

## Would Principled Negotiation Have Saved Eve?: A Feminist Analysis of *Getting to YES*

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### I Introduction

In one of the first recorded negotiations,<sup>1</sup> the serpent suggested to Eve that she eat the forbidden fruit from the Tree of Knowledge. "No," said Eve, employing the hardhearted partner tactic<sup>2</sup> by appealing to a Higher Authority, "because God told me not to." "Ah," said the serpent, using deceptive tactics and concealing his underlying interests,<sup>3</sup> "but if you eat from the Tree then you will be like God and know everything." As Eve recognised the advantages that come from knowledge,<sup>4</sup> she could not resist this appeal. Therefore, not stopping to verify this information independently nor to evaluate her alternatives,<sup>5</sup> Eve accepted the serpent's proposal rather than rejecting it in favour of her BATNA (Best Alternative To a Negotiated Agreement).<sup>6</sup>

Despite Eve's infamous negotiation failure, negotiation has often been described as a "female" activity.<sup>7</sup> This is supported by evidence that women are more likely than men to prefer negotiation to more adversarial forms of conflict resolution.<sup>8</sup> However, at least in the business and legal spheres, negotiation itself has often been perceived as an adversarial activity: each party takes a position, argues for it and makes concessions to reach a compromise.<sup>9</sup>

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<sup>1</sup> Adapted from *Genesis* 3:1-6. The metaphor of Eve's dealing with the serpent has been used by other legal writers, most notably by Helena Kennedy QC in the title of her book, *Eve Was Framed: Women and British Justice* (Vintage, London, 1992).

<sup>2</sup> Roger Fisher, William Ury & Bruce Patton, *Getting to YES: Negotiating Agreement Without Giving In* (Penguin, New York, 2d ed 1991) at 141. As Fisher and Ury were the authors of the first edition in 1981 (with Patton as editor), and the second edition retains the text of the original largely unchanged (with new material in an extra chapter), this article refers to "Fisher and Ury."

<sup>3</sup> *Ibid* at 132-133 (describing these tactics).

<sup>4</sup> *Ibid* at 181-182.

<sup>5</sup> *Ibid* at 132 and 97-106 (describing these tactics).

<sup>6</sup> *Ibid* at 100.

<sup>7</sup> This is especially so in the legal context when negotiation is contrasted with litigation. See, eg, Carrie Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1985) 1 *Berkeley Women's L J* 39.

<sup>8</sup> Mona Harrington, *Women Lawyers: Rewriting the Rules* (Penguin, New York, 1993) at ch 5.

<sup>9</sup> These are the features of what Fisher & Ury call "positional bargaining." *Supra* n 2 at 3.

<sup>10</sup> For a thoughtful consideration of the increasing use of alternative dispute resolution (ADR) by the New Zealand legal profession, see Austin Forbes, "Arbitration and dispute resolution in New Zealand - where to from here?" [1995] *NZLJ* 414.

The perception and practice of negotiation as an adversarial activity has been mitigated by modern trends emphasising other approaches. One such trend has its origins in Fisher and Ury's ground-breaking book *Getting to YES*, which presents "principled negotiation." Principled negotiation has developed into one of the most popular alternatives to adversarial bargaining, and has been extensively promoted in New Zealand legal circles. Interest in principled negotiation is likely to continue, given the growing interest in ADR techniques within the New Zealand legal profession.<sup>10</sup>

This article examines the usefulness of principled negotiation for women negotiators. It does so by drawing on advances in feminist theory and social science<sup>11</sup> that have largely occurred after principled negotiation's rise to prominence. In particular, it examines the extent to which principled negotiation assumes a male norm,<sup>12</sup> the extent to which it promotes "female" skills and whether it covers the important issues for women negotiators. It then goes on

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<sup>11</sup> Combining "theory" with concrete experience is an important aspect of feminist methodology. See *infra* n 69.

