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## The Definition of Negotiation: A Play in Three Acts

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# The Definition of Negotiation: A Play in Three Acts

Andrea Kupfer Schneider\*, Noam Ebner\*\*, David Matz\*\*\*, and John Lande\*\*\*\*

## I. INTRODUCTION

This Article is based on a conversation between Andrea, Noam, and David as they drove to the airport following the *Tower of Babel* symposium.<sup>1</sup> Then, John metaphorically joined the ride and participated in the quest to find a good definition of negotiation.

## II. ACT ONE: CAR RIDE WITH ANDREA, NOAM AND DAVID AFTER THE SYMPOSIUM ON THE WAY TO THE AIRPORT

**Andrea:** . . . At the beginning of my career, I asked my dean for a maternity leave and he said yes.

**David:** Thinking back on what you said yesterday, in the session about defining negotiation, would this situation be considered a negotiation?

**Andrea:** Absolutely! I prepared in advance, thinking about the items that will persuade my dean to give me what I want. I treated it as a negotiation because he could say no, or offer a compromise like trading reduced classroom time for other duties. I needed to be prepared with regards to my goals, the standards, and other options that would serve my interests.<sup>2</sup>

This is like a negotiation I had this year with my dean, when I asked if I could take a trip with students to Cuba. I utilized every bit of what I teach--how to frame my requests in a way that will be most persuasive to him; how to communicate to set up the meeting (email), make the request (in person), and ensure follow through (again via email).<sup>3</sup> I thought of different ways to meet my interests so that I could

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1. CTR. FOR THE STUDY OF DISPUTE RESOLUTION, *Moving Negotiation Theory From the Tower of Babel Toward a World of Mutual Understanding*, U. OF MO. SCH. OF L., <http://law.missouri.edu/faculty/category/csdr/16-symposium-csdr/> (last visited Apr. 9, 2017).

2. See, e.g., Andrea Kupfer Schneider, *Aspirations in Negotiation*, 87 MARQ. L. REV. 675 (2004).

3. See, e.g., Andrea Kupfer Schneider & Sean McCarthy, *Communication Choices*, in THE NEGOTIATOR'S DESK REFERENCE (Andrea Kupfer Schneider & Christopher Honeyman eds., DRI Press 2017)

offer him different budget options that would make me happy. I researched objective criteria (like what other university departments had done) and utilized outside helpers (the Office of International Education, for example) to help sell my ideas.<sup>4</sup>

**David:** But one could say, all of that was on your side, or in your mind. It was your perception of the situation based on *your* preparation. This was work *you* needed to do. As far as the dean was concerned, you came to him with a request, and he said yes. No negotiating, just independent decision making.

**Noam:** Andrea clearly *experienced* it as a negotiation. This might suggest that, while we could look for an objective standard for what constitutes a negotiation, we might also recognize that negotiation is subjectively experienced, and perhaps the term negotiation can encompass any experience in which you *feel* you are in a negotiation.

**David:** Well, let me ask you this: you walk into a store to buy a carton of milk. You take it off the shelf, pay the price, and leave the store. Is that a negotiation?

**Andrea:** I suppose this could be negotiation at its broadest level. You decided what you wanted, what you were willing to pay, etc. The store opened with an offer, putting the milk on the shelf with a price tag, and you accepted it. That's the structure of a negotiation.

**David:** So, offer and acceptance – that's all you need?

**Noam:** Well, that's what the legal formulation would be, looking back from the viewpoint of how a contract is formed.<sup>5</sup> Every move or countermove is viewed through the lens of whether it constitutes or rescinds an offer, or presents an acceptance of a previously extended offer. Legal frameworks aside, however, do we have anything to add that would create a more helpful definition of negotiation?

**Andrea:** Well, should there be some type of communication? Of course, even in the milk transaction, there is some communication; the shop keeper puts a price tag on the carton, I extend my hand to present my cash, and so on. I can imagine a similar situation with even less communication – such as when I buy the same carton of milk but pay at a self-checkout register with no human interaction. Still, there is a very basic exchange of price-request and acceptance.

How about if I'm driving, and signal my intention to shift over into the left lane? My turn signal clearly communicates what I want, and the driver behind me in the left lane, either accepts my request by pressing on the brakes to let me in, or steps on the gas and rejects it. Is such tacit or implicit communication enough for a negotiation process?

