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Essay Review

The Pros and Cons of "Getting to YES"

Roger Fisher and William Ury, *Getting to YES*. Boston: Houghton Mifflin Co., 1981. Pp. 160. $10.95.

Reviewed by James J. White

Getting to YES is a puzzling book. On the one hand it offers a forceful and persuasive criticism of much traditional negotiating behavior. It suggests a variety of negotiating techniques that are both clever and likely to facilitate effective negotiation. On the other hand, the authors seem to deny the existence of a significant part of the negotiation process, and to oversimplify or explain away many of the most troublesome problems inherent in the art and practice of negotiation. The book is frequently naive, occasionally self-righteous, but often helpful.

Initially, one should understand what the book is and what it is not. It is not a scholarly work on negotiation; it is not the kind of work that Schelling, Eisenberg or Bartos might write.[1] The book is not rigorous and analytical, rather it is anecdotal and informative. It does not add fundamentally to our understanding of the negotiation process. Rather it points to a need for change in our general conception of negotiation, and points out errors of emphasis that exist in much of the thinking about negotiation.

The book's thesis is well summarized by the following passage:

> Behind opposed positions lie shared and compatible interests, as well as conflicting ones. We tend to assume that because the other side's positions are opposed to ours, their interests must also be opposed. If we have an interest in defending ourselves, then they must want to attack us. If we have an interest in minimizing the rent, then their interest must be to maximize it. In many negotiations, however, a close examination of the underlying interests will reveal the existence of many more interests that are shared or compatible than ones that are opposed (p. 43).

This point is useful for all who teach or think about negotiation. The tendency of those deeply involved in negotiation or its teaching is probably to exaggerate the importance of negotiation on issues where the parties are diametrically opposed and to ignore situations where the parties' interests are compatible. By emphasizing that fact, and by making a clear articulation of the importance of cooperation, imagination, and the search for alternative solutions, the authors teach helpful lessons. The book therefore provides worthwhile reading for every professional negotiator and will make sound instruction for every tyro.

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1. See Thomas C. Schelling, An Essay on Bargaining, 46 Am. Econ. Rev. 281 (1956); Melvin A. Eisenberg, Private Ordering through Negotiation Dispute-Settlement and Rulemaking, 89 Harv. L. Rev. 637 (1976); Otomar J. Bartos, Process & Outcome of Negotiations (New York, 1974).

Unfortunately the book's emphasis upon mutually profitable adjustment, on the "problem solving" aspect of bargaining, is also the book's weakness. It is a weakness because emphasis of this aspect of bargaining is done to almost total exclusion of the other aspect of bargaining, "distributional bargaining," where one for me is minus one for you. Schelling, Karrass and other students of negotiation have long distinguished between that aspect of bargaining in which modification of the parties' positions can produce benefits for one without significant cost to the other, and on the other hand, cases where benefits to one come only at significant cost to the other. They have variously described the former as "exploring for mutual profitable adjustments,"[2] "the efficiency aspect of bargaining,"[3] or "problem solving."[4] The other has been characterized as "distributional bargaining"[5] or "share bargaining."[6] Thus some would describe a typical negotiation as one in which the parties initially begin by cooperative or efficiency bargaining, in which each gains something with each new adjustment without the other losing any significant benefit. Eventually, however, one comes to bargaining in which added benefits to one impose corresponding significant costs on the other. For example, in a labor contract one might engage in cooperative bargaining by the modification of a medical plan so that the employer could engage a less expensive medical insurance provider, yet one that offered improved services. Each side gains by that change from the old contract. Ultimately parties in a labor negotiation will come to a raw economic exchange in which additional wage dollars for the employees will be dollars subtracted from the corporate profits, dollars that cannot be paid in dividends to the shareholders.

One can concede the authors' thesis (that too many negotiators are incapable of engaging in problem solving or in finding adequate options for mutual gain), yet still maintain that the most demanding aspect of nearly every negotiation is the distributional one in which one seeks more at the expense of the other. My principal criticism of the book is that it seems to overlook the ultimate hard bargaining. Had the authors stated that they were dividing the negotiation process in two and were dealing with only part of it, that omission would be excusable. That is not what they have done. Rather they seem to assume that a clever negotiator can make any negotiation into problem solving and thus completely avoid the difficult distribution of which Karrass and Schelling speak. To my mind this is naive. By so distorting reality, they detract from their powerful and central thesis.

