

1-1-2017

# Ethical Bedrock Under a Changing Negotiation Landscape

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Published version. "Ethical Bedrock Under a Changing Negotiation Landscape," in *The Negotiator's Desk Reference* / Christopher Honeyman, Andrea Kupfer Schneider, editors Saint Paul, Minn. : DRI Press, [2017]: 493-502. [Publisher link](#). © 2017 DRI Press. Used with permission.

## The Ethical Bedrock under the Negotiation Landscape

Kevin Gibson

*Editors' Note: Your dilemmas as a negotiator fall into two basic sets, "what's possible?" and "what's right?" The first is treated by many chapters in this book. Here, from his philosopher's background, Gibson writes about the influence of morality on negotiations, and how we can think more clearly about what's the right thing to do. This chapter should be read in conjunction with Carrie Menkel-Meadow's chapter on The Morality of Compromise.*

### Ethics in Negotiation

Negotiation approaches and personal attitudes vary widely and against a backdrop that promotes bargaining as optimizing personal gains some might think that anything goes. However, individuals are constrained not only by the threshold requirements of law but also by personal values that shape our conduct at the negotiating table.

The discipline of philosophy can help negotiators in two ways. First, it provides a set of time-tested principles that give us the conceptual framework and language to assess our actions. Secondly, it gives us benchmarks of acceptable behavior, which are particularly useful in novel or difficult cases when the law may give little or no guidance. Thus there are a number of reasons why we should think about values in an expansive way, and consider our personal morals and those we may encounter when there are incentives to act to maximize our immediate self-interest.

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For instance, negotiators necessarily make decisions about the process they will use and the posture they will adopt to satisfy their needs, and those decisions will reflect personal values involving moral issues such as fairness, rights and justice. Similarly, parties rarely have full information about each other, and so they may be in a position to take advantage of a perceived deficiency, or to present information that may not be true. [NDR: Hinshaw, *Ethics*] They may also agree to a settlement that affects third parties—for example, they could externalize costs by putting them on some entity not present at the negotiation. [NDR: Wade-Benzoni, *Future Generations*] And there may be obvious opportunities to exploit someone's ignorance or lack of power.

This chapter outlines three major ways that we can think about the morality of negotiation. First, the moral stance of the parties themselves should be taken into account. Second, we should note that individuals may approach negotiation along a spectrum from cooperation to zero-sum competition, and consequently we have to acknowledge the importance of the value-laden issues involved, such as trust, disclosure, or beneficence. Finally, we should recognize that private deal making is sanctioned against a societal backdrop that currently (at least in the U.S.) gives a lot of latitude to agreements as long as they are not unconscionable. Hence we ought to be aware of the way negotiation fits into the wider social and political context of justice, rights, equality, or welfare. [NDR: Welsh, *Fairness*]

Morality encompasses value-based decisions and behavior. Although the term *ethics* is formally the practice of critical assessment of morality, it is commonly used to describe behavior in defined roles or circumstances. For example, we could discuss the *ethics of poker*, where those playing the game acknowledge the specific rules and behavior involved. Given the nature of the game, bluffing and lying are allowed, and even become routine and expected ploys that take advantage of the opponents' ignorance. At the same time, other behaviors are prohibited: it is unacceptable to play with marked cards or a confederate. This distinction is important, since some negotiators will consider their personal behavior to be compartmentalized into distinct spheres where they separate their everyday behavior from what they consider acceptable in a bargaining situation, especially if they are acting as a paid agent for a third party.

