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ADR Ethics

Scott R. Peppet

If one wishes to enlarge the ADR canon, the topic of ethics may seem an unlikely place to start. Most books and textbooks on negotiation and ADR discuss ethics, and scholars have published many articles dealing with both negotiation and mediation ethics.¹ What then, is so new about ADR ethics? Why should we see it as having growth potential as a topic for discussion, teaching, and research?

I break the topic of ADR ethics into two related parts: *the ethics of exchange*, which deals with the moral and legal implications of bargaining, and *the ethics of assistance*, which deals with the ethical issues that arise whenever a third party intervenes in a dispute. In this short comment I defend the proposition that both areas would profit from renewed attention. I argue that central questions remain about the ethics of exchange, such as how to think about honesty and fairness in the context of bargaining, whether negotiators have any ethical obligation to cooperate rather than compete, and how best to understand a lawyer's role in negotiation. Likewise, the ethics of third-party assistance could be further developed. Although much excellent work has been done in this area (for example, by others participating in this symposium), more thinking is needed about what ethical obligations a mediator or arbitrator takes on, about how these roles change in various contexts, and about how best to regulate the ethics of the assisting professions.

The Ethics of Exchange

Bargaining is morally complicated. Whenever negotiators interact, there is opportunity for deception and manipulation, evasion and exploitation. Given that bargaining fuels our economy and our polity, governs our daily affairs, and structures our relations, insight into the moral and ethical dimensions of bargaining is fundamentally important.

What are these moral and ethical dimensions? There are many rich and varied questions to be answered. How should bargainers think about the moral aspects of their actions? If there are moral obligations to be honest or fair during negotiation, how can we best describe or discern those obligations?

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1. For an excellent recent summary of this literature, see Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 *Geo. J. Legal Ethics* 739, 741 n.3 (2001).

What are they based on, where do they come from, and what are their boundaries? If these moral concerns are formalized in ethics codes or legal rules, what should those rules say? Should they set a floor of minimally acceptable ethical behavior, or describe an aspiration or ceiling? How can such ethical obligations be monitored or enforced? Should they vary by context, and if so, how? And what is a lawyer's role in all of this? Do these various moral or ethical restraints apply to an attorney's negotiations in the same way that they might apply to a client's?

Thankfully, my task here is to raise such questions, not answer them. More than that, my goal is to focus our research agenda on what I consider to be the most interesting or underdeveloped topics in negotiation ethics. There are four.

First, how should we think about honesty and fairness in negotiation? These are the two most difficult moral problems bargainers face. They raise all sorts of questions. Can I lie? If so, why is such deception justified in the bargaining context when it might not be elsewhere? If not, how far can I go in bluffing or puffing without crossing the line into unacceptable lies? Even if I don't lie, when may I keep silent? What am I required to disclose, and why? Assuming I have been honest, can I take advantage of another negotiator or accept a deal that is grossly in my favor? What does fairness require of me in bargaining? Far more work has been done on the issues of honesty and disclosure than on the problem of fairness, but both areas remain ripe for discussion.

Second, is there a duty to cooperate in bargaining? Negotiation scholars have long described the basic tension between problem-solving, collaborative, or cooperative strategies and more adversarial, "hard," or competitive strategies.² In general we have discussed this choice as a pragmatic one. On the one hand, if you are a problem solver, you may be able to expand the pie by coming up with value-creating trades that satisfy one or both parties' interests. You may also be able to build or preserve your relationship with the other side, which may have long-term benefits. On the other hand, if you adopt a more competitive strategy, you may be able to exploit the other side, particularly if the other side is unsophisticated, inept, or overly trusting. Although such an approach may forgo some opportunities to expand the pie, the lion's share of a small pie may be better for you than a more equitable division of a larger one. Particularly if the other side has adopted a collaborative strategy, you may be tempted to try to exploit them rather than reciprocate.

These pragmatic considerations are no doubt important. Equally interesting, however, is whether a negotiator—principal or agent—has any *moral* obligation to try to collaborate or expand the pie. This is analogous, of course, to the infamous prisoner's dilemma (PD).³ As many negotiation scholars have

2. See Robert H. Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 12–13 n.1 (Cambridge, Mass., 2000).

3. I will assume familiarity with the prisoner's dilemma. For background on this most famous of games, see Douglas G. Baird et al., *Game Theory and the Law* (Cambridge, Mass., 1994); William Poundstone, *Prisoner's Dilemma* (New York, 1992).

noted,⁴ the choice of a collaborative or competitive strategy is quite similar to the choice of whether to cooperate or defect in a PD game. For brevity's sake, therefore, I will focus here on whether there is any duty to cooperate in a prisoner's dilemma.