**David:** I always view it as requiring more. There needs to be some exploration of each other's needs, not only an exchange. The core idea for me would be an exploration of what else is possible from the interchange such as a better price or better idea.

**Noam:** David, would I be wrong in hearing – both in the interaction with the dean and in the milk transaction – that you expect there to be some degree of resistance, pushback, or attempt to gain more, from a counterpart or offeree's side, for a situation to enter the realm of negotiation?

**David:** For the dean, yes, except that I would add “or to do better” however the dean defines that, after “gain more.”

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4. See ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 81-94 (3d ed. 2011).

5. CLAUDE D. ROHWER & ANTHONY M. SKROCKI, CONTRACTS IN A NUTSHELL 4 (7th ed. 2010).

**Noam:** Well, ok, let's flip that and look at the other side. How about if the response is beyond pushback – and is absolute rejection? Imagine that terrorists have hijacked a plane and demand that the United States release all of the prisoners in Guantanamo in return for their safe release. The U.S. President calls a press conference at which she clearly reiterates the United States' policy: we do not negotiate with terrorists.<sup>6</sup> Is this a negotiation?

**Andrea:** Well, if we announce that there is no negotiation—and there really is not—then no, this is not negotiation. Sometimes, however, this is a signal that *we* (the U.S. State Department) don't negotiate but that *others* acting on our behalf (e.g., Switzerland, Morocco) will be doing so.

**Noam:** I think that conceptually, the delineation of negotiation could certainly use clarification, and these are very helpful examples for exploring it. For teaching purposes, though, I'm very comfortable with a much broader scope of situations that are 'negotiation-ish.' People can argue whether certain situations, or certain elements of situations, are negotiation – but we can agree that they contain negotiation-like characteristics, and that therefore, approaching them with a negotiation mindset can help you do better in them. From that perspective, students can practice their negotiation skills in a low-cost setting – ahead of the big, significant, definitely-a-negotiation situations they will face ahead. Is 'parenting' negotiation? Are discussions with my spouse negotiation? Maybe, maybe not – but in many of them, you can apply a negotiation mindset, and use them for practice. So, the fuzziness serves a teaching purpose.

**Andrea:** I take a different slant on this same approach: I look at skills. If a situation lends itself to application of negotiation skills, that's negotiation.<sup>7</sup>

**Noam:** Setting aside any constructive fuzziness we utilize for teaching purposes, I can see we are going to have a hard time pinning down any one definition for negotiation. I've always approached this from a 'These things are in the realm of negotiation activity' approach, not with a more classical definition statement of 'negotiation is...'. Does this make sense, or is it a cop-out? One way or another, in my view *any attempt to affect, convince or persuade* is in the realm of negotiation, in the sense that it lends itself to being analyzed through negotiation frameworks, and improved through application or enhancement of negotiation skills.

**David:** Really? How about arguing a case in front of a judge?

**Noam:** That certainly has negotiation elements. I'm referring to the interaction between the judge and the lawyer, not an 'argument' taking place between the two lawyers.

**Andrea:** Although that could also be a negotiation, or, more likely, a step in a future negotiation settlement.

**Noam:** Sure. And their attempts to influence the judge are, in that sense, an attempt to improve each lawyer's BATNA in the case of no settlement between them. However, when we focus on the interaction between a judge and an attorney, there are clear attempts to affect, convince, or persuade. In looking for a negotiation element that makes these interactions stand out, I'd say that this is an arena in which

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6. See ROBERT MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* (2010).

7. Andrea Kupfer Schneider, *Teaching a New Negotiation Skills Paradigm*, 39 WASH U. J. L. & POL'Y 13 (2012).

the ‘objective criteria’ or ‘standard’ that *Getting to Yes* discusses is much more salient,<sup>8</sup> and much more central, than it is in other negotiations. Our attempts to persuade the judge focus, to a large extent, on the objective criteria of precedent and law that we claim support our client.

**Andrea:** Noam’s example troubles me. I don’t think that you are negotiating with the judge when you are presenting your arguments about a case. That just seems to me like a different structure. Perhaps this has to do with power. For me, it is that the decision of the judge really is limited in significant ways. Yes or no, win or lose. When the decision maker is that limited, I’m not convinced that a negotiation is occurring.

