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# TOWARD AN EXPANDED “CANON” OF NEGOTIATION THEORY: IDENTITY, IDEOLOGICAL, AND VALUES- BASED CONFLICT AND THE NEED FOR A NEW HEURISTIC

KEVIN AVRUCH\*

## I. INTRODUCTION<sup>1</sup>

Beginning in the summer of 2003, as part of the “Broad Field Project” in conflict resolution directed by Christopher Honeyman, and in collaboration with Professor Andrea Schneider of the Marquette University Law School, an effort was made to elucidate a universal (or near universal) and interdisciplinary “canon of negotiation.”<sup>2</sup> More specifically, the point was to go beyond the existing “common core of negotiation”—topics or concepts readily agreed to be part of any negotiation curriculum, training module, or (indeed) theory—and see if, twenty-five years after Fisher and Ury’s *Getting to Yes* and Raiffa’s *The Art and Science of Negotiation* (and forty years after Walton and McKersie’s *A Behavioral Theory of Labor Negotiations*),<sup>3</sup> the influx of new disciplines and the expanded sensibilities of “conflict resolution” as it relates to negotiation have made any new topics or concepts centrally part of a more comprehensive common core.<sup>4</sup> The results of this

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1. A version of this Essay was presented at the annual meeting of the International Association for Conflict Management, June 6–9, 2004, in Pittsburgh, Pennsylvania. I thank co-panelist Linda Putnam and organizers Christopher Honeyman and Andrea Schneider. In subsequent drafts, Evans Mandes helped with additional sources in cognitive psychology. My colleagues, Marc Gopin, Christopher Honeyman, Dan Rothbart, Richard Rubenstein, and Wallace Warfield, all read earlier drafts closely and critically. Having satisfied none of them entirely, I thank them wholeheartedly.

2. The project is outlined more fully in the introduction of a special issue of the *Marquette Law Review*. See Christopher Honeyman & Andrea Kupfer Schneider, *Catching Up With the Major-General: The Need for a “Canon of Negotiation,”* 87 MARQ. L. REV. 637 (2004).

3. ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Bruce Patton ed., 1981); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); RICHARD WALTON & ROBERT MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965).

4. Briefly, the six topics Honeyman and Schneider list as part of the extant common core canon are (1) the idea of personal style or strategy in negotiation, including adversarial versus interest-

effort, found in a special issue of the *Marquette Law Review*,<sup>5</sup> indicate that such an expanded canon is indeed suggested by interdisciplinary research and by the involvement of practitioners of wide background and negotiation experience. Among the twenty-five essays emerging from the special symposium, ones that discuss the role of emotions, culture, apology, narrative and metaphor theory, power, and identity stand out as especially good candidates for inclusion in an expanded and canonical common core.<sup>6</sup>

This is especially true if negotiation theory and practice are ever to be fully relevant to conflicts involving ideology, identity, or values. My goal in this Essay is to argue why and in what ways the negotiation theory and practice of the canonical “first-generation” are not at present wholly relevant to these sorts of conflicts—in fact, in what ways their irrelevance is intentional and self-inflicted—and then to suggest that a new heuristic, built from the start around the problems of values-based conflict, can help us begin to expand the range of relevance of negotiation theory and practice.

## II. THE FIRST GENERATION HEURISTIC: RATIONAL CHOICE AND THE BUYER-SELLER

An examination of the six topics listed by Honeyman and Schneider as part of the already accepted canon of negotiation—for example, positions versus interests, the notion of negotiation efficiency (as in Pareto-optimal solutions), or problem solving—reveals its basis in the larger theory of rational choice (or rational decision making) and the key heuristic of the buyer-seller encounter.<sup>7</sup> The two—the theory and the heuristic—are of course inextricably entangled in neo-classical economics: rational choice as its conceptual foundation and the buyer-seller transaction as its paradigmatic praxis. Many of the metaphors in negotiation theory and practice reflect this, for instance, claiming or creating value (*not* “values”!), leaving value (“money”) on the table, maximizing one’s surplus, and so on. Both classic and contemporary texts on negotiation presume throughout their analyses and prescriptions some sort of buyer-seller interaction as the fundamental

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based and problem-solving styles; (2) communication skills; (3) integrative versus distributive negotiation; (4) ideas of zone of potential agreement (ZOPA), reservation price, and best alternative to a negotiated agreement (BATNA); (5) use of brainstorming and other option-creating techniques in problem-solving; and (6) the importance of preparation to efficient and productive negotiation. See Honeyman & Schneider, *supra* note 2, at 643-44.