<sup>12</sup> A major task of feminist research has been to determine whether descriptions and prescriptions purporting to be of universal application are in fact specific to men. For example, Carol Gilligan showed that there are different ways of speaking about moral problems and of describing the relationship between the self and other and that the perspectives more commonly associated with women have been ignored in psychology. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard, Cambridge, 32nd printing 1993) at 1. Note, firstly, that Gilligan acknowledges that her conclusions are based on findings "from a small and highly educated sample" (at 156). Secondly, although Gilligan's work is often (mis)interpreted as proving the existence of two very different and mutually exclusive perspectives for men and women (with women focusing on relationships and men on separate identity), Gilligan herself acknowledges that both sexes experience the struggle between identity and intimacy (at 156 and 164) and that men and women may come "in the course of becoming adult, to a greater understanding of both points of view and thus to a greater convergence in judgment" (at 167). Therefore, while her research suggests that there are different perspectives correlated with gender, it should not be taken as establishing definitive or immutable differences between the perspectives of men and women. Fisher and Ury, in the material added in the second edition, note Gilligan's research in passing: "Some research suggests that women are more likely than men to gather information in a more open and less structured way, to be more sensitive to relationships, and to operate on a morality that is based proportionately more on caring and obligation to others and less on rules and individual rights . . . . See, as a starting point, Carol Gilligan, *In a Different Voice . . . .*" Fisher & Ury, *supra* n 2 at 167. They do not explore the consequences of such research for principled negotiation.

<sup>13</sup> See, eg, Barry Gerhart & Sara Rynes, "Determinants and Consequences of Salary Negotiations by Male and Female MBA Graduates" (1991) 76 *J Applied Psychol* 256; Ian Ayres, "Fair Driving: Gender and Race Discrimination in Retail Car Negotiations" (1991) 104 *Harv L Rev* 817; Ian Ayres & Peter Siegelman, "Race and Gender Discrimination in Bargaining for a New Car" (1995) 85 *Am Econ Rev* 304. See generally Deborah M Kolb & Gloria G Coolidge, "Her Place at the Table: A Consideration of Gender Issues in Negotiation" in J William Breslin & Jeffery Z Rubin (eds), *Negotiation Theory and Practice* (Program on Negotiation at Harvard Law School, Cambridge, 1991) 261 at 263 and 267. Studies on gender differences

to discuss an advance in negotiation theory that also highlights issues that are particularly cogent for women and to suggest some possible means of making principled negotiation more useful for women.

## II Why Look at Women as a Group?

In an era that some describe as “postfeminist”, are there concerns specific to women in negotiation? Research concluding that, on average, women are less successful in negotiations than men<sup>13</sup> suggests that there are indeed serious issues to be examined from a gender-specific perspective. Such research outcomes could be explained in different ways. One explanation could be that women’s negotiating behaviour is different from, and less effective than, that of men. Alternatively, such outcomes could be explained purely as the result of others’ reaction to women, especially if those with whom they negotiate have set beliefs about how women should behave or believe that women will accept less than men.<sup>14</sup>

These two hypotheses are closely related. When there are observed differences in negotiating styles between men and women, such differences arise out of a

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in negotiation differ on whether there is a “gender gap.” See Jeffrey Z Rubin & Bert R Brown, *The Social Psychology of Bargaining and Negotiation* (Academic Press, New York, 1975) at 169-171; Kolb & Coolidge at 263; Sheila Heen, “Defining Gender Differences: Is the Proof in the Process?” (1996) 12 *Negotiation J* 9; Jennifer J Halpern & Judi McLean Parks, “Vive la difference: Differences between males and females in process and outcomes in a low-conflict negotiation” (1996) 7 *Int’l J of Conflict Mgmt* 45. In particular, Halpern and Parks conclude that “in the context of the total evidence presented, there can be little doubt that there are differences in how males and females negotiate. Failure to control for the effects of gender, or to consider it explicitly in research on conflict and dispute resolution is a serious omission.” On the other hand, many researchers conclude that the studies show little difference between men and women negotiators. See, eg, Dean G Pruitt, *Negotiation Behavior* (Academic Press, New York, 1981) at 45-46; Burton et al, “Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles” (1991) *J Disp Resol* 199 at 224-237. Others argue that there are gender differences and that the contradictory findings can be explained by women’s greater sensitivity to interpersonal aspects of relationships which leads them to react to many elements in experimental environments. Rubin & Brown at 172-174. Given the many studies showing that women are less successful than men in negotiations and the other social science findings discussed in this article, it appears that there are indeed gender differences relevant to negotiation.

<sup>14</sup> Gerhart & Rynes, *ibid* at 260. Some difficulties experienced by women in negotiations are likely to be exacerbated in the “public” and “male” worlds of business compared with the “private” and “female” worlds of home and family: Frances E Olsen, “The Family and the Market: A Study of Ideology and Legal Reform” (1983) 96 *Harv L Rev* 1497. It may be significant that the studies referred to in n 13 concerned the “public” context, in which negotiations have traditionally been conducted in a more adversarial manner.

