN RECENT FEMINIST PHILOSOPHY* (1993).

25. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* 217-27 (2003).

world as a set of perceived narratives, and, consequentially, we should see negotiation not so much as an exposition of positions and interests, but also as a question of which story comes to dominate the discourse.²⁶ Research indicates settlements emerge out of the initial narrative eighty percent of the time, which means there is immense power in presenting a case first, with the clear implication that we should not only look for power in the leverage that each party has over the other, but also in the process of presenting a case. Moreover, justice concerns will be more than substantive or procedural guidelines, but as Cobb and Rifkin note, it is “a question of access, of participation in the construction of dominant descriptions and stories.”²⁷ The upshot is that we should examine not only the process of negotiation and the participant’s behavior, but also the whole context in which the negotiation is set and the way the parties’ interpretations are presented, contested, transformed, and finally settled upon in terms of what would be most just. For example, two insurance adjusters may share the same world view and agree on the terms of negotiation, whereas if we think of a struggling tenant and landlord, the difference is not just one of positions and interest, but the very way in which they see (and make sense of) the world.

V. CONCLUSION

What we find, then, is that negotiation ethics has developed from merely knowing the minimal legal threshold of acceptable behavior, to more of an awareness that our best interests may be best understood in a wide perspective over the long term. This implies that the canon of negotiation should include concrete, practical issues, questions, and ethics that are more broadly and subtly understood as the backdrop of universal moral principles.

26. For an overview, see Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 L. & SOC. INQUIRY 36 (1991).

27. *Id.* at 62.