5. See Symposium, *The Emerging Interdisciplinary Canon on Negotiation*, 87 MARQ. L. REV. 637 (2004).

6. Not to mention other, deeper markers of context and positionality, such as gender, culture, and worldview.

7. Honeyman & Schneider, *supra* note 2, at 643-44.

practice,<sup>8</sup> as did most first-generation work by experimentalists.<sup>9</sup> But even ranging further afield, a classic of applied diplomacy defines diplomatic negotiation as “essentially a mercantile art. . . . [T]he foundation of good diplomacy is the same as the foundation of good business . . . .”<sup>10</sup>

No one can deny the rigor, parsimony, and productiveness of the rational choice paradigm even if, as one commentator notes, the model is not without flaws, “not least through the real world’s bloody-minded obstinacy in simply not conforming to theory.”<sup>11</sup> The apparent, frequent disconnect between actors’ behavior as “predicted” by the paradigm and their actual behavior has long been noted by scholars, both those working within the paradigm and those critics outside it.<sup>12</sup> Perhaps the most friendly explanation for the disconnect involves information. Rational choice requires actors to possess rigorously valid and reliable information about many variables to arrive at a decision.<sup>13</sup> In the “real world,” such information is very often partial or imperfect and hence, expectedly, decisions are far from optimally rational.<sup>14</sup>

However, how “friendly” to the overall paradigm the information defense is depends on where the main sources of imperfection are held to lie. If they are in a sense external to the actor, in the situation or the environment—in the nature of “the world”—then the defense of rational choice is robust. It is the booming, buzzing world that is to blame, not the decision-making actor. But if we presume instead that the information deficits are to be found mainly as a result of something “in” the actor’s own *regular* cognizing processes—for instance, in a range of fairly frequent and “standard” cognitive distortions—then the basic presumption of the cognizing actor as a *rational* decision maker becomes a shakier one.<sup>15</sup> In fact, the negotiation literature is now full of

8. For a classic, see RAIFFA, *supra* note 3. A contemporary example is LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* (2d ed. 2001).

9. In the Prisoners’ Dilemma version of game theory, central to so much early negotiation research in the experimentalist tradition, the “prosecutor” has something to “sell” the “prisoners,” with clear payoffs (costs and benefits), and they must decide whether and how to “buy” it. See DEAN G. PRUITT & PETER J. CARNEVALE, *NEGOTIATION IN SOCIAL CONFLICT* 19-21 (1993).

10. HAROLD NICOLSON, *DIPLOMACY* 71, 77 (3d ed. 7th prtg. 1973). For a view underlining the cultural construction of such a conception, see KEVIN AVRUCH, *CULTURE AND CONFLICT RESOLUTION* 39-48 (1998).

11. Jocelyn Evans, *Fitting Extremism into the Rational Choice Paradigm*, in *GOVERNMENT AND OPPOSITION* 110 (2004).

12. 1 HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY* 236 (1982).

13. *Id.*

14. *Id.*

15. These can result from structural limitations in the capacity of the cognitive apparatus to store, retrieve, or process information, or from a range of other distortion causing mechanisms, many supported by the apparent organismic requirement for “cognitive miserliness” (or risk aversion), resulting in such framing biases as attribution errors, just-world thinking, mirror imaging, illusory correlations, reactive devaluation, etc.

research, discussion, and analysis of such distortions as being part and parcel of “regular” cognitive processing.<sup>16</sup> More recently, that most important distinction—a bifurcation, actually—in the theory of mind assumed by rational choice theory between “cognition” on the one hand and “emotion” on the other has been questioned. Affect and cognition appear to interpenetrate one another all the time in our thinking.<sup>17</sup> And if our conception of thinking—of cognition—no longer allows the partitioning away of (messy, irrational) emotion, then how can we assume that rational choice theory “predicts” any actor’s behavior at any time? Perhaps the value of the theory as stipulating a set of practical, normative prescriptions remains undiminished: When negotiating, this is how one ought to act to maximize utilities when and if . . . etc.<sup>18</sup> But the value of it for prediction, describing how people actually reach decisions in the bloody-minded real world (and, coincidentally, for supporting its purported evolutionary roots in our psychological past), seems much diminished.<sup>19</sup>

These are some of the critiques that have emerged from within cognitive psychology itself, at the foundation of rational choice theorizing. I will not engage here the important problem of how one gets from the behavior of an individual rational actor to the behavior of the collective—a problem that has engaged some of the best minds in a variety of the social sciences. One can note that it has long been recognized that “rationality” in the form of maximizing behavior at the individual level can result in “irrationality” (severely sub-optimal system outcomes) at the level of the collective—the

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16. See PRUITT & CARNEVALE, *supra* note 9, at 81-102; THOMPSON, *supra* note 8, at 293-97. For a discussion of such regular distortions found in international negotiation at the state level, see ROBERT JERVIS, *PERCEPTION AND MISPERCEPTION IN INTERNATIONAL POLITICS* (1976). An early insight in this direction, deeply connected to peace studies and coming from the polymath and perennially former-economist Kenneth Boulding, is *THE IMAGE: KNOWLEDGE OF LIFE AND SOCIETY* (1956).

17. For a sample of recent works in this vein, see ERIC EICH ET AL., *COGNITION AND EMOTION* (2000); *EMOTIONS AND BELIEFS: HOW FEELINGS INFLUENCE THOUGHT* (Nico Fridja et al. eds., 2000); *FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION* (Joseph P. Forgas ed., 2000).