Of course, I could change the hypothetical to make this a negotiation even with a judge. Perhaps this is in a criminal context where the prosecutor, defense attorney, and judge all need to agree about diversion sentencing.<sup>9</sup> Perhaps, instead of arguments on the case, this is setting the schedule for discovery where there is more of a negotiation between all parties as to what will work.

**Noam:** Certainly. In criminal cases, particularly cases involving lesser offenses or young offenders, the courtroom process sometimes takes the form of something that is clearly a three-way decision making processes. Perhaps this is because the overlapping interests are more overt.

**David:** So, Andrea, in the situation with your dean, were you advocating or negotiating?

**Andrea:** I think even when the dean tells me no, this is still a negotiation. He is negotiating with me for my continued good will, work ethic, and future support of him and the school. Even if he says no, he still has an interest in all of these. And, even though he has power, it is not absolute. I could leave. I could go to the provost or president and try to make his life at least a little uncomfortable. And I too am negotiating with my future reputation and our relationship to consider. My demands should not so unreasonable that he starts to dismiss any request I make, out of hand.<sup>10</sup> They should be articulated in a way that preserves the relationship for the future. Because I will be back to ask again. And, since we both know that, each interaction becomes a negotiation, whether the result is a yes, or a no, or a not now.

**David:** But suppose the dean has no such thought in mind. He just doesn’t like your idea and says so. It seems to me that you are collapsing advocacy and negotiation into the same thing. Or, to put it differently, students sign up for negotiation courses and people buy all those negotiation books because they think they have problems and think we have some help for them. Assuming we want to be in the helping business, what problems do they think they have?

They are contemplating a situation in which someone has something they want, they have something the other wants, and neither can command a result. Persuasion is a useful skill, but they will also want to know how to find the boundaries of acceptable persuasion: is economic pressure ok? Is shouting ok? Is an appeal ok? They will also want to know how to learn what the other finally will need to give

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8. FISHER, URY & PATTON, *supra* note 4.

9. See, e.g., Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445 (2016) (discussing the importance of negotiation in criminal law practice).

10. G. RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 56-7 (2006).

up of what they want. And they will want to know how much they themselves will finally give to get what other has. They will want to know the parameters of what is at stake: is future relationship on the line? Is an enlarged pie possible? Is there a way to frame the process and stakes so that more kinds of agreements are possible? They will want to know the importance of the stakes to each player: how much time is one or the other willing to put into this process? How much risk of loss is either willing to take on to get what one wants? In arguing to a judge, or similar situation, the only thing that counts is persuasion.

**Noam:** I'm not suggesting, in any way, that the two roles are the same. I think, though, that an advocate's interactions with a judge involve many negotiation elements. There are also many actions that are not related to negotiation. I think it would be beneficial for the advocate to recognize negotiation elements and actions in his or her work.

**David:** Let's remember that we are working on communication: "negotiation" is just a noise; we could help ourselves and everyone else if we can agree on the behavioral referent that we all have in mind when we make it. Sure, vagueness at the edges is inevitable but that should not prevent the heart from being clear. I think we should try for agreement on a meaning that we think makes sense and that can be used in a larger public.

Of course, negotiation shares characteristics with other interpersonal behaviors. How could it not? A scalpel and a bread knife share characteristics, but that doesn't mean they are the same thing. As always, purpose counts. If we want to open a knife store, we might stock both. If we are planning an appendectomy, we're not likely to think of them as interchangeable.

We often talk about power in negotiation, and how to deal with power differentiations. I think that in cases where the power differentiation means that one party ultimately has decision making power over the other, no one gains by calling the process a negotiation.

**Noam:** I wonder whether power should be the defining line. Power is experienced subjectively. Similarly, absolute or decision making power is experienced subjectively.

**David:** In the court setting we discussed earlier, those advocates I've worked with would tell you, flat out, that there is nothing subjective about it. That judge had all the power. If one party thinks she is negotiating and the other thinks he is using the power he believes he has to decide unilaterally, do we gain anything by calling the process a negotiation? I suggest that it can be a negotiation only if both parties experience it as a negotiation.

**Noam:** But I'm sure that even those advocates, if asked, would remember a case in which they affected a decision using some form of negotiation tool.

**David:** Perhaps.

**Noam:** Then setting a "judge with absolute power" frame around the around the situation is a matter of choice, a subjective view.