Chapter 5, entitled "Insist on Objective Criteria," is a particularly naive misperception or rejection of the guts of distributive negotiation. Here, as elsewhere, the authors draw a stark distinction between a negotiator who simply takes a position without explanation and sticks to it as a matter of "will," and the negotiator who is reasonable and insists upon "objective

2. Schelling, *supra* note 1, at 281.

3. *Id.*

4. Chester L. Karrass, The Negotiating Game 66 (New York, 1970).

5. Schelling, *supra* note 1, at 201.

6. *Id.*

criteria." Of course the world is hardly as simple as the authors suggest. Every party who takes a position will have some rationale for that position; every able negotiator rationalizes every position that he takes. Rarely will an effective negotiator simply assert "X" as his price and insist that the other party meet it.

The suggestion that one can find objective criteria (as opposed to persuasive rationalizations) seems quite inaccurate. As Eisenberg suggests, the distributive aspect of the negotiation often turns on the relative power of the parties.[7] One who could sell his automobile to a particular person for $6,000 could not necessarily sell it for more than $5,000 to another person, not because of principle, but because of the need of the seller to sell and the differential need of the two buyers to buy. To say that there are objective criteria that call for a $5,000 or $6,000 price, or in the case of a personal injury suit for a million dollars or an $800,000 judgment, is to ignore the true dynamics of the situation and to exaggerate the power of objective criteria. Any lawyer who has been involved in a personal injury suit will marvel at the capacity of an effective plaintiff's lawyer to appear to do what the authors seem to think possible, namely to give the superficial appearance of certainty and objectivity to questions that are inherently imponderable. For example, an effective plaintiff's lawyer will sometimes fix a certain dollar amount per week for the pain and suffering which one might suffer. He will then multiply that amount by the number of weeks per year and the number of years in the party's life expectancy. Thus he produces a series of tables and columns full of "hard" numbers. These have the appearance of objectivity, but in fact they are subjective, based (if on anything) on a judgment about how a jury would react to the case. Every lawyer who has ever been involved in a lawsuit in which experts have been hired by each side will have a deep skepticism about the authors' appeal to scientific merit as a guide in determining a fair outcome in the negotiation of any hotly disputed problem.

In short, the authors' suggestion in Chapter 5 that one can avoid "contests of will" and thereby eliminate the exercise of raw power is at best naive and at worst misleading. Their suggestion that the parties look to objective criteria to strengthen their cases is a useful technique used by every able negotiator. Occasionally it may do what they suggest: give an obvious answer on which all can agree. Most of the time it will do no more than give the superficial appearance of reasonableness and honesty to one party's position.

The authors' consideration of "dirty tricks" in negotiation suffers from more of the same faults found in their treatment of objective criteria. At a superficial level I find their treatment of dirty tricks to be distasteful because it is so thoroughly self-righteous. The chapter is written as though there were one and only one definition of appropriate negotiating behavior handed down by the authors.

7. Eisenberg, *supra* note 1, at 637, 638.

Apart from the rather trivial concern about their self-righteousness, their discussion is troublesome because it discloses an ignorance of, or a disregard for, the subtleties involved in distinguishing between appropriate and inappropriate conduct in negotiation. There is no concession to the idea that certain forms of behavior may be acceptable within certain regional or ethnic groups; that Jews may negotiate differently than Quakers, or city people differently than those in the country. There is no recognition that the setting, participants, or substance may impose a set of rules. Rather a whole host of things labeled "dirty tricks," "deliberate deception, psychological warfare, and positional pressure" are out of bounds. Consider their treatment of threats:

> Good negotiators rarely resort to threats. They do not need to; there are other ways to communicate the same information. If it seems appropriate to outline the consequences of the other side's action, suggest those that will occur independently of your will rather than those you could choose to bring about. *Warnings* are much more legitimate than threats and are not vulnerable to counter threats: "Should we fail to reach agreement, it seems highly probable to me that the news media would insist on publishing the whole sordid story. In a matter of this much public interest I don't see how we could legitimately suppress information. Do you?" (p. 143).

The statement which they approve (and label as a "warning" and not a "threat") would likely be construed as a threat. One who wishes to threaten his opponent in a negotiation is not likely to say, "If we do not reach agreement I will see to it that the information concerning your client becomes public." Rather he is likely to say what the authors suggest, "In a matter of this much public interest, I don't see how we could legitimately suppress information, do you?" In fact the authors have suggested merely a more subtle and more Machiavellian form of threat.