<sup>15</sup> “Pragmatic feminism” eschews simple explanations of women’s inferior position in society, of human nature or of what would constitute an ideal world. It recognises the complexities of different courses of action, and hence promotes experimentation to determine what furthers the equality of women. See Margaret Jane Radin, “The Pragmatist and the Feminist” (1990) 63 *S Ca L Rev* 1699.

social context in which different characteristics are seen as appropriate for, and hence encouraged in, men and women. This social context also privileges “male” styles of behaviour over “female” styles of behaviour, so that male styles are “objectively” perceived as superior and hence likely to achieve superior outcomes. Women seeking to use these “objectively” superior styles of behaviour are perceived to be acting inappropriately and hence may jeopardise their chances of achieving a favourable outcome. Therefore, women can find themselves in a “no-win” situation either way, a classic example of what “pragmatic feminism”<sup>15</sup> describes as the “double bind.”<sup>16</sup>

Three further points should be noted. Firstly, the fact that women prefer negotiation to more adversarial forms of dispute resolution does not prove any “natural” disposition towards negotiation. Different behavioural characteristics of men and women can be explained in terms of women’s position in the prevailing social structure. In particular, MacKinnon argues that women like to negotiate because they are forced into a situation of inequality in which they lose conflicts.<sup>17</sup>

Secondly, it is inevitable that, in identifying behaviour as “male” or “female”, generalisations are made which will not be true for many individuals. Therefore, when this article identifies behaviour as gendered, this should always be taken to refer to broad tendencies, more true of one sex than the other, rather than as an accurate description or prediction of any individual’s behaviour.

Thirdly, it can be argued that highlighting gender differences in behaviour merely perpetuates stereotypes.<sup>18</sup> The author recognises this danger, another example of the “double bind.” In any particular context, the dangers of

<sup>16</sup> The “double bind” occurs when all alternative courses of action could be harmful given the oppressive social context. Although in the long run the solution to the double bind is to dissolve it by removing the oppressive social context, in the meantime a pragmatic choice is made by “look[ing] carefully at the nonideal circumstances in each case and decid[ing] which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on.” Radin, *ibid* at 1700. For an example of the double bind in the context of negotiation, see Mary Power, “Does a Woman Negotiator Have to be like a Man?” (1994) 5 *Aust Disp Resol J* 49 at 50.

<sup>17</sup> MacKinnon in DuBois et al, “Feminist Discourse, Moral Values, and the Law - A Conversation” (1985) 34 *Buff L Rev* 11 at 27. See Carol Watson, “Gender versus Power as a Predictor of Negotiation Behavior and Outcomes” (1994) 10 *Negotiation J* 117 (arguing that differences in negotiating styles are better explained by status and power differences than by gender); Power, *ibid* at 53 (explaining that research does not support a power explanation over a socialisation explanation or vice versa).

<sup>18</sup> Some feminists criticise the labelling of behaviours and attitudes as gendered because it perpetuates stereotypes. Cf David Cole, “Strategies of Difference: Litigating for Women’s Rights in a Man’s World” (1984) 2 *L & Inequality* 33 at 39-40 (explaining that feminists in the late 1960s saw that “different” meant unequal, so they sought to minimise their difference from men). Other feminists argue that a necessary step towards equality is the recognition of sex differences created by socialisation. See, eg, Menkel-Meadow, *supra* n 7 at 40-41 n 8; Linda Stamato, “Voice, Place, and Process: Research on Gender, Negotiation, and Conflict Resolution” (1992) 9 *Mediation Q* 375 at 376.

<sup>19</sup> Fisher & Ury, *supra* n 2 at 10.

stereotyping must be carefully weighed against the benefits of a gender-specific analysis. For negotiation analysis, the author contends that the fact of women's inferior outcomes tips the balance in favour of explicitly addressing issues of difference. This is because identifying characteristics of women's behaviour is a prerequisite to formulating better advice for women on negotiating techniques.

### III The Four Precepts of Principled Negotiation

Principled negotiation, sometimes called "negotiation on the merits",<sup>19</sup> was designed as an alternative to positional bargaining. Its objective is "to produce wise outcomes efficiently and amicably."<sup>20</sup> It can be summed up in four precepts:<sup>21</sup>

- People: Separate the people from the problem.
- Interests: Focus on interests, not positions.
- Options: Generate a variety of possibilities before deciding what to do.
- Criteria: Insist that the result be based on some objective standard.