**David:** But there are realities outside subjectivity. A lawyer usually can't jail a judge for contempt.

**Noam:** Absolutely. Still, I suggest that the potential for subjective effects remain, on either end of the interaction. An attorney might view herself as being a decision-making partner to a judge. Conceivably, a judge might have a concern about his behavior or decision incurring some type of backlash from a lawyer, even

if the lawyer has not suggested (or even considered) this. Certainly, the power imbalance you describe is an accurate depiction of most people's typical assessment of power-distribution in such interactions, but individuals might choose to see things otherwise, and behave as if they were otherwise.

Imagine walking into a bank and asking for a loan. While that might be discussed as a negotiation, it might also seem to be a case where the bank has full, sole, decision making power. Right? Some people walk into that situation feeling they were making a request from an authority figure, and others walk into that same scenario feeling as if it were a negotiation. This might have something to do with personality, but it can also be achieved by framing. Some people might approach it hoping the bank will do them a favor; they are requesting, and the bank is deciding. Others might approach it as a more level playing field (e.g., "Surely, they'll want to do right by a long-standing customer."). Still others might achieve a subjective power-flip, by viewing the situation as one in which they are offering their bank a golden opportunity to buy their money (the interest on the loan) at a good price. Does subjective mindset or framing affect the question of whether this is negotiation?

**David:** God does not make something a negotiation, but the parties can. Andrea and the dean can engage in a negotiation *or* an advocacy process. Life gets sticky if Andrea thinks she is negotiating and the dean thinks that after he hears her argument he will decide. But, the nature of the process itself can be up for negotiation. If Andrea says give me X and Y for my maternity leave, on its face that is an advocacy posture. But, if she also lets the dean know that she has an offer from another law school, and the dean says that Andrea's request might be acceptable if modified, this can now become a negotiation. This can be true in court too: occasionally a plea bargain is a negotiation, and occasionally the judge is a player in it.

To put it differently, as negotiation is inherently interactive, I would say that to make something a negotiation requires two choices—one by each participant. One's subjective view that this is a negotiation by itself does not make it a negotiation.

**Andrea:** So, what is negotiation? You ask your dean for a raise? (Or a different course package or a larger travel budget or to take a group of students to Cuba.) You make an argument in front of a judge on behalf of your client? You go into a big box store to buy a television? You go back and forth with friends about where to go to dinner? Which of these are negotiations? Which are not?

Let's see if we can highlight at least the elements on which our definitions turn:

- Power of decision making;
- Both parties need to think they are negotiating;
- Structure of back and forth communication;
- Use of particular skillsets--advocacy, communication, and more;
- Other elements?

Perhaps we can think about negotiation on a continuum rather than trying to reach an absolute definitional agreement. It is certainly more than 'we know it when we see it.'

**Noam:** This sounds like a conversation I wish we had time for yesterday!

**David:** Well, we're having it now.

**Andrea:** We're practically writing the 'what is negotiation?' piece in this conversation.

## III. ACT TWO: JOHN JOINS THE RIDE (METAPHORICALLY)

**John:** Sorry I'm late to this ride. But fortunately, I could read the "transcript" and catch up. Let me tell a true story that may test the boundaries of the definition of negotiation even more. One night, as I got out of my car, a guy rapidly approached me with a gun pointed at my face. He told me to empty my pockets. Stunned, I gave him everything in my pockets including my keys. Right after doing so, I realized that I couldn't get into my apartment, so I asked him nicely if he would give me my keys back. He thought for a moment and then threw my keys under a car, where I could get my keys though it would take a little while to find and retrieve them. I interpreted his action as a way to accommodate my request but slow me down from going after him (assuming that I would get my keys rather than give chase or immediately report him). Did I negotiate with my mugger? More importantly, what difference does it make if we say yes or no?

**Andrea:** Let me start by saying wow—I don't know that I would have ever thought to ask for my keys back, so I'm just impressed you kept your wits about you. Or maybe that was totally foolhardy and you just got lucky he was in a good mood! In any case, yes, I think you negotiated. You asked for something and he gave you it.