Much recent moral theory has been done on this topic, although negotiation scholars seem largely unaware that their field has become of great interest to philosophy departments. Here I will mention only one strain of such work. David Gauthier, a Canadian philosopher, has forcefully argued for more than two decades that there are indeed moral implications to the prisoner's dilemma.⁵ He reaches the rather startling conclusion—at least from the perspective of most economists and game theorists—that a moral person will at times cooperate rather than defect, even in a one-shot PD.

Gauthier reasons as follows. He begins from the common conclusion that rational, self-interested actors will defect in a one-shot prisoner's dilemma. He recognizes that this is an equilibrium solution to the game. He then focuses on the question of how a self-interested actor in this situation will reason about her plight. Ultimately, Gauthier argues that rational, self-interested actors—whom he calls straightforward maximizers (SMs)—will make a choice. They will choose to stop being SMs, and instead to become constrained maximizers (CMs). A CM differs from an SM in an important way: whereas an SM will cheat if given the opportunity, a CM will sometimes sacrifice short-term self-interest to a longer-term commitment to keep promises and agreements. In other words, a CM will give up short-term gains for long-term gains. Why? Because a CM has figured out that there are certain sorts of gains that come from cooperation. And that you cannot cooperate to exploit those gains if you are always looking over your shoulder for fear that your collaborators are trying to exploit you.

A CM thus pulls himself out of the prisoner's dilemma—deciding to start being a different kind of person, or a person with a different kind of disposition. This is not just a temporary mood change. Instead, Gauthier imagines that an SM can choose among basic dispositions—and that once that change is made and the SM is a CM, the CM will no longer succumb to the short-term temptation to defect. The CM has internalized a moral code that constrains self-interest in order to be able to cooperate.

This is a complex argument, and Gauthier's work has been much discussed, criticized,⁶ and improved upon by others.⁷ I am not prepared to attack or

4. See, e.g., David A. Lax & James K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* 30 (New York, 1986) (characterizing as the "negotiator's dilemma" the "central, inescapable tension between cooperative moves to create value jointly and competitive moves to gain individual advantage").

5. See generally *Moral Dealing: Contract, Ethics, and Reason* (Ithaca, 1990); *Morals by Agreement* (New York, 1986).

6. Some have attacked Gauthier's contractarianism as ignoring the fact that any social contract inevitably has racial, economic, and other biases—that, in short, it can be a contract of the elite to maintain itself. See Charles Mills, *The Racial Contract* (Ithaca, 1997); Carole Pateman, *The Sexual Contract* (Cambridge, Mass., 1989).

7. See, e.g., Paul Voice, *Morality and Agreement: A Defense of Moral Contractarianism* (New York, 2002).

defend it at this point. But it is worth noting the important connections that can be drawn between the work of negotiation and ADR scholars interested in the ethics of exchange and those already working on such problems in the more traditional philosophical disciplines. Gauthier's work—and much contractarian and contractualist moral theory⁸—suggests that there are moral dimensions to the negotiator's choice of whether to cooperate or compete. If one is willing to take this stand, it has obvious and important consequences for our understanding of ADR ethics.

A third area ripe for continued consideration is the lawyer's role in negotiations. Many ADR scholars, myself included, have urged lawyers to adopt more problem-solving or collaborative strategies in order to best meet their clients' interests. Many lawyers, however, remain skeptical. At its most extreme, this skepticism leads lawyers to reject any bargaining strategy that does not seek to squeeze every last dollar from one's opponent. Problem solving may seem too soft to such lawyers, or too likely to amount to compromise that could have been avoided through a more adversarial approach. Even in its less extreme incarnation, however, this skepticism raises serious doubts for lawyers. How, they ask, are we to reconcile a desire to problem-solve with a competing desire to protect our clients from exploitation? Even if I *want* to collaborate, I can not (or should not) because it will put my client in jeopardy.

This role conflict is easily dismissed, minimized, or overlooked, but it is not as easily resolved. Many scholars, again myself included, have made the empirical assertion that although adopting a problem-solving or collaborative orientation may sacrifice *some* gains for some clients some of the time, overall it will produce better outcomes.⁹ (Generally such scholars also add that with sufficient understanding of defensive tactics, a problem-solving attorney can minimize the negative consequences of trying to collaborate.) But there is little empirical testing of this hypothesis, and it may be wrong. Lawyers who adopt a problem-solving stance may put their clients' interests in peril more than we realize, particularly given that learning new strategies and techniques takes time. As a lawyer experiments with collaborative approaches, he may implement them incompletely or lack the skill to simultaneously defend himself. In truth, we know little about the developmental path that attorneys take as they implement these approaches, and less about the consequences for clients.

