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The Sale of a Unique Object in an Open Market

Kenneth S. Gallant

Imagine that a non-believer found an object that proved to be the True Cross, lost during the Crusades. Imagine also that the True Cross had been stripped of all the decorative work and jewelled encrustation that had accumulated around it before its loss. The non-believer—at least one without a sense of history—would have a piece of wood, which he or she might like to sell. How should the finder dispose of the Cross?

The simple answer is to put the Cross up for public auction. There the curiosity-seeker, the historian, the individual committed Christian, the Vatican, the university, and other interested parties will collectively determine the secular value of the item by expressing willingness to buy it at stated prices. The seller should not set a price.

This example poses an interesting challenge to the Fisher-Ury theory that principles—external, more or less objective benchmarks—should be the basis for negotiated agreements. Pure will, they argue, is inferior to the use of

objective criteria in attempting to reach favorable, fair agreements (Fisher and Ury, 1981). Their argument is generally powerful, but in certain atypical instances, such as this one, it seems to fail.

By hypothesis, there are no external benchmarks against which price can be measured. To anyone like the finder, the Cross has no particular value—it is no longer good, even as a piece of lumber. To the Christian, however, the Cross is unique and incomparable. It cannot be valued by any standard other than itself. The marketplace for unique historical objects—e.g., the recently found manuscript of the U.S. Constitution's Bill of Rights—provides no comparable transaction. One can hardly imagine a reasoned basis to price the Cross by anything other than auction.

The true auction—whether of a unique or an interchangeable item—is a pure contest of wills. The price is determined wholly on the basis of willingness to pay. In the case of non-

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unique objects, obviously the prospective buyers should consult external benchmarks in determining what to bid. Where the prospective buyer is a corporation, family or other group, the internal negotiation concerning the highest bid to be made can therefore be conducted along principled lines. Yet, unless the auction is by a single round of sealed bidding, the final price of an object is set almost exclusively by the willingness to pay of the second-highest bidder—whether or not the second highest bid was made on the basis of good reasons, bad reasons, or no reasons at all.

The auction, however, has one important virtue that traditional positional negotiation, also will-based, does not: In a fair public auction, no premium is placed upon deception concerning what one party or another is willing to pay.¹ In private positional negotiation, as Fisher and Ury point out, there is reason to deceive concerning one's willingness either to pay or to sell. Theorists of the Fisher and Ury school might argue that the willingness of another to pay a price, as manifested in a bid, in fact constitutes an external benchmark protecting one from making an irrational purchase. Yet the fact that another has made a certain bid is by itself hardly a justification for the decision to make or not make a higher bid.

In the case of the Cross, only the nonreligious historian or collector of the unusual has any external benchmarks to provide what Fisher and Ury would admit as reasons for a bid. Surely they should base their bids upon those reasons. Christian bidders, whether individuals or churches, have no comparison whatever. This is not to say that Oral Roberts, the United Methodist Church, or the Vatican should spend its entire treasury on the Cross. It is merely that the reasons for their bids are in a

special way their own, not subject to evaluation by external or objective criteria. There is no price that an outside observer who respects genuine religious motivation could call so high as to be silly or unjustified.

A Sale with Only One Buyer

Imagine now that a seller has come into legitimate possession of a diary. The seller knows that the diary is being sought by its author's daughter, and that it is of no interest to anyone else, including the seller. How should the sale be arranged?

Here even the auction model breaks down. With only one prospective buyer, there are no opposing wills against which to measure the will of the daughter. The price can only be set in a direct negotiation between the buyer and the seller. Yet the negotiation is an odd one. As with the Cross example, the seller is better off taking any price above the transaction cost. Similarly, the buyer has difficulty establishing external benchmarks for making her offer. Either she or the seller may negotiate on the basis of knowledge of what other children pay for diaries. They may also negotiate on the basis of the seller's transaction costs plus some reasonable value for the seller's time. Nonetheless, the buyer's parent wrote only one diary, and her desire for it may not be measurable against what other children pay for parent's diaries, and her valuation of it may exceed the reasonable value of the seller's time.

Her calculation will therefore be made principally against what else she would do with the prospective purchase money—her alternatives to a negotiated agreement. While her alternatives may be objectively verifiable—the other things she wants may have clear, relatively stable prices—the decision whether she would rather have

those things or the diary is ultimately a matter of desire and will.