There is considerable literature that treats negotiation as an amoral game, where ethical concerns do not stand in the way of substantive gains.<sup>1</sup> In a similar vein other writers have advocated that the only constraint on an attorney's behavior in negotiation should be its legality.<sup>2</sup> Given the prevalence of such approaches it is worthwhile to be aware of the nature of the techniques involved and the dynamics they set up. [NDR: Craver, *Distributive Negotiation*] Clearly, the aim in most of these tricks of the trade is to give one party an advantage in bargaining. Such

tactics, however, risk putting one's credibility at risk and limiting the prospect of future interaction.<sup>3</sup> Although the aggression and competition of gamesmanship may lead to short-term gains, it put reputation at risk.<sup>4</sup> [NDR: Tinsley et al., *Reputation*] The evidence is that any immediate benefit will typically be negated by the inefficiencies imposed by distrust and the opportunity costs of foregone future transactions.<sup>5</sup>

An intermediate view would accept that while we initially make moral decisions about the roles we adopt, such as an attorney or doctor, subsequently our duties are not personal, but instead are governed by the appropriate professional codes (Lyons 1984; Fuller 1965; Kadish and Kadish 1973). Nevertheless we should note that professional codes are not comprehensive algorithms that cover all contingencies, and in fact they allow considerable latitude for discretionary behavior. For example, under Federal Rule of Evidence 408, settlement discussions may not be used in future litigation. At the same time, participants may not have to tell the truth in those discussions, or even bargain in good faith.

Moreover, while the law provides a useful threshold, there are a number of problems associated with using it as a moral yardstick that would guide all our actions. The law is largely a reactive instrument that responds to challenges, and it is incapable of legislating every possible case. New and different issues not covered by settled law would constantly be contested and demand interpretation. We might imagine what the world would be like if dependence on the law were the prevailing attitude. Against a background where people are constantly wary that others are predatory, and feel they only have to fulfill legal obligations but nothing more, everyone would become dependent on armies of monitors, enforcers, jurists and punishers. In contrast, however, it turns out that in the real world most people operate in an everyday environment of trust and credibility that makes sharp dealing dramatically conspicuous and jarring. [NDR: Lewicki, *Trust*]

Accordingly, let us now consider the other sense of ethics, which is not so much a set of rules for a specific enterprise as a broad framework for critically assessing moral ideas of right and wrong, good and bad, fairness, and justice.

## The Value of Ethical Theory

Traditionally philosophical ethics fall into three major camps: consequentialism, deontology, and virtue theory.

*Consequentialism*, as the name suggests, finds the moral locus of an issue in its results. One way to do this is to assess the balance among utility functions involved, and so one form of this camp is called utilitarianism. Moral worth is then judged on the overall happiness created, or good, of an action, sometimes with the watchword that we should *maximize good for the maximum number*. There are also variations that

suggest we all do well in the long run by cooperating, and hence the concern for others may anticipate reciprocation or other payoffs for the individual.<sup>6</sup> Apparent altruistic acts such as donating blood are interpreted in terms of greater psychological welfare for the donors, or strategic self-interest since one day the individual may derive personal benefit from the arrangement.

A contemporary version of utilitarianism is known as preference maximization, associated with the work of Herbert Simon. Instead of looking to maximize happiness or pleasure in general, it seeks to find acceptable options and "satisfice" as many individual preferences as possible (Simon 1956). Doing so addresses difficulties in calculating varying personal utility functions while still seeking to increase overall aggregate welfare.

*Deontology* gets its name from the Greek word for duty, as it looks to motives and obligations rather than seeking any particular outcome, and is sometimes described in terms of the golden rule; *do unto others as you would have them do unto you*. It reflects a belief that we should always do the right thing for the sake of goodness alone, without regard for any potential reward (Fisher et. al. 1994). Thus, promises should be kept and obligations met simply because they are duties which should not be compromised because of inconvenience or greater benefits elsewhere. Specifically, it treats individuals as autonomous moral actors, each capable of judging right from wrong. In any particular case, deontologists believe our behavior should not be a function of the probability and gravity of anticipated results, such as a lie being discovered, but instead we should always be able to justify our actions whatever the outcome turns out to be. Additionally, as the theory is based on individual autonomy, it implies that all people should be treated with respect and not just as an instrument in the other party's aggrandizement.