18. See THOMPSON, *supra* note 8, at 327.

19. Richard Rubenstein reminds me that there is another dimension to the problem over and above imperfect information and emotional biases in decision making, namely that rational choice theory is not as “coldly analytical” as it seems. Rubenstein argues that it is in many ways “a disguised normative theory, instantiating certain *values* such as a commitment to a certain sort of freedom and a certain sort of social order.” Personal Communication with Richard E. Rubenstein, J.D. (July 1, 2004). He adds parenthetically, “One might even be tempted to call these ‘bourgeois values’ if one weren’t concerned with being thought of as a Marxist dinosaur.” *Id.* I would note that one need not be a Marxist (nor a saurian) to recognize the normative dimension (and social functions) of what theorists from Max Weber to Jurgen Habermas, among others, sometimes call “technical rationality” (*Zweckrationalitat*). For a beginning, see MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 115 (1947).

well-known “tragedy of the commons”; or that it is impossible to reliably derive from aggregated individual preferences a preference set for the collective; or that some sociological analogue of the market’s “invisible hand” will make things come out all right at the social or collective level.<sup>20</sup>

Other critics have come at rational choice not from the perspective of its (problematic) sociology, but from anthropology—for example, a cultural critique that questions the universality of utilities divorced from their encompassing contexts of meaning and valuation.<sup>21</sup> Of course, the nature of utilities is not a problem at all in neoclassical economics, since if one defines a utility as anything desirable or valued, then one simply needs to identify what, in a given culture, is desired or valuable, and then look around to discover individuals striving to maximize it left and right. The adequacy of this conception of utility for understanding other cultures has long been questioned,<sup>22</sup> but the questions become harder if one imagines trying to “transact” (say, negotiate) *across* different “utility universes.” For even if we assume that a behavioral theory of utility maximizing holds across all cultures, if we admit that the nature of utilities varies cross-culturally, then to imagine intercultural “rational” transactions, we would also have to assume that culturally-specific utilities are essentially fungible.<sup>23</sup>

The fungibility of utilities is (if we adopt the discourse of neoclassical economics, at least) one issue at the heart of a theory of intercultural negotiation—or intercultural transactions of any sort, for that matter.<sup>24</sup> But for the purposes of this Essay, I want to hold cultural variability constant, as it were, and redirect our analysis of utility to the related notion of “interest,” which is so important in contemporary and canonical negotiation theory and practice.

In what one might legitimately call the first “Copernican revolution” of negotiation theory and practice, the idea was put forward that if individuals

20. On the “tragedy of the commons,” start with Garrett Hardin, *Tragedy of the Commons*, 162 SCI. 1243, 1243-48 (1968); the economist Kenneth Arrow proposes the “impossibility theorem” in his SOCIAL CHOICE AND INDIVIDUAL VALUES (2d. ed. 1963); for skepticism directed at a sociological “invisible hand” capable of maximally organizing social collectivities, see MICHAEL HECHTER, PRINCIPLES OF GROUP SOLIDARITY (Brian Barry et al. eds., 1987). I have hardly scratched the surface of this literature in rational choice and exchange theory, ranging from ecology and economics to sociology and political science.

21. See, e.g., AVRUCH, *supra* note 10.

22. See generally MARSHALL SAHLINS, CULTURE AND PRACTICAL REASON (Univ. of Chicago Press ed., 1978).

23. Aaron Wildavsky, *Choosing Preference by Constructing Institutions: A Cultural Theory of Preference Formation*, 81 AM. POL. SCI. REV. 3, 4-5 (1987) (arguing against the universality and for the cultural variability of “preferences” (utilities)).

24. Kevin Avruch, *Culture, in CONFLICT FROM ANALYSIS TO RESOLUTION* 140, 147 (Sandra Cheldelin et al. eds., 2003).

could be shown that most unproductive and inefficient negotiation involves arguments around surface demands or "positions," then the act of having parties move beyond positions to analyze their underlying interests would free them to engage in a whole range of creative problem-solving activities.<sup>25</sup> Put more formally, one could in many, though certainly not all, situations move from distributive (fixed-pie, zero-sum) bargaining toward problem solving and integrative (expanded-pie, positive-sum) solutions, toward the famous "win-win" agreement.<sup>26</sup> The question that some within our field have asked is whether anything, capable of motivating behavior or social action, lies "beneath" interests.<sup>27</sup> This is the crucial question if one wants to assess the relevance of negotiation for conflicts around issues involving ideology, identity, or values. How one answers it determines how one assesses the adequacy of the existing "canon of negotiation," or the need for its expansion.

### III. BASIC HUMAN NEEDS AND THE CRITIQUE OF INTEREST-BASED NEGOTIATION

To imagine "motivators" underlying interests is to adopt an essentially stratigraphic or archaeological view of the person as social actor.<sup>28</sup> As elaborated by Wallace Warfield, this view yields a "layered" model of conflict (or social transactions generally) that puts "positions" on the top layer, at the surface.<sup>29</sup> Beneath these lie "interests."<sup>30</sup> Positions, often phrased as "demands" in a negotiation, may be consciously strategic or political, or may stem from emotionally occluded—as by anger—or inadequately analyzed interests. Interests refer (as in Fisher and Ury) to "real," and presumably utilities-connected, desires or wants.<sup>31</sup> At these two top levels, one is operating within the bounds of the rational choice paradigm,

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25. Outside of the more formal negotiation literature, the *locus classicus* of this argument is Fisher and Ury's *Getting to Yes*. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* (2d. ed. 1991). Although I have critiqued this book from a cultural perspective in the past, it is mildly distressing to see "win-win" turned so decisively into a cliché. I have been in the field long enough to remember first encountering the phrase "win-win" as a genuine and thought-provoking insight. Now one can hear it used routinely by Pentagon spokespersons or on unwary consumers in the finance departments of Ford dealerships all over the country.