Therefore it seems that this negotiation is likely to become positional, with each party attempting to find the price at which the other is willing to make the transaction. The opportunity to negotiate this case "on the merits" appears to be very limited. If the buyer has made it clear that she will pay what she can afford, the seller may attempt to determine what expenses she must meet before paying for the diary. The seller may then attempt to show that she can actually afford more than she thought (or said she thought). The seller might also show try to show that the buyer has spent large sums of money on goods or services she actually wanted less than she wants the diary.

On the other hand, the buyer can do very little to show how useless the item is to the seller. She can refuse to pay any more than transaction costs plus reasonable time compensation, on the ground that any greater price is extortionate. Her refusal does not necessarily end the negotiation, which may proceed along two lines.

First, suppose that the seller has legitimately acquired knowledge of the seller's willingness to pay, say \$10,000.² Is there any reason that the seller should not set the price of the diary at \$10,000, and stick to that price?

The answer appears to be no, unless the seller believes that the buyer will, in fact, authorize a higher price if necessary. Known willingness to pay—or sell—appears to be the most rational basis of valuation of the diary. It is thus a powerful argument for actually charging the amount—and the seller can give the buyer's stated willingness to pay as the seller's reason for setting the diary's price. Any attempt by the buyer to move the seller away from that price involves a risk of failing to obtain the item. It places the parties in the situa-

tion of playing a game of chicken, in which a mutually beneficial deal is endangered. On the other hand, at any demand above transaction costs, the seller can be charged with taking the same risks. Despite the increase in knowledge, the two parties, if they are ultimately rational, will find a positional solution to their problem.

If, on the other hand, it is assumed that the seller does *not* know the buyer's resistance point, it is hard to say why the seller should not try to find it through positional bargaining. Why should the seller accept less than close to what the buyer would be willing to pay, when one need not do so for the Cross? The only conceivable reason is that there is only one bidder for the diary.

This is not a very attractive solution to the problem. The protection from deception obtained by the auction process is not present in the diary case. The best thing that can be said about this example is that the sale of a unique object to a sole interested buyer is a rare transaction—theoretically interesting but infrequent.

Desire and Will

The thesis of the principled negotiation theorists is that most disputes and prospective deals can be negotiated by focusing on external or objective criteria. This is undoubtedly true.

There is, however, an element of uniqueness in more transactions than the principled theorists generally state. This uniqueness implies that at some level, pure will—usually disguised as the buyer's evaluation of alternatives to negotiated agreement—may of necessity enter into the transaction.

The typical transaction in the American economy involving this element of uniqueness is the purchase of a house. It is not an accident that courts in common law countries treat each par-

cel of real estate as unique. They will generally require specific performance of contracts for the sale of real estate, even though most other sales contracts can be enforced only by monetary damages (see Dobbs, 1973).

Much about houses is subject to comparison. Square footage, current access to water, the presence or absence of amenities such as air conditioning, are all objectively verifiable. They are also subject to valuation by external benchmarks, and the profession of real estate appraisal has grown up around this fact. Moreover, in most cases, the reasonable price of even an unusual house should probably be capped by the cost of re-creating it on equivalent land, if such is available. Thus at least some of the conditions for a principled negotiation exist.

Nonetheless, even in the blandest subdivision, houses are by no means interchangeable. Where a house is of unique design, or particularly fine craftsmanship (increasingly rare these days), or on a particularly fine piece of property, it rapidly becomes one of a kind. These are matters that cannot be objectively valued except within a very broad range, and with which appraisal techniques are inadequate to deal. Therefore these factors frequently get left out of neutral statements of value. Within this broad range, desire and will are important.

Desire and will may, of course, be constrained by factors subject to more or less objective analysis. In the case of an unusual house, one might well use the standard guidelines concerning how much of one's income ought to go to housing, as defining the price one is willing to pay. These guidelines may very well be important in the internal family negotiation concerning what price to offer on a house.

On the other hand, the internal decision-making process should also

consider alternate uses of resources remaining after different prices have been paid. The choice of whether, at any given price, the best alternative to agreement is better than the agreement, is governed by desire under the same sorts of conditions as the sale of the diary. For example, the value of a fourth bedroom in an alternate house can be roughly ascertained, but the difference between two eccentric houses offered at the same price, or a house and a Picasso at the same price, cannot be. In other words, neither external criteria nor will and desire are alone sufficient to make an intelligent decision on price for an item, when at least part of its value is its uniqueness.