The question of deception is dealt with in the same facile way:

> Less than full disclosure is not the same as deception. Deliberate deception as to facts or one's intentions is quite different from not fully disclosing one's present thinking. Good faith negotiation does not require total disclosure. Perhaps the best answer to questions such as "What is the most you would be willing to pay if you had to?" would be along the following lines: "Let's not put ourselves under such a strong temptation to mislead. If you think no agreement is possible, and that we may be wasting our time, perhaps we could disclose our thinking to some trustworthy third party, who can tell us whether there is a zone of potential agreement." In this way it is possible to behave with full candor about information that is not being disclosed (p. 140).

The authors seem not to perceive that between "full disclosure" and "deliberate deception" lies a continum, not a yawning chasm. They seem to ignore the fact that in one sense the negotiator's role is at least passively to mislead his opponent about his settling point while at the same time to engage in ethical behavior.

Most who have engaged in significant negotiation will concede the tension between those two responsibilities. How does one answer a question about his authority? Can one ethically allow a bumbling opponent who has drawn the incorrect inference about one's statement to continue in ignorance? Assume for example that one is a skillful negotiator representing a housing authority that is attempting to buy houses subject to condemnation. Assume that the opposing lawyer, a person of marginal competence, concludes incorrectly from a statement that you have made that you have been

purchasing similar houses for $20,000, when in fact you have been paying $60,000 for them. When he says, "Now I understand that you have been buying similar houses for $20,000," can one remain silent? Can one make accurate statements concerning his position in the hope that the other party will draw incorrect inferences from those statements? "We have other offers, and we are asking $25." The other offers are in fact at $10. Can one make the foregoing statement in the hope that the other party will draw the inference that the other offers are at or near $25? Each has a different point on the continuum where he will stop. Notwithstanding superficial agreement on generalizations among lawyers, if one stimulates open discussion about lying and dissembling in negotiation, he will find large differences of position among lawyers on specific cases. To suggest that drawing the line between appropriate disclosure and inappropriate deception is easy to mislead the reader.

Finally, because the book almost totally disregards distributive bargaining, it necessarily ignores a large number of factors that probably have a significant impact on the outcome of negotiations. For example, Karrass and Ross suggest that a party's aspiration level is an important factor in determining the outcome of a negotiation, other things being equal.[8] There is evidence that the level of the first offer, and the pace and form of concessions all affect the outcome of negotiation, yet there is no consideration of those matters. Doubtless the authors can be forgiven for that. No book of 163 pages can be expected to deal with every aspect of negotiation. Yet this one suffers more than most, for implicitly if not explicitly, it seems to suggest that it is presenting the "true method."

In his recent article Marvin Mindes[9] identifies three prominent images of lawyers: hero, helper, and trickster. From Machiavelli onward much classical negotiating behavior could certainly be classified as trickster behavior, yet the trickster is the most perjorative of the various lawyer models. In a sense *Getting to YES* may be regarded as a plea for the recognition that a lawyer can be a good negotiator without deviating at all from his role as "helper." I believe that the authors are fundamentally mistaken about that. Anyone who would maximize his potential as a negotiator must occasionally do things that would cause others to classify him as a "trickster," whether he so classifies himself or not. To suggest that the world is otherwise is to mislead the reader.

Thus the book is more elegant and urbane than those written by Nierenberg[10] and Cohen,[11] but at bottom it suffers from some of the same problems. On the one hand the book promises an entirely new technique of negotiation, but it delivers only interesting techniques and insights. On the other hand the book delivers more than it promises in that its argument rests on a series of inarticulated moral premises. In sum, the book is useful; it

8. Karrass, *supra* note 4, at 42; H. Laurence Ross, Settled Out of Court 149 (Chicago, 1970).

9. Marvin W. Mindes & Alan C. Acock, Trickster, Hero, Helper: A Report on the Lawyer Image, 1982 Am. B.F. Research J. 177.

10. Gerald I. Nierenberg, Fundamentals of Negotiating (New York, 1973).

11. Herb Cohen, You Can Negotiate Anything (Secaucus, N.J., 1980).

contains interesting techniques and valid criticism of much negotiator behavior. However, its overstatement and its facile denial of some of the serious difficulties involved in negotiation detract from its quality.