26. See *id.* at 56.

27. Wallace Warfield, *Public Policy Conflict Resolution: The Nexus Between Culture and Process*, in CONFLICT RESOLUTION THEORY AND PRACTICE 176, 186 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993).

28. See Kevin Avruch & Peter W. Black, *Ideas of Human Nature in Contemporary Conflict Resolution Theory*, 6 NEGOTIATION J. 221, 221-28 (1990).

29. Warfield, *supra* note 27, at 186.

30. *Id.*

31. See *id.*

and interest-based negotiation theory and practice suffice.<sup>32</sup> However, beneath interests lie “values,” resulting from social learning and enculturation.<sup>33</sup> At this level, Warfield says a “non-rational choice paradigm” applies.<sup>34</sup> Finally, ontologically and foundationally, there lie basic human needs; here a “bio-genetic paradigm” is called for.<sup>35</sup>

It is from the deepest level, basic human needs, that John Burton mounted his critique of interest-based negotiation (or any third party facilitation, such as mediation, which is merely an extension of it) as a response to what he called “deep-rooted conflicts.”<sup>36</sup> Social conflicts resulting from the suppression of individuals’ basic human needs are not negotiable or “mediatable.”<sup>37</sup> Only the satisfaction of the needs can resolve the conflict.<sup>38</sup> The sort of problem solving called for in these cases involves the formal analysis by the parties, aided by a panel of experts in basic human needs theory (*but not necessarily in the substance of the conflict*), of how the needs of the parties are being suppressed and of ways the parties may achieve mutual satisfaction of them.<sup>39</sup>

32. *Id.*

33. *Id.* at 187.

34. *Id.* at 186.

35. *Id.* An important caveat to all these sorts of models, especially hierarchical ones, is that interests and values are never uniformly distributed in social groups—some may hold interests and values that others in the group do not—and that interests and values, even if socially shared, are always differentially internalized by different individuals. For some individuals, to take an example, the value of “Christian charity” may be held, but only at the level of cultural cliché; other individuals might organize their whole lives around it. See AVRUCH, *supra* note 10, at 16-20 (discussing how these points are generalized to culture).

36. JOHN BURTON, CONFLICT: RESOLUTION AND PREVENTION 15 (1990).

37. *Id.* at 34.

38. *Id.* at 242.

39. See generally BURTON, *supra* note 36. Burton assumed that one party—the weaker, disenfranchised, or oppressed one—suffers disproportionately suppressed needs and that its social agitation “causes” the conflict, with the stronger party (often the State) then responding repressively and violently, leading to escalation and conflict spirals. *Id.* at 50. But Burton always recognized that the stronger party has irrepressible needs too—often around “security”—and these must be addressed as well if resolution is to occur. *Id.* at 34. A striking example of this was Burton’s arguing throughout the 1970s, 1980s, and early 1990s that any nonviolent solution to South African apartheid and the transition to majority black rule would necessitate addressing white, and particularly Afrikaner, concerns. *Id.* In that era, in the liberal to radical university, peace studies, and conflict resolution settings in which he moved, this was a politically incorrect and for some a distasteful position to espouse. Always the iconoclast, political correctness of any sort was never Burton’s concern. Nevertheless, most “experts” predicted the end of apartheid in a racial bloodbath, borne mostly by whites, and a few in radical circles were prepared to welcome it. Now reflect on the genius of Nelson Mandela’s guiding South Africa’s nonviolent transition to majority black rule and the end of Apartheid—precisely, how the fears of white South Africans were addressed, materially and symbolically—and the wisdom of Burton’s insights about protecting the needs of apparently stronger parties in deep-rooted conflicts cannot be ignored. There are lessons here for the resolution



While Burton's conception of conflict resolution was certainly a critique of interest-based negotiation, he did not so much desire to "expand" the canon of negotiation as to replace it entirely as a technique for resolving deep-rooted conflicts. This is because basic human needs "trumped" mere interests, and therefore an entirely different practice or technology of conflict resolution (the "analytical problem solving workshop") was called for.<sup>40</sup> Burton sidestepped what I earlier referred to as the problem of the "fungibility" of utilities, or the closely related notion of interests, by postulating the primary, ontological power of basic human needs.<sup>41</sup> But since he argued that these needs were indeed ontological—the same everywhere and universally shared—they were by definition also transcultural, and the whole problem of transactions across what I have called "utility universes" never arises.<sup>42</sup> Unlike interests, one does not have to devise integrative solution sorts of trade-offs or other manipulations (bridging, logrolling, alternative compensations, etc.) between different species of needs, since (a) one in any case cannot—all the needs imperiously require satisfaction eventually; and (b) every individual has the same set of them. Thus, Burton would certainly agree that the essential heuristic of rational choice and interest-based negotiation, the *buyer-seller*, is grossly inappropriate for fashioning a resolution to deep-rooted conflicts; but this is because basic human needs, being *given*—literally *inalienable*—can never be "bought," "traded," or "sold."<sup>43</sup> Insofar as we need a new heuristic here, it would be, as Warfield suggests, something in line with a "bio-genetic paradigm."<sup>44</sup> The microsociological rationality of the calculating, maximizing individual of neo-classical economics is somehow to be replaced by the perduring evolutionary rationality of the adaptive, inclusive-fitness seeking genome.