External benchmarks have a similarly limited place in the external negotiation between buyer and seller for the unique house. The buyer can use banks' unwillingness to finance at a level above appraised value as an external benchmark to constrain the seller's demand. In this case, however, the external benchmark is not really a fair measure of value; by hypothesis, there is some value that has not been measured. (Indeed a buyer will occasionally be prevented from willingly paying a price above appraisal by this sort of banking rule. This is the price of allowing accountants to make our artistic decisions. It also demonstrates an anomaly, showing that hewing to a principle, even in the absence of an alternative pricing principle, may occasionally lead to a "makable" deal going unmade.)

The seller can also use external benchmarks of the financial markets to help the buyer find ways of affording the assignment of a high price to the uniqueness of a purchase. If the resources of the buyer are approximately known, the seller can demonstrate the level of spending on the item the buyer ought to be able to afford. The seller may also, by knowledge of the financial mar-

kets or by a willingness to undertake financing, arrange a more affordable combination of down payment and finance and other charges. Once again, this has nothing to do with any benchmark of the value of the item to be sold.

Principled negotiation remains a powerful technique in this sort of transaction for bringing the price into an appropriate range—in the house example, somewhere between a conservative appraisal value and replacement cost. The negotiator can therefore proceed confidently on the basis of more or less objective criteria to determine whether a bargaining range for reasonable agreement exists. Even within this range, external criteria—for example different methods of appraisal or of judging replacement construction costs—can be principles on which the negotiation is founded.

Yet the choice of price, within a range narrowed by principled negotiation, may finally come down to the intangible value of the house, which is a matter of will and desire. Another way of characterizing this conclusion is to say that, within the externally justifiable bargaining range, whether a particular deal ought to be struck will more likely be determined by the buyer's and seller's desire-based valuations of their alternatives to a negotiated agreement than by a monetary valuation of the property's intangibles based upon external criteria.

Nonetheless, in certain markets, such as that for original artwork, appraisers make a living attempting to quantify the unique attributes of objects for sale. Certainly demand for a certain painter's works can be judged, and, at a gross level, technique in composition, use of color, and so on can be evaluated as well. Yet auction results and other purchases make clear that such an

appraisal is more an indication of a range of value than a firm benchmark upon which a purchase price can be based. Taste is the ultimate arbiter.³

Some principled negotiation theorists may argue that there is an inherent confusion in the foregoing accounts—a confusion of the internal negotiation with the external. Of course, all would concede that the choice between accepting and rejecting a particular negotiated agreement usually involves an act of will. Unless one is comparing two different prices for essentially the same commodity, an element of preference enters into the calculation. If my best alternative use of money to buying this house is going to Europe, then at any given price I have to decide which use I prefer. However, this should not require that these same elements enter into what the price of the house ought to be.

This is unfair to the role of desire in human affairs. Additionally, it introduces a potential internal contradiction into principled bargaining theory. That is, by insisting on external criteria for matters that cannot be measured that way, the bargainer strictly following the theory introduces a new element of deception, a hidden agenda of undisclosed desire-based interest.

Conclusion

My purpose in this article is not to probe the sorts of deals most likely to be made by the wealthy—though the examples chosen are obviously from a restricted class of deals. Neither am I attempting to “show up” principled negotiation as a general rule. Most of the examples used in this article are so clearly atypical that a general system of negotiating could not be impeached solely by reference to them.

Rather, my goal here is to show that

the negotiator ought to be sensitive to those elements of a deal that may not be subject to principled valuation, as well as to those that are. It is also to

begin to delineate the legitimate place of will in a negotiating system generally founded on externally verifiable claims to fairness.⁴

NOTES

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1. Deception can be present in an auction where there is an undisclosed "reserve price" below which the buyer will not sell.

2. Those familiar with Roger Fisher's negotiation seminars may suspect that the examples here were inspired by the "Sally Swansong" case used there. They would be right. Copies of the case, written by Norbert S. Jacker of DePaul University College of Law, as revised and adapted by Mark N. Gordon and others affiliated with the Program on Negotiation at Harvard Law School, are available from the Clearinghouse, Program on Negotiation at Harvard Law School, 500 Pound Hall, Cambridge, Mass., 02138.

3. A study of the closeness of fit between auction prices and appraised value of artworks might reveal some interesting things about the role of taste in price setting. In addition, if the fit were not at all close, one would have to consider whether there is a category of external criteria which are more or less "false" benchmarks, whose use is not likely to lead to a fair agreement.

4. One question raised by this paper but not discussed here is the relationship, if any, between negotiation theory and theory of value.

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