The third approach, *virtue theory*, differs in that it avoids providing an ethical formula by looking either to aggregate welfare or to how everyone ought to be treated in similar circumstances. Derived from the work of Aristotle, this approach looks instead to the purposive arc of our lives. It encourages us to think how we should develop a value-driven life that allows for maximum personal flourishing. Rather than focusing on specific acts, it suggests that what matters most is making the most of our personal virtues to form a robust character. In short, it asks what sort of person we want to be, what it means to have a life well lived, and what virtues we should foster to avoid regret when we look back on our lives. Sometimes it has been linked with the motto *moderation in all things*, but this could be misleading. The theory says we all have a package of virtues such as courage, generosity, compassion and so forth, but that these have to be applied in a specific context with the practical wisdom of experience. There are times when we should be more angry, or more

trusting. The key is to apply them at the right time for the right reasons and in the right way: moderation in this sense seems more akin to navigating a ship through a rocky passage by judicious use of the appropriate adjustments than to tamping down all our moral reactions. Further, virtue theory looks to character models, and allows us to step back and ask how our heroes and champions would behave in similar circumstances.

These varied ethical approaches should not be thought of as exclusive or exhaustive, and in most cases they support common conclusions. For example, they would all condemn slavery or oppression, but on different grounds. The fact that they provide contesting perspectives should not be considered a drawback: they serve as first principles for ethical discourse that make plain the foundational assumptions involved, and each in its way provides theoretical underpinning for subsequent argument and policy development.

Moreover, ethical foundations also serve to arrest the notion of ethical relativism. Relativism suggests that ethical choice is no more than expressed preference, much like choosing one flavor of ice cream over another. Because there are so many views of correct behavior, this argument goes, no single theory is correct—with the implication that the search for ethical standards is specious from the start. An analogy might be useful to counter the claim: the fact that there are many different religions does not by itself argue that the quest for spiritual truth is pointless, but rather speaks to the fact that there is a common yearning that is manifested in a wide variety of forms. Similarly, the fact that there are differing bases for ethical theory cannot support the argument that there are no universal moral standards. In fact, the congruence of their conclusions suggests some common ground in human interaction, and a basis for subsequent rational argument. Perhaps a better way to think of the theories is not as competing approaches but more as tools in a toolbox which may be called on in varying kinds of justification.

## **Ethics Awareness in Negotiation**

A worthwhile starting point in discussions about the ethics of negotiation is to determine what individuals believe the aim of negotiation is, and what they feel are the proper means to achieve it. For instance, some may feel that negotiation is a contest where the object is to win at the expense of another, with the implication that any compromise would be a sign of weakness. Others might align more closely with the belief that each party will naturally seek mutually beneficial outcomes. Such core assumptions will naturally govern the subsequent behavior of the parties.

In iterated prisoner dilemma games, for example, it is often profitable—at first—for parties to lie or betray each other. Some people will not feel constrained by concerns about lying or defection. In contrast, empiri-

cal work shows that some participants will prefer to retain a sense of ethical self-worth rather than compromise their values for instant gain (Murnighan 1992). Testing based on personality types found that cooperative people believe there are cooperative, neutral, and competitive people in the world; people with a more neutral disposition felt there were neutral and competitive sorts; and competitive individuals felt that everyone was exclusively competitive too (Kelly and Stahelski 1970). The result is that individuals who impute values to others may unnecessarily constrain bargaining styles and lose opportunities for settlements. In addition, competitive behavior in these tests was also associated with aggressive behavior characterized by selective misrepresentation and willingness to renege on agreements.<sup>7</sup> It also appears that an aggressor will push the other side as far as it will go, in the belief that the opponent will speak up if negotiations go over the boundary of moral acceptability. In that sense, they do not self-monitor their behavior, but rather rely on their opponents to restrain them, a stance that may leave other parties feeling "steamrollered" (Kelly and Stahelski 1970). Some negotiation exercises may foster self-consciousness about individual negotiation styles and our perceptions of others, and it has been found that reassessing personal values is useful in developing a greater repertoire of potential actions and responses (Mannix, Tinsley and Bazerman 1995).

### Present Directions in Ethics

The emergence of ethics awareness and training might be viewed as an expanding circle. Where originally it dealt mainly with compliance and avoiding sanctions, modern ethics discussion has moved to looking at issues in a far wider and more comprehensive context (Singer 1981). It is also significant that ethics has become less of a purely intellectual exercise, and now normative issues are often explored in association with findings of social science, economics, and psychology.