At a more fundamental level, ADR scholars need to reexamine our assumptions about the short- and long-term tradeoffs that must be made when an individual lawyer and/or client seeks to adopt a collaborative approach to bargaining. Many of us seem to believe—perhaps due to an overly optimistic reading of Robert Axelrod's famous *The Evolution of Cooperation*¹⁰—that nice

8. For an excellent recent collection of essays on the subject, see *Contractarianism/Contractualism*, ed. Stephen Darwall (New York, 2003). See also *Contractarianism and Rational Choice*, ed. Peter Vallentyne (Cambridge, 1991). For an intriguing review and critique (of many things, including Gauthier), see Ken Binmore, *Playing Fair: Game Theory and the Social Contract* (Cambridge, Mass., 1994).

9. See Mnookin et al., *supra* note 2, at 322.

10. New York, 1984.

collaborative strategies analogous to tit-for-tat will over time come to dominate in PD-type situations. The accepted wisdom about Axelrod's tournament has made it reasonably comfortable for ADR scholars to assume that collaborators will do better over time than hard bargainers, and thus to assume away the lawyer's role conflict described above.

Such assumptions are misleading, however. Without digressing into extended game theoretics, it is not at all clear that tit-for-tat dominates other strategies, or, by analogy, that collaboration will over time do better than hard bargaining. Other strategies fare reasonably well, and much depends on the initial distribution of strategies across a population.¹¹ Assuming that most lawyers use adversarial strategies—or at least *believe* that most other lawyers use such strategies—it may be very difficult for collaborative or problem-solving approaches to take hold. At the very least, the profession could profit from additional guidance on how to reconcile the lawyer's possible desire to collaborate with the lawyer's duties to her client.

Finally, and most broadly, there is work to be done on how conflict and conflict resolution contribute to moral development. It is increasingly clear to me that conflict—and the choices one makes in conflict—can serve as a millstone under which to grind our moral sensibilities.¹² In particular, I am curious about the moral dimensions of listening and empathy—about what is required truly to hear and attend to another person despite disagreement. Similarly, I am curious about how learning to manage interpersonal conflict both depends upon and furthers moral growth. This aspect of the ethics of exchange may be particularly important for lawyers, many of whom despair at the state of their profession and the adversarial flavor of most legal negotiation. As the legal profession struggles to find moral footing for its members, conflict and conflict resolution may paradoxically provide some refuge.¹³

The Ethics of Assistance

Just as negotiation or exchange has moral consequence, so does conflict intervention. Whenever a third party steps between two disputants, she risks that her attempt to assist will be mistaken for a desire to control or an effort to serve her own ends. The interventionist must manage these perceptions and the ever-present possibility that they are accurate—that, indeed, her motives or means are not as pure as we might hope.

A great deal has been written about the ethics of ADR, particularly the ethics of mediation and arbitration.¹⁴ Nevertheless, a great deal more remains to be done. I will focus on three areas ripe for continued discussion.

11. For an interesting discussion of Axelrod's experiments and ensuing critique, see Binmore, *supra* note 8, at 194–203.
12. See Scott Peppet, *Can Saints Negotiate: An Introduction to the Problems of Perfect Ethics in Bargaining*, 7 *Harv. Negot. L. Rev.* 83 (2002).
13. See, e.g., John R. Van Winkle, *Mediation: A Path Back for the Lost Lawyer* (Chicago, 2001).
14. See generally Phyllis Bernard & Bryant Garth, *Dispute Resolution Ethics: A Comprehensive Guide* (Washington, 2002).

First, many questions remain about the ethics of the mediator's (or arbitrator's) role. In the last two decades we have focused primarily on the debate about what mediation is and whether certain approaches to mediation—particularly evaluative approaches—are mediation or should be practiced. The facilitative-evaluative-transformative debate continues. At the same time, however, ADR scholars and practitioners have begun to discuss many other interesting ethical issues related to the mediator's role. What is neutrality, and how does it change from context to context?¹⁵ How much control should parties have over the structure of a mediation or the mediator's role? Should, for example, parties be permitted to sacrifice certain heralded values—such as neutrality—by enlisting a mediator to work under a contingent fee agreement that conditions the mediator's payment on whether the case settles during mediation?¹⁶ How transparent should a mediator be about her perceptions of the parties and of the likelihood of settlement?¹⁷ Can a mediator deceive the disputing parties or distort information if such distortion might increase the odds of concluding a deal?¹⁸ Each of these issues goes to the ethics of the mediator's role, and each is an example of the importance of continued work in this area.