Fisher and Ury claim that "[t]hese four points define a straightforward method of negotiation that can be used under almost any circumstance."<sup>22</sup> Parts IV to VII of this article examine this claim of near-universal application by considering the efficacy of the precepts for women negotiators.<sup>23</sup>

### IV Separate the People from the Problem

#### 1 *The Importance of Maintaining the Relationship*

A central tenet of principled negotiation is that negotiators have an interest in their relationship with the other side, as well as an interest in the substance of the negotiation. As Fisher and Ury point out, most negotiations occur in the context of an ongoing relationship so that negotiators must act so as to help rather than hinder future negotiations. The ongoing relationship is more important than the outcome of any particular negotiation.<sup>24</sup>

<sup>20</sup> Idem.

<sup>21</sup> Ibid at 10-11.

<sup>22</sup> Ibid at 10.

<sup>23</sup> This article does not deal with issues specific to negotiations in contexts such as family violence and divorce. Negotiation in these contexts has been analysed by many writers. See, eg, Barbara C Bedont, "Gender Differences in Negotiations and the Doctrine of Unconscionability in Domestic Contracts" (1994) 12 Canadian Fam L Q 21. As well as the four precepts set out, other aspects of principled negotiation can be critiqued from a feminist perspective. See, eg, Deborah M Kolb, "Negotiation Theory Through the Looking Glass of Gender" in *Negotiation Strategies for Women Lawyers* (Massachusetts Continuing Legal Education, Boston, 1994) 1 at 22-26 for a feminist analysis of negotiation power and BATNAs.

<sup>24</sup> Fisher & Ury, *supra* n 2 at 19-20. There is evidence that negotiators who pay attention to the relationship are more effective than those who do not. Burton et al, *supra* n 13 at 231.

<sup>25</sup> Gilligan, *supra* n 12 at xiv and 17. Miller argues that women are more attuned to others because "[w]omen are taught that their main goal in life is to serve others. . . ." Jean B Miller, *Toward a New Psychology of Women* (Penguin, Middlesex, 1976)

This emphasis on relationships is consistent with a “female” view of the world, as there is evidence that women tend to define themselves in the context of human relationships, unlike men who tend to see themselves as separate, independent and autonomous.<sup>25</sup> In having to spell out the importance of relationships, it seems that the architects of this “breakthrough” negotiating principle were very much taking for granted a male norm among their readers.

Given women’s focus on relationships, principled negotiation may be a more comfortable approach for women than positional bargaining.<sup>26</sup> It is also likely to be more effective for them than acting aggressively, given societal expectations.<sup>27</sup>

In principled negotiation, the key to maintaining a good relationship is to deal with people problems directly, rather than trying to solve them with substantive concessions.<sup>28</sup> This advice is particularly significant for women, as there is evidence that women’s greater emphasis on the relationship results in women being more likely to make concessions to maintain it.<sup>29</sup> Feminist theory suggests that these effects are a result of women’s subordinate and powerless position in society.<sup>30</sup>

Therefore, separating the relationship from the substance is likely to empower women insofar as it may prevent them from adopting “female” behaviour that makes them less effective at negotiating outcomes favourable to themselves. The issue then becomes how to separate the substance from the relationship so

at 65. Cf Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (University of California Press, Berkeley, 1978) at 173-174 (arguing that girls and boys develop different relations, capacities and senses of self from growing up in a society in which women mother, because boys, unlike girls, must differentiate themselves from their mothers, and hence define themselves as separate from others).

<sup>26</sup> Power, supra n 16 at 54. As principled negotiation may encourage greater participation by the parties, it is consistent with the feminist value of inclusion. Eve Hill, “Alternative Dispute Resolution in a Feminist Voice” (1990) 5 J Disp Resol 337 at 372.

<sup>27</sup> Michael Burgoon, James P Dillard & Noel E Doran, “Friendly or Unfriendly Persuasion: The Effects of Violations of Expectations by Males and Females” (1983) 10 Hum Comm Res 283; Kolb & Coolidge, supra n 13 at 267 and 270; Deborah Tannen, *Talking From 9 to 5: How Women’s and Men’s Conversational Styles Affect Who Gets Heard, Who Gets Credit, and What Gets Done at Work* (William Morrow, New York, 1994) at 15, 40, 123, 170 and 280. Watson maintains that women need the skills of principled negotiation more than men because of the conflicting expectations that they face. Watson, supra n 17 at 125. Women should not always conform their behaviour to sexist expectations. However, because aggressive strategies may be counterproductive in any event, Burton et al, supra n 13 at 231 (noting that lawyers exhibiting care toward the other side in negotiations are more effective), women will not disadvantage themselves by avoiding such strategies.

<sup>28</sup> Fisher & Ury, supra n 2 at 21.