The expansion of ethical consideration to the welfare of others has sometimes been referred to as plus-one staging (Schmidt and Davison 1983). Lawrence Kohlberg developed a well-known set of moral levels. They move from the pre-conventional, where moral reasoning revolves around the physical consequences of action in terms of punishment and reward, to the conventional level, where conformity to social order takes priority in order to fit in with prevailing norms. He then describes the post-conventional, which focuses on principled reasoning in which the subject is motivated by moral values and principles with a concern for universality and consistency (Kohlberg and Kramer 1969). 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. In negotiation theory we often begin by making sure that

a participant's actions will not lead to punishment by poor performance or breaching the law, and then move on to exploring how we think an ideal negotiator might behave. Using the Kohlberg model, some negotiation trainers encourage personal reflection and moral development.

Kohlberg's work has been supplemented by Carol Gilligan's insights (Gilligan 1982). Gilligan noted that oftentimes women confronted with moral dilemmas thought about them differently from men—roughly, they were more concerned about relationships between individuals and about why the dilemma arose in the first place. It is not surprising, then, that in general women may deal with moral concerns, conflict, and negotiation in ways that have not traditionally been explored in the classroom. There is a growing literature both in ethical theory and negotiation that challenges the established male-defined template of correct action (Kolb and Williams 2003; Kolb and Williams 2000; Babcock and Laschever 2003; Jaggar and Young 1998; Pearsal 1993). [NDR: Bear & Babcock, *Gender*]

One manifestation of the wider realm of moral concern is the more frequent use of stakeholder analysis. Stakeholders are people or institutions that will be helped or harmed in some way by change, and perhaps ought to be considered at the bargaining table even if they are not represented.<sup>8</sup> [NDR: Amsler, *Systems Design*]

Post-modernist ethics go beyond individual actions to the much broader canvas of society as a whole. They propose that we need to look at the world as a set of perceived narratives, and, consequently, we would think of negotiation not so much as an exposition of positions and interests, but as a larger story that examines which narrative comes to dominate the discourse (Cobb and Rifkin 1991). Research indicates that when inexperienced or untrained individuals negotiate, settlements emerge out of the initial narrative almost eighty percent of the time, which means there is immense power in being the first to make a case. As Cobb and Rifkin note, justice issues should cover more than substantive or procedural guidelines, and spill over into "a question of access, of participation in the construction of dominant descriptions and stories" (Cobb and Rifkin 1991: 62). Consequently the framing effects of different articulations of the same facts are likely to affect our moral judgments (Bazerman 1984).

The upshot is that ethics in negotiation should be expanded significantly to consider 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, fair, or appropriate. For example, two insurance adjusters may share the same worldview and agree on the terms of a settlement, but if we think of a struggling working-class tenant and wealthy landlord, the differences we find may not just be one of positions and interests, but the very way in which they live and make sense of the world.



Another development at the very core of ethics deserves to be highlighted. Traditionally there have been well-established theories of human nature; these have lately come under increasing scrutiny. Although the analogy is not strict, animal studies indicate that, for instance, monkey populations are basically cooperative and spend significant time in reconciliation (De Waal 1989; Colman 1982). A result of this research is that long-held assumptions that all animals, including humans, are aggressive and competitive are no longer taken for granted. Similarly, from the time of Aristotle, one of the chief distinguishing features of being human has been considered to be our rational intellectual ability. Yet some philosophers suggest that our initial relationships are not rational, but instead emotional and compassionate. [NDR: O'Shea, *Compassion*] Our first formative experiences are not rule-governed, but begin with emotional bonding, such as the connection between mother and child. Consequently much of recent ethics research has explored the normative implications of changing our basic assumptions about human interaction. In time, this may lead to a very different template for interpersonal behavior (Noddings 2003).