**John:** I would say you are correct about all of the above. In some ways, my interaction with the mugger was like yours with your dean (although I assume your dean didn't brandish a deadly weapon with criminal intent). This incident happened quite a while ago, so my memory is fuzzier than usual. As I recall, the mugger seemed scared and not very personally menacing (other than the gun, of course). From his tone, I inferred that he just wanted my money, he didn't want to hurt me, and he might have been afraid that I would resist, make a commotion, or call the cops. I assumed that he didn't want my keys and would have thrown them away if he took them with him. When I talked with him politely, he may have appreciated that I treated him with respect. So, this had some elements of an interest-based negotiation, though we didn't explicitly discuss our interests or brainstorm options together and there was no explicit quid pro quo. Of course, this was my subjective analysis and I don't really know what my mugger was thinking, as Noam would point out.

**Noam:** Well, I would point out that this was a situation in which your counterpart had all of the power (to anyone conducting an external power-assessment), and yet, you were still able to affect, convince and persuade him. So, it certainly fits into my own negotiation-zone. Your story also demonstrates how much of a negotiation can take place in a compressed manner, in-between the lines or in our minds. Your actual conversation with the mugger was 'Give me your money . . . can I have the keys back?' However, when you flesh out the conversation to include likely everything going through each party's minds, you might find a fully-developed negotiation script; in this case, an interest-based negotiation, as you said. This is what that negotiation might sound like to me:

Mugger (brandishing weapon): Your money or your life.

John: My life, of course. Here, here you go, take everything.

Mugger: Excellent choice, it's a pleasure doing business with you.

John: You know, now that we've settled who gets the money, and who's just grateful to be alive...

Mugger: Yes?



John: I have a pie-expanding idea.

Mugger: Say what?

John: Look, you and I are just two guys who like to sleep in our own beds, right? Nice and comfy?

Mugger: Sure. So?

John: Well, you're on your way to go home with the money you've just earned; but I'm locked out of my house now. Seeing as you're not going to be needing those keys I just gave you, how about you give them back to me? That way, you get to go home with my money, and I get to go home and hug my teddy bear under the covers, just glad to be alive.

Mugger: How do I know this isn't a trick, and you're not going to pull some ninja trick on me if I hand over the keys?

John: ...

Mugger: ...

John: Do I *look* like someone who could pull some kind of ninja trick on you?

Mugger: If I toss them under the car, you won't be able to pull anything. By the time you've got them, I'll be gone somewhere you can't find me.

John: Great thinking. You should do this kind of thing for a living!

Mugger: One last thing: If you ever use become a negotiation professor, and use this as an example in your negotiation classroom, could you maybe leave an open ending, you know, so students might be thinking, 'Hey, maybe he wasn't such a bad guy after all?'

John: Negotiation classroom? Dude, I work for a living! But, sure, if that's what I wind up doing, that's how I'll tell it.

Mugger: That's the best I could ask for (throws the keys under a car and vanishes into the night).

John (staring after the mugger, rubbing his goatee): Negotiation professor... huh!

When you look at it this way, the interaction contains many of the elements we discussed in the car, and then some. So, as if we needed another question to open this up even wider: once we identify the elements necessary for an interaction to be a negotiation – how overt or explicit do they need to be? I wonder what you folks think.

**David:** I think the mugger turned a situation of advocacy (he had the power to decide, the gun) into a negotiation when he tossed the keys under the car. "I will give you your keys if you agree not to chase me." His mindset changed and his action communicated that.

**John:** Hmm. So, it sounds like you think that the interaction doesn't need to be an explicit agreement to be a negotiation.

I also have some questions about the things you all discussed. First, what difference does the definition make? And is the answer different for different populations, such as negotiators, scholars, or teachers and students? For example, would lawyers do something differently if they think of arguments in court as negotiations? Would scholars miss important negotiation phenomena if they use a narrow definition, such as one requiring verbal communication or subjective perception of individuals that they are negotiating? Should teachers focus only on complex interactions involving extensive back-and-forth?

Would it help to use a broad definition that permits categories of negotiation including ones that don't fit into widely-accepted definitions? For example, considering David's knife example, would it help to have a broad definition of negotiation analogous to a definition of knives that includes scalpels, bread knives, box cutters, etc.? Similarly, there might be some categories of negotiation in addition to generally-accepted conceptions of it. Thus, one might distinguish negotiations that are simple or complex, primarily involve non-verbal communication or verbal communication, involve highly dominant parties or not, etc. From this perspective, one would consider a wide range of interactions to be negotiation and that particular negotiations would be distinguishable by certain variables (which might be dichotomous or continuous).