#### IV. VALUES-BASED CONFLICTS, INTERESTS, RIGHTS, AND POWER

Sandwiched between the presumed universal comparability of utilities, opening the way for creative problem solving at the level of interests, and the bedrock universality of basic human needs, lies the layer Warfield calls "values."<sup>45</sup> Inculcated in individuals through socialization and enculturation,

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of the Palestinian-Israeli conflict (especially for those more vehement critics of Israel or Zionism who tend toward demonification), among others.

40. *Id.* at 204.

41. *Id.* at 23.

42. *Id.* at 211.

43. *Id.* at 39-40.

44. Warfield, *supra* note 27, at 186.

45. *Id.*

“values” in this scheme cover a wide range of notions, including such ideas as ideology, beliefs, or worldview, which are not at all identical.<sup>46</sup> So the term is being used here, imperfectly, as a kind of shorthand.<sup>47</sup> Instead of being linked, through the notion of utility, to what is useful, desired, or preferred, values are linked (through a different calculus?) to what is deemed good and true. Warfield also argues that at this level some sort of “non-rational choice paradigm” is the appropriate one for understanding social transactions—conflict or its resolution, for example.<sup>48</sup> At the least, values-based conflicts may resist the sort of rational, problem-solving negotiation practices that often and demonstrably work well to address conflicts involving competing interests. In the past, many such values-based conflicts have been labeled as “intractable,” especially if they involve basic incompatibilities between the parties at the deepest levels of worldview, or perceived threats to personal or group identity.<sup>49</sup> In any case, if a negotiation “canon” is to be expanded at all, it would be at the point of addressing values-based conflicts.

A first step is, I believe, the formulation of a different heuristic for orienting oneself to these sorts of conflicts; different, that is, from the *buyer-seller* metaphor that is central to interest-based negotiation theory, research, and practice. Tversky and Kahneman, and Lakoff and Johnson, among others, have pointed to the ways in which heuristics play an important role in decision making, and metaphors in cognition and perception generally.<sup>50</sup> The metaphor or heuristic of *buyer-seller* is hardly in itself “value-neutral” in this regard. Consider, for example, how it orients us to the notion of “trust” in negotiation. Discussing the (canonical) concept of “reservation point,”—essentially the quantification of one’s BATNA—Leigh Thompson assesses the wisdom of one party revealing her reservation point to the other, in part thereby demonstrating “good faith and trust” in the other party.<sup>51</sup> Thompson

46. *Id.* at 187.

47. Values are connected closely to matters of ideology and identity, and, therefore, values-based conflicts are connected closely to ideological and identity conflicts. However, to keep the discussion that follows relatively simple, I will focus on values only and leave the nature of their connection to the latter two unspecified.

48. *Id.* at 186-87.

49. See John Agnew, *Beyond Reason: Spatial and Temporal Sources of Ethnic Conflicts*, in INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION 25 (Louis Kriesberg et al. eds., 1989); Susan Hunter, *The Roots of Environmental Conflict in the Tahoe Basin*, in INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION 13 (Louis Kriesberg et al. eds., 1989); Terrell A. Northup, *The Dynamic of Identity in Personal and Social Conflict*, in INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION 55 (Louis Kriesberg et al. eds., 1989).

50. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* (Univ. of Chicago Press ed., 1980); AMOS TVERSKY & DANIEL KAHNEMAN, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1982).

51. THOMPSON, *supra* note 8, at 43.

writes, prescriptively: “Negotiation is not an issue of trust; it is an issue of strategy. The purpose of negotiation is to maximize your surplus, so why create a conflict of interest with the other party by ‘trusting’ them with your reservation point?”<sup>52</sup> Given the underlying and orienting heuristic, this seems a perfectly reasonable, indeed rational, way to structure a buyer-seller relationship and approach negotiation within one.<sup>53</sup> But if one is negotiating with another in the context of a values-based conflict, ought the matter of “trust” be dismissed so emphatically? If one thinks not, then what sort of heuristic can move us away from thinking of negotiation in a “maximize your surplus,” buyer-seller modality?

Before suggesting such a heuristic, it is worthwhile briefly to examine how rational choice and interest-based negotiation theorists have themselves addressed values-based conflicts. The two main ways pull in rather different directions.