Second, interest is growing in the ethical issues raised by the growing use of ADR processes in different contexts and institutional settings. As mediation becomes embedded in ombuds offices, etc., it raises questions about how traditional conceptions of confidentiality and neutrality apply in these settings. Similarly, mediation and conflict-resolution practitioners seem increas-

15. See Alison Taylor, *Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process*, 14 *Mediation Q.* 215, 217 (1997). The best writings in this area are Sarah Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 *Law & Soc. Inquiry* 35 (1991); Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 *Geo. J. Legal Ethics* 503 (1991); Sydney E. Bernard et al., *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 *Mediation Q.* 61, 66 (1984).
For critique of the classical conception of neutrality, see David Dyck, *The Mediator as Nonviolent Advocate: Revisiting the Question of Mediator Neutrality*, 18 *Mediation Q.* 129, 139 (2000); Matthew A. Levitt, *Kilometer 101: Oasis or Mirage? An Analysis of Third-Party Self-Interest in International Mediation*, 15 *Mediation Q.* 155, 155 (1997); Christopher Honeyman, *Bias and Mediators' Ethics*, in *Negotiation Theory and Practice*, eds. William Breslin & Jeffrey Z. Rubin, 429, 430–31 (Cambridge, Mass., 1991). See also Connie J. A. Beck & Bruce D. Sales, *Family Mediation: Facts, Myths and Future Prospects* 41, 42, 47 (Washington, 2001); Susan S. Silbey, *Mediation Mythology*, 9 *Negot. J.* 349, 351 (1993).
16. For critique that overly formal conceptions of neutrality restrict mediators from correcting power imbalances, see Isabelle R. Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 *J. Disp. Resol.* 55, 80; Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 *Buff. L. Rev.* 515 (1992). See also Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987, 1990 (1999); Judith L. Maute, *Mediator Accountability: Responding to Fairness Concerns*, 1990 *J. Disp. Resol.* 347, 358.
17. See Scott Peppet, *Contractarian Economics and Mediation Ethics: The Case for Contingent Fee Mediation*, 82 *Tex. L. Rev.* 227 (2003).
18. See Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?* 13 *Ohio St. J. on Disp. Resol.* 1 (1997).
19. Brown and Ayres raise the point that deception is in some ways necessary to create value. See Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 *Va. L. Rev.* 323, 339–40 (1994). See also Michael Moffitt, *Will This Case Settle? An Exploration of Mediators' Predictions*, 16 *Ohio St. J. on Disp. Resol.* 39 (2000).

ingly to be crossing over into the worlds of organizational development, change management, and organizational psychology. My own practice, for example, has increasingly been within the corporate context, whether I am working on intrateam or intraorganizational conflicts. There is much work to be done connecting these different disciplines. Likewise, there is much work to be done reconsidering the ethics of assistance in these new contexts.

Finally, there remain ethical issues related to the institutionalization of ADR and the growth of the mediation and arbitration professions *as* professions. We remain a decentralized and relatively unorganized profession. Ethics codes abound,¹⁹ but many mediators practice in ignorance of their relevance. Few states have centralized licensing or review processes. Statutory guidance on issues such as confidentiality and immunity varies tremendously by jurisdiction. (Although the new Uniform Mediation Act may bring some consistency, it is limited in scope and may not enjoy uniform adoption.) Lawyers face particular complications as they blend their role as legal advocate with the role of mediator, but the American Bar Association's new Model Rules of Professional Conduct offer little assistance. The rules do include a new Model Rule 2.4 that deals with lawyers serving as third-party neutrals, but it is very limited in scope. In short, we have a long way to go before the mediation community achieves the sort of coherence, internal regulation, and structure that will make it a true profession.

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Both the ethics of exchange and the ethics of assistance continue to provoke discussion, debate, and research. Each raises difficult moral questions, such as when one can lie or what it means to be neutral when intervening between disputing parties. Each also raises difficult professional ethics questions, such as how best to reconcile one's competing roles as lawyer, negotiator, or mediator, or how the mediation profession can best self-regulate. Despite several decades of advances in our understanding of ADR, we still have a great deal more to do.

19. The Model Standards of Conduct for Mediators are the best-known. The Model Standards are available at 1995 J. Disp. Resol. 122-28. They are also reprinted in Bernard & Garth, *supra* note 14, at 257-62. Many state and federal courts have also adopted codes of conduct for mediators. See Peppet, *supra* note 16.