On the other hand, would it be problematic to use a broad definition? For example, if we come up with a definition of negotiation that deviates a lot from common understandings of the term, would our definition be irrelevant and ignored? If it is so broad as to include virtually all efforts at persuasion and advocacy, is it meaningless and useless?

**Andrea:** I have a few answers to some of these questions. First, I realize that my definition of negotiation turns very much on my perspective of negotiation in my role as director of my program and as professor. I focus on the skills used in negotiation because that is what I teach,<sup>11</sup> and therefore, that *must* be included in the definition. Similarly, if I am focusing on using my skills to negotiate with my dean, then that activity is also negotiation—regardless of the response on the other side. I think that a broad definition is more helpful than a narrow one. Given how many disciplines and practice areas contribute to our learning in negotiation,<sup>12</sup> I would be afraid that unduly narrowing the definition would result in us missing pieces of negotiation that could be useful—in research, in practice, and in teaching.

**David:** How we define behaviors has to do with our purpose in defining them. If we are parties, it is better that we both have roughly the same meaning in mind so we come to a conclusion satisfactory to both of us. If John thought he was trying to negotiate with the mugger and the mugger thought John was challenging his unilateral power, John, as Andrea suggests, could have gotten shot. (Less dramatically, I don't know many lawyers in court who would say "Judge, I'll make you an offer.") If, however, we are teaching about a multi-party process we might, as Noam points out, find ambiguity evocative.

#### IV. ACT THREE: ARRIVING AT A DEFINITION OF NEGOTIATION?

**Andrea:** Perhaps we could think of certain factors that help move us along a negotiation-advocacy continuum where pure negotiation is a traditional give-and-take, option creating, dialogue resulting in an agreement and pure advocacy is arguing, making a speech, or a soliloquy that may or may not be designed to be part of an exchange.<sup>13</sup> We could examine each element and do almost a balance of factors to see if we are closer or not to negotiation. Factors could include:

11. Schneider, *supra* note 7, at 13.

12. Christopher Honeyman & Andrea Kupfer Schneider, *Introduction to THE NEGOTIATOR'S DESK REFERENCE* 1-13 (Andrea Kupfer Schneider & Christopher Honeyman eds., DRI Press 2017).

13. See e.g. CARRIE MENKEL-MEADOW, ANDREA K. SCHNEIDER, & LELA PORTER LOVE, *NEGOTIATION: PROCESS FOR PROBLEM SOLVING* 3-4 (2d ed. 2014) (working definition of negotiation).

- The extent of dialogue or back and forth conversation
- The extent of offers and counteroffers
- The extent of option generation
- The extent of conversation about the interests, needs, and motivations of the parties
- The extent that the parties need to work with each other versus power of one to decide
- The extent that the parties think they are negotiating
- The use of questions, inquiry, and active listening
- The extent of one or both parties' preparation for the conversation
- The result—a simple yes, trade-offs, a plan of action for both parties, etc.

These factors could help us judge several of our examples. Signaling to move lanes or purchasing milk at the store does not involve most of these. A request to the dean or talking to a judge has more. The conversation with the mugger, even though he had all the power, seems even more like a negotiation.

**Noam:** I think that some of those would be helpful variables to measure, in identifying a negotiation process. I think that others might be related to the *type* of negotiation taking place. Perhaps a shorter list might suffice for determining entry into the negotiation club, such as:

- Purpose: The extent to which the communication includes offers and counteroffers regarding each party's actions/resources in the future;
- Communication: The extent of dialogue or back and forth conversation;
- Interdependence: The extent that the parties need to work with each other, versus the power of one to decide unilaterally; and
- Subjective participation: The extent that each party thinks they are negotiating.

All the rest seem to explore whether this is interest-based negotiation or not (e.g., conversation about interests, generation of options), or whether the parties are doing a good job at negotiation or not (e.g., preparation, constructive communication).