First, one can simply deny that any significantly different sorts of “motivators” underlie interests. This is the tack taken by Dean Pruitt and Sung Hee Kim, who see “interests underlying interests,” although they do agree that interests cluster into “hierarchical trees,” the deepest or most “basic” level of which consist of such Burtonian basic human needs as identity, security, justice, or self-esteem.<sup>54</sup> However, they do not agree with needs theorists “about the need to draw a sharp distinction between interest-based conflicts and needs-based” ones.<sup>55</sup> Negotiation of what we would call values-based conflicts in this view consists of the parties moving “up” or “down” their respective interest trees until they reach mutually bridgeable ones.

The second tack is very different. Agreeing that values-based conflicts are rarely if ever amenable to interest-based negotiations, these analysts

52. *Id.*

53. Granted, though I suspect that another reason for this assertion, regarding trust in general, if not disclosing one’s BATNA, has to do with the presumption (particularly in simulation or experimentalist settings) that buyer-seller negotiations are one-off, “cash-and-carry,” non-repetitive encounters. If one assumes a continuing relationship, even in strictly surplus-maximizing, cost-benefit encounters, then perhaps the notion of trust looms larger—it becomes another utility. The one-off nature of the buyer-seller heuristic is of course not a necessary element, but a commonly assumed one. More broadly, Thompson is forgetting that even the most coldly rational or economic negotiation between buyer and seller depends upon the existence of some shared norms; for example, a consensual legal framework that valorizes contracts. In this sense, one might assume there is a basic level of trust in “the system” if not in the (other) individual. Finally, markets in other cultures may well parse trust in different ways. See Clifford Geertz, *Suq: The Bazaar Economy in Sefrou in Meaning and Order*, in *MOROCCAN SOCIETY* 123 (1979).

54. DEAN G. PRUITT & SUNG H. KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 199-200 (3d ed. 2004).

55. *Id.* at 200 n.9.

suggest that two other modes of settlement or resolution may be called for, one based upon power, the other upon rights.<sup>56</sup> Both may be deployed in the framework of a “negotiation,” although such negotiations rarely present the same opportunities, as do interest-based ones, for creative or “pie-expanding” problem solving. Power implies coercion of one sort or another, whether deployed as threat or exercised in some sort of contest—the outer limits of “negotiation.” Rights refer to standards of legitimacy, justice, or fairness, whether formally codified in a contract or generally understood in some cultural context. (The context may vary in scope. One may speak of an organizational culture where salary is “rightfully” or “justifiably” tied to seniority, or of culture more broadly, where “justice before the law” is the right of all. Rights may be generally socially accepted, but they are often not, and contested as well, frequently looping us back to power.)

In contrast to Pruitt and Kim, who believe all motivators, including values and basic human needs, can be collapsed into the category of interest, Thompson and Ury appear to leave the field of values-based conflicts open to alternative paradigms, based on power and rights.<sup>57</sup> In the former case, the existing canon is therefore probably sufficient; in the latter case, it is probably irrelevant. In addition, the role of negotiation aimed at achieving integrative solutions is greatly circumscribed in rights and power settings. Rights conflicts are most often settled through stipulative or adjudicatory processes of one sort or another, usually producing winners and losers. Moreover, the interests of individuals (the starting point of the rational choice, interest-based heuristic) are often supplanted here by the more distal and abstract interests of the corporation, society, or the state. Meanwhile, power-based negotiations may reduce merely to communication between the parties (metaphorical or not) about the terms of ceasefire or surrender—with correspondingly little scope for creative brainstorming or elaborate problem solving.<sup>58</sup> In addition, power-based settlements are notorious for their less-than-optimal sustainability, engendering as they do resentment and vengefulness—the seeds of the next round of conflict.<sup>59</sup>

When faced with values-based conflicts, then, the choice with regard to negotiation at present seems to be between presuming that such conflicts are not qualitatively different from other sorts of interest-based conflicts, even if more ingenuity in moving “up and down” the hierarchical interest trees is

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56. See THOMPSON, *supra* note 8; WILLIAM URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 7-9 (1988).

57. *Id.* at 9.

58. Perhaps the paradigmatic negotiation in both rights and power (more the latter!) is the plea-bargain—the prisoners’ dilemma in a different light.

59. AVRUCH, *supra* note 10, at 48-50.

called for; or presuming that the notion of interests no longer productively applies, and negotiation itself constricts to power-plays or rights contests. For myself, I am doubtful that deeply held values or needs can be lumped with other sorts of interests, but I am reluctant to leave the field thus open only to power and rights. Might it be that what we need, precisely, is an expanded canon of negotiation? Certainly some thinking in this direction has already occurred with respect to power: consider Kenneth Boulding's *Three Faces of Power*<sup>60</sup> (only one of which is coercive) as an important step in this direction. Several of the articles in the *Marquette Law Review* referred to earlier carry Boulding's ideas forward and suggest that power considerations beyond coercion or force be assimilated and added to the negotiation canon.<sup>61</sup>