## Conclusion

Morality is a function of our values. Some values are trivial; some can be traded; and some, like faith, honor, and loyalty, sustain our identity. Quite literally, history shows that many people have believed that maintaining fundamental values may be worth dying for. Moreover, we can also see the compelling power of the raw moral appeal of the child who claims that something is "just not fair." One of the elements that make negotiation so complex, and not just a mechanical procedure, is that we are dealing with individuals who have psychological and emotional needs that are intimately linked with their value systems.

Thus, asking someone to make a commitment to a settlement that he or she perceives as unfair, or to accept a procedure she considers unjust, is likely to tap into core beliefs about who we are and how we should relate to people and situations. This means that while we may personally accept or reject the value systems of others, any serious examination of negotiation cannot afford to ignore their effects. Ethical issues in negotiation may be approached in a narrow sense that looks at the minimally acceptable levels of bargaining behavior. However, we have seen that the current movement is to think more seriously about fundamental issues of justice and fairness, and in a much wider perspective.

## Notes

<sup>1</sup> There is a considerable literature on the ploys of so-called "hard" bargaining. See generally Schartzki and Coffey, *Negotiation: The Art of Getting What You Want* (1981); Ringer, *Winning Through Intimidation* (1974); Gotbaum, *Negotiating in the Real World: Getting the Deal You Want* (1999). Also see [NDR: Craver, *Distributive Negotiation*]

<sup>2</sup> See, e.g., Shell, *Bargaining for Advantage*, 201-234 (contrasting deception to integrity). See generally Murray L. Schwartz, "The Professionalism and Accountability of Lawyers," *California Law Review*, 66 (1978): 669; Walter W. Steele, Jr., "Deceptive Negotiating and High-Toned Morality," *Vanderbilt Law Review*, 39 (1986): 1387; Charles B. Craver, "Negotiation Ethics: How to be Deceptive Without Being Dishonest/How to be Assertive Without Being Offensive," *South Texas Law Review*, 39 (1997): 713; see also Freedman, *Lawyers' Ethics in an Adversary System*, 9 ("Let justice be done—that is, for my client let justice be done—though the heavens fall."). Note that legality remains the benchmark of acceptable behavior, and thus reliance on misrepresented information, for instance, would still be actionable.

<sup>3</sup> In iterated prisoner's dilemmas where one side has defected following a period of cooperation, a voluntary working relationship can be reestablished, but typically the injured party demands considerable penance; that is, there are costs to the defecting party if it wants to interact again with the same partner. See Kevin Gibson, et al., "Once Bitten: Defection and Reconciliation in a Cooperative Enterprise," *Business Ethics Quarterly* 9, no. 69 (1999): 75-85.

<sup>4</sup> Akerlof makes the point that if it is known that there is a percentage of duds in a given market (e.g., 10% of cars are lemons) then customers will discount what they are prepared to pay to compensate for the risk of ending up with one of the duds. This implies that parties in a negotiation will lower their substantive offers in relation to the possibility of getting taken. Similarly, they will pay more for what they perceive as a straight deal. Thus the overall effect of sharp practice is to lower the gains of those involved. See George A. Akerlof, "The Market for Lemons: Quality Uncertainty and the Market Mechanism," *Quarterly Journal of Economics*, 84, no. 3 (1970): 488-500.

<sup>5</sup> See generally Leigh Thompson, *The Mind and Heart of the Negotiator*, (Pearson, 2005). A study at the University of Michigan demonstrated that a good reputation for seller on E-bay led to a twelve percent increase in profits. See Catherine Dupree, "Integrity has its Price," *Harvard Magazine*, July-Aug. 2003, available at <http://www.harvardmagazine.com/2003/07/integrity-has-its-price.html> (last visited November 25, 2015).

<sup>6</sup> This is not to say that individuals cannot combine both intrinsic and instrumental approaches.

<sup>7</sup> Williams, *Style and Effectiveness in Negotiation*, 172-74. 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. Kritek, *Negotiating at an Uneven Table*, 215.

<sup>8</sup> There is extensive literature on stakeholder theory in business ethics. See Freeman and McVea, "A Stakeholder Approach to Strategic Management," in *The Blackwell Handbook of Strategic Management*, 189.

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