## V. CONCLUSION

**John:** Andrea and Noam, your lists of factors illustrate a challenge in establishing a definition that identifies essential features so that something doesn't fit within the definition if it lacks a feature considered essential (though I realize that this is not what you are suggesting). This would be what Linda Edwards calls the "classical" approach in which membership in a category is based on the presence of certain characteristics deemed to be essential.<sup>14</sup> The problem with this approach using factors in your lists is that we could all think of situations we would consider to be negotiation that did not feature some, or perhaps all, of these factors. For example, I assume that we would all agree that some interactions are negotiations even if the parties hadn't prepared for the process, identified options, or exchanged

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14. Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 183 (2014).

offers etc. There are numerous varied manifestations of negotiation and I think that it would be counterproductive to exclude many that don't fit within narrow theoretical conceptions. So, I have suggested a broad definition of "process of seeking agreement," without including any essential features.<sup>15</sup> I think that there needs to be some coordination between parties for an interaction to be considered as negotiation, like David's perspective. So, one person's persuasion attempt without the other's effort to accommodate would not be negotiation as far as I'm concerned.

There's an alternative to the classical approach in creating definitions. Edwards argues that "most categories do not function according to the classical view. . . . [Instead,] categorizers examine potential category members, looking for family resemblances' to the prototype. . . . In a family-resemblance category, likeness is not a matter of objective observation of the natural world but rather a matter of a cultural gestalt."<sup>16</sup> This may be like Noam's concept of "negotiation-ish." If we use the family resemblance approach, what should be the prototype? Here is where it might help to consider our examples of the interactions with deans, judges, bank officers, grocers, drivers, terrorists, muggers, etc. Consider the following very incomplete set of possible prototypes for negotiation: kids trading baseball cards, parents promising children ice cream if they finish eating their veggies, large groups of friends ordering dinner at a Chinese restaurant, families planning a vacation, tourists haggling at a Middle Eastern bazaar, claims adjusters processing a constant stream of routine insurance claims, TV stars cashing in on their celebrity in employment contracts, retirees renting a vacation condo on Airbnb, customers paying prostitutes for services or drug dealers for products, buyers and sellers interfacing through eBay to resolve a dispute, union and management officials working out collective bargaining agreements, professors wheedling perks from their deans, executives hashing out a corporate strategy, tycoons making huge real estate deals, community leaders crafting environmental compromises, public defenders coaxing their clients to accept plea bargains, lawyers settling contentious lawsuits, attorneys devising arguments intended to satisfy judges' interests in making good decisions, governments back-channeling with terrorists, and diplomats arranging peace treaties. And let's not forget mugges pleading with their muggers. It would be important to recognize our own cultural lenses, mindful that people in other societies negotiate in ways quite different than people in the U.S., particularly American professionals. I'm not sure if there is (or should be) a single prototype that would be the right standard for determining whether an interaction is more or less of a negotiation. One might suggest having multiple prototypes, but that would be far from a definition of negotiation.

A third approach would be Andrea's or Noam's continuum based on the presence or absence of certain factors. This would avoid some of the problems with the classical approach, though I think that it is prone to some of the same problems in privileging some characteristics over others without good justification. The list would seem to weight all factors equally, which may not be appropriate. One could

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15. **Error! Main Document Only.** John Lande, *A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation*, 16 CARDOZO J. CONFLICT RESOL. 1, 12-16 (2014). In a conversation with Sanda Kaufman, she suggested referring to "decision" instead of or in addition to "agreement," since many of the negotiations she focuses on result in decisions rather than agreements as such. So, we could revise the definition to be a process of seeking agreement or decision.

16. Edwards, *supra* note 14, at 183-84.

create tiers of factors, with factors in some tiers being weightier than others. But, it is hard for me to imagine that this would solve the problem.

Linda Edwards argues that “the relevant question is not whether the categories are objectively right or wrong. Instead, the relevant questions are what work the category does, and whether, on balance, that work is desirable.”<sup>17</sup> This brings me back to the question of a definition for whom -- scholars, practitioners, instructors, students, the general public, etc.? Conceivably, we could have different definitions for different audiences, but that seems like a nightmare. Instead, I think it would be good to have a simple definition that is easily understandable by a wide range of audiences.

At this point, I am still inclined to suggest the broad definition of a “process of seeking agreement or decision,” considering Andrea’s and Noam’s factors as variables that would distinguish some negotiations from others. I am not completely satisfied with this approach as it wouldn’t clearly assign some situations as being negotiation or not,<sup>18</sup> though that’s to be expected with a family resemblance model.<sup>19</sup> It seems better than the alternatives as I now view them, though I would be delighted to hear of better ways to go.

**David:** Like Noam’s ambiguity, Andrea’s continuum is a rich classroom tool. It would also give scholars a vocabulary to analyze a real process, to create an understanding about what was going on, and to choose how they might want to categorize it. Would it also be useful for practitioners?