And what about rights? If one thinks of such commonly conceived rights as fairness, equity, or justice, it seems as if we are very close to the domain of "values" as this is commonly conceived as well. Can we imagine an expanded canon of negotiation capable of addressing these sorts of conflicts? If so, I think we have to begin by conceptualizing a heuristic for negotiation different from that of *buyer-seller*. If Tversky and Kahneman are correct about the orienting role heuristics play in our thinking, then the purpose of a new heuristic is to orient us away from thinking of negotiation predominantly in terms of utility-talk and rational choice, and towards a sense of it more open to conflicts around values, needs, and worldviews.<sup>62</sup>

## V. A NEW HEURISTIC FOR NEGOTIATION

If one thinks about a deep values conflict in our contemporary society, then something like abortion or capital punishment is immediately suggested. But if we want a heuristic similar in type to *buyer-seller*, focused (microsociologically) on dyadic actors in a specified and delimited decision making situation, consider the following:

*A couple, each deeply religious but coming from very different religious traditions, has a child. Religion is extremely important to both of them, and while each "respects" the tradition of the other, a decision must be made as to which tradition the child will be affiliated with and raised in. How do they go about "negotiating" this?*

Perhaps the first thing to note about this—let us call it the *two-religions*—

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60. KENNETH E. BOULDING, *THREE FACES OF POWER* (1989).

61. Honeyman & Schneider, *supra* note 2; see also Jayne Docherty, *Culture and Negotiation: Symmetrical Anthropology for Negotiations*, 87 MARQ. L. REV. 711 (2004); Christopher Honeyman, *The Physics of Power*, 81 MARQ. L. REV. 872 (2004); Russell Korobkin, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795 (2004).

62. See LAKOFF & JOHNSON, *supra* note 50; TVERSKY & KAHNEMAN, *supra* note 50.

heuristic is how, by its own limitations, it highlights the robustness and appeal of *buyer-seller*. For one thing, *buyer-seller* has wide, virtually universal, applicability as an example of a decision making situation. Buyers meet sellers in different sorts of markets all the time and everywhere, and although the nature of these markets is hardly the same, the essential roles are remarkably constant and recognizable.<sup>63</sup> In stark contrast, the *two-religions* heuristic is *imaginable* only in an essentially liberal society in which religion is culturally constituted as a matter of individual “conscience,” privatized and free of coercive pressures from larger social groups—at least larger than each of the couple’s immediate family.<sup>64</sup> In many of the world’s societies, today and historically, this scenario would make no sense. It is, compared to *buyer-seller*, narrowly historically and culturally contingent.

Accepting the cross-cultural constriction of the heuristic (not a small thing), how would rational choice, *buyer-seller*, thinking apply? Simple solutions of the “fair divisibility” sort are immediately objectionable. Children (as the great arbitrator Solomon pointed out in a much cited precedent) ought not be divided in half. A child cannot reasonably be raised in one tradition in the months that end in thirty-one days, and in the other in the months that do not. Shall the couple agree to alternate traditions with each new child? Raise boys in one and girls in the other? Pick a third religion alien to both of them? It is difficult to imagine the parties maximizing mutual “value” if each believes that only his or her religious tradition will lead the child to full heavenly reward (or whatever soteriological goal is desired). Perhaps they should raise the child simultaneously in both traditions, leaving the ultimate decision up to the child when he or she reaches legal majority?<sup>65</sup>

It is also difficult to imagine a “power” process being applied to this decision without great damage to the relationship, and perhaps eventually to the child as well. If, however, power is conceived beyond the bonds of the dyadic relationship and generalized to society, then one can imagine a rational decision being made to raise the child in the tradition that is more closely identified with the power structure of the society, for the future advancement and “benefit” of the child. This, indeed, is why Moses Mendelssohn was a

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63. “Recognizable” but not necessarily “identical.” Other markets in other places (“cultures”) provide evidence of this. See Geertz, *supra* note 53. Among other things—*pace* Leigh Thompson on “trust”—Geertz writes of *buyer-seller* interaction in the suq: “Bargaining does not operate in purely pragmatic, utilitarian terms, but is hedged in by deeply felt rules of etiquette, tradition, and moral expectation.” *Id.* at 222.

64. Other features of this social setting may include notions of gender equality (for heterosexual couples), egalitarianism, the absence of an official state-sponsored religion, or at least the effective legal separation of church and state.

65. This “solution” is the one most in keeping with the highly individualized and religiously privatized nature of the society itself. It *is* rational. Does it make any sense to you?

great Jewish philosopher in the Austro-Hungarian Empire in the eighteenth century, and his grandson, Felix, a great Christian composer in the nineteenth. But note that we have now clearly turned religion into an *interest*, amenable to utility-talk. History is certainly replete with examples of this.<sup>66</sup> In fact, under some circumstances, values do get treated like interests and negotiated as one would negotiate interests. This happens in the United States Congress or parliaments or in democratic electoral politics generally—not to mention in labor-management relations—more often than not. But if we insist on preserving the genuine and deeply held values—the non-utilitarian—nature of the couples' thinking (and *feeling*) as they make their decision, then choosing on the basis of secular, "profane," and interest-based advantage should be offensive to both parties.<sup>67</sup>

If power is to be applied only problematically in this situation, what of rights? In one sense rights are inextricably embedded in the heuristic, as implied when I specified the kind of culture, society, or polity in which this scenario is even imaginable.<sup>68</sup> But if there exists no set of rights—objective, legitimate, widely recognized, and shared standards—available to help the parties make their choice (even if rights make their *choice* possible), then are we thrown back to power?