**John:** I think that Andrea’s continuum would be way too complex for practitioners, especially considering that it is just illustrative and presumably there would be many other factors to add to the list. I think that a condensed list like Noam’s would be more manageable given our limited cognitive abilities that the behavioral economists have demonstrated.<sup>20</sup> I think that this would be a useful set of key variables distinguishing different negotiations, but not a definition.

**Andrea:** I think John has outlined some interesting thoughts in terms of categories and when they might be useful or not. Let me first say that if we were going with the broad definition of negotiation, I would define a little differently than John. For me, anytime one person is interacting with others to get them to change their minds and do something differently, it would be a negotiation.<sup>21</sup> So my definition of negotiation is broad.

Having said that, I do think that having a set of factors for negotiation we could assess on a continuum might be the way to make this broad definition more workable. And I agree that my list should probably be condensed. So here is my second take, informed significantly by Noam’s condensed list.

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17. Edwards, *supra* note 14, at 184.

18. Similarly, I struggled trying to develop a definition of alternative dispute resolution. See John Lande, *What is (A)DR About?*, INDISPUTABLY BLOG (Jan. 13, 2015) <http://www.indisputably.org/?p=6243>.

19. When I (Lande) was young, my hair was light blond, whereas my parents’ and sisters’ hair was dark. So, there was a joke about whether I really belonged in my family. Although this is a trivial example, the family resemblance approach contemplates that some units would have more resemblance to the family prototype than others. See Edwards, *supra* note 14, at 205-08.

20. See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (extensive summary of psychological research).

21. See, e.g., ROGER FISHER, ELIZABETH KOPELMAN, & ANDREA KUPFER SCHNEIDER, BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT 10 (1994) (describing advice to decision-makers on how to influence others to change their minds).

- Parties' Perspectives: Did the parties prepare to negotiate? Do they view it as negotiating?
- Structure or Relationship: Do the parties need each other to get something done? What is their level of interdependence? As Noam put it, what is "the extent that the parties need to work with each other, versus the power of one to decide unilaterally"?
- Action (or what a third party would observe if watching the parties interact): Are the parties communicating back and forth? Are they asking questions of each other? Sharing interests or needs or demands? Making offers or creating options?
- Result: Has behavior of the parties changed? Was an agreement reached or demand accepted?

I think that these four factors can shed light on whether or not there is a negotiation in a more concise fashion. And, to John's point, I would weigh the last factor as the least important because lack of an agreement definitely does not mean that this was not a negotiation. Noam, what do you think? My guess is that we could reach agreement on factors to weigh along a continuum of negotiation.

**Noam:** I bet we could. We might need another short car ride to fully flesh it out, though. For example, going over both of our lists, I'd suggest that we need to preserve a distinction between two elements that have been combined with others: object or purpose of the negotiation, and interdependence. The first explores whether parties are engaging in the interaction in order to achieve something. Anything! To what degree is there an object to the interaction? To what degree are parties engaging in the interaction to achieve something of importance to them? This might distinguish negotiation from other interactions, such as social conversations. Interdependence then explores the extent to which they are reliant on each other, for achieving those purposes. I think these are separate variables. So, a third take might look like this:

- Parties' Perspectives: Did the parties prepare to negotiate? Do they view it as negotiating?
- Purpose: Does each party have something they are trying to achieve, in this interaction? Are they trying to obtain something, better their situation, increase their wealth, etc.?
- Structure or Relationship: Do the parties need each other to achieve their purpose? What is their level of interdependence? To what extent do the parties need to work with each other to achieve their purpose, as opposed to the power of one to decide unilaterally?
- Action (or what a third party would observe if watching the parties interact): Are the parties communicating back and forth? Are they asking questions of each other? Sharing interests or needs or demands? Making offers or creating options?
- Result: Was an agreement explicitly reached, or a demand accepted? Regardless of agreement, has parties' behavior changed?

You know, in a way I'm glad we left some of this open for our next drive.

**John:** Thanks, everyone, for letting me come along for the ride. We haven't reached a final destination - and I don't know that we will all go to the same place - but I think we are moving in the right direction. And it sure was fun.

**Andrea:** I think the journey here is more valuable than the destination. And I'm happy we were all part of it.