Is this decision *negotiable* at all?

## VI. CONCLUSION: A NEW CANON FOR A NEW HEURISTIC?

I do not, in fact, have a very decisive or satisfying answer to this question. But the raising of it brings us back to the starting point of the Essay, the call for a new, expanded canon of negotiation theory, research, and practice. I do think the *two-religions* heuristic demonstrates the limitations of the older canon, based on rational choice and buyer-seller, in approaching these sorts of conflicts. It is not clear to me, *pace* Pruitt and Kim, how we can conceive of

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66. "Paris is worth a Mass," said Henri IV, famously, as the Protestant king converted to Catholicism to take the city in 1594. See HUGH ROSS WILLIAMSON, PARIS IS WORTH A MASS (1971). Religion as interest is widely to be found in the politics, especially urban, of multi-confessional societies: The mayor is an *X*, the city council president is a *Y*, different wards have their predetermined religious or ethnic representative, etc. One can even try to run a nation-state in this way, for example, Lebanon. (Thus, "rational choice.")

67. Among my (American) colleagues who read and responded critically to this essay, it was the colleague who is most committed to his faith and cultural or ethnic identity who was the most unhappy with the *two-religions* scenario as a basis for much of anything.

68. In contrast, the *millet* system of the Ottoman empire protected the prerogatives of minority religious communities by allowing them jurisdiction over legal matters involving personal status—marriage, divorce, adoption, etc. 7 ENCYCLOPEDIA OF ISLAM 61 (Hamilton A.R. Gibb et al. eds., 1993). But all matters arising between communities, especially those involving Muslims, fell under the jurisdiction of Muslim *qadis* and courts: the clear intersection of rights with power. *Id.*

the religious values of *these* parties (they are not horse-trading or logrolling Congressional Democrats and Republicans, after all) in any productive way reducible to interests.<sup>69</sup> Nor does it seem to me that identifying or acknowledging a deeply rooted basic human need around religious meaning, affiliation, belief, or spirituality, *pace* Burton—that both parties indeed share—points us toward decision or *solution*.<sup>70</sup> I can see that based upon the older canon of negotiation we might well call this conflict fully “intractable” and non-negotiable. The advice of a third party to this couple might then be to forego bringing children into their relationship entirely—or rethink the sustainability, if not the value, of the relationship. Hardly win-win.

But if new heuristics guide or orient our thinking about problems in new ways, then what might the *two-religions* heuristic suggest? The list of topics for a new “common core” in an expanded canon of negotiation suggested by many of the authors in the *Marquette Law Review* include subjects under apology, culture, emotions, ethics, identity, power (beyond coercion), narrative, and metaphor.<sup>71</sup> If the older canon seems too restricted to imagine negotiating the *two-religions* conflict under it, it is equally difficult to imagine a negotiation—were one possible—that did not include recourse to some of the subjects listed above. But how?

One important question raised here is under what circumstances does the interest-based paradigm work or fail when confronted by values-based conflicts—when are values reducible or irreducible to interests? I think we need a more nuanced—processual and dynamical—way of describing negotiations in values-based conflict. Wallace Warfield, for example, suggests that we should not so much see interests and values in a hierarchical relationship where one “trumps” the other—my earlier game metaphor—as to understand the ability of oppositional parties in negotiations of various dimensions to engage in what he describes as “rapid shifting” between “negotiable interests and so-called non-negotiable values.”<sup>72</sup> Reflecting on his own conflict resolution training and workshop practice in post-genocide Rwanda, Warfield writes: “Thus Rwandans (Hutus and Tutsis) were able to negotiate around interests in a scenario that dealt with organizational conflict because organizational structure and culture provided negotiators a bridge. Whereas, those same parties, when it came to fundamental issues of genocide and forgiveness, struggled to find a common ground.”<sup>73</sup> He suggests the need

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69. See PRUITT & KIM, *supra* note 54, at 199-200.

70. BURTON, *supra* note 36, at 15.

71. Honeyman & Schneider, *supra* note 2, at 645-48.

72. Personal Communication with Wallace Warfield, Associate Professor of Conflict Analysis, George Mason University (June 30, 2004).

73. *Id.*



for heuristic and models that depict not static layers, but “shifting . . . boundaries driven by situation and perhaps other characteristics.”<sup>74</sup>

The really hard work, not even attempted in this Essay, is not to devise a new heuristic, but having proposed one to develop it in order to imagine the possibility for *negotiation* of values-based conflicts now deemed intractable, beyond the sometimes uncertain remedies of rights and power. The *two-religions* heuristic, given its limitations, may in the end serve only to remind us that these sorts of deeply embedded conflicts demand, on the part of theorists and practitioners alike, greater attention to understanding the dynamics of values-based negotiations (in the area of practice), and for theorists, greater attention to axiology in general and the nexus between values and identity—in the end hinted at but unexplored here—in particular.

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74. *Id.*