<sup>29</sup> See Bonnie R Kasten, “Separate Strengths: How Men and Women Manage Conflict and Competition” in Lynda L Moore (ed), *Not as Far as You Think: The Realities of Working Women* (Lexington Books, Lexington, 1986) 128 at 132 (noting that women believe that relationships are more important than getting what they want); William F Morrison & Henry H Calero, *The Human Side of Negotiations* (Krieger, Malabar, 1994) at 196 (noting that women make more concessions than men).

as to prevent unjustified concessions. Principled negotiation claims that the various people problems fall into three major categories - perception, emotion and communication<sup>31</sup> - and prescribes techniques for dealing with each of these so as to keep relationships and substance separate. This section will examine each of these categories in turn.

## 2 Perception

With respect to perception, principled negotiation warns against searching for "objective reality", instead advocating that "[i]f you want to influence them, you . . . need to understand empathetically the power of their point of view and to feel the emotional force with which they believe in it."<sup>32</sup> This is consistent with aspects of feminist theory, which reject the idea that there is an objective reality independent of one's perspective and claims that "objective" reality usually means men's perspective.<sup>33</sup> Many feminists also believe that empathy leads to better outcomes because the human meanings of a given situation become known.<sup>34</sup>

In our male-dominated society, women's perspectives are often ignored. McConnell-Ginet states that "where the sexes have somewhat different perspectives on a situation, the man's view is more likely to be familiar to the woman than hers is to him" and that "men are much more likely than women to be unaware that their own view is not universally shared."<sup>35</sup> Therefore, exploring different perspectives during a negotiation is likely to benefit women. As Goldfarb points out, "narratives . . . articulated by the excluded, hold possibilities for changing the listeners' consciousness through empathetic understanding."<sup>36</sup>

The use of empathy as part of principled negotiation also appears to benefit women insofar as empathy tends to be a strength of women.<sup>37</sup> However, in the context of a male-dominated society, empathy can become a double-edged sword

<sup>30</sup> Supra n 17 and accompanying text.

<sup>31</sup> Fisher & Ury, supra n 2 at 22.

<sup>32</sup> Ibid at 23.

<sup>33</sup> See, eg, Mary Becker et al (eds), *Cases and Materials on Feminist Jurisprudence* (West, St Paul, 1994) at 57-58; Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard, Cambridge, 1989) 231-232. Fisher and Ury do not seem to go as far as this, as they appear to assume that objective reality always exists and that people may merely be mistaken over what it is. Fisher & Ury, supra n 2 at 22-23. However, their advice not to focus on determining objective reality is still helpful.

<sup>34</sup> Lynne N Henderson, "Legality and Empathy" (1987) 85 Mich L Rev 1574 at 1576.

<sup>35</sup> Sally McConnell-Ginet, "The Sexual (Re)Production of Meaning: A Discourse-Based Theory" in Francine Wattman et al (eds), *Language, Gender, and Professional Writing: Theoretical Approaches and Guidelines for Nonsexist Usage* (Modern Language Association of America, New York, 1989) 35 at 43. For an example of women's awareness of the non-universality of their perspective, see Gilligan, supra n 12 at 43. Gilligan observes that in unequal power situations the people with greater power know less about the other people (at 63). See also Miller, supra n 25 at 38.

<sup>36</sup> Phyllis Goldfarb, "A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education" (1991) 75 Minn L Rev 1599 at 1632.

<sup>37</sup> Kolb & Coolidge, supra n 13 at 268; Power, supra n 16 at 59; Leonard Greenhalgh & Roderick W Gilkey, "Our Game, Your Rules: Developing Effective Negotiating Approaches" in Lynda L Moore (ed), *Not as Far as You Think: The Realities of Work-*

for women. At the same time as women use empathy to understand others' points of view, there is a danger of undervaluing their own perspective - particularly if women's perspectives are undervalued by society generally. Thus, while empathy is a useful technique, it must be invoked with an awareness of the underlying societal context.

Fisher and Ury's original discussion of perceptions related only to different perceptions of matters specific to the dispute. Such differences of perception are important in a gender-specific analysis, given that women's different socialisation and life experience may result in differences in perception in such matters. Somewhat belatedly,<sup>38</sup> Fisher and Ury expanded their discussion to include a further aspect of perception: differences in perception can arise from negotiators stereotyping individuals.<sup>39</sup> As women are often the victims of stereotyping, this advice is likely to assist women. However, principled negotiation misses an important aspect of perception that is also likely to affect women: self-perception. Despite substantial improvements in women's position in society, women are still less confident about their own ability than men, which may affect their performance.<sup>40</sup> Therefore, negotiating advice helpful to women should explicitly address this issue.

### 3 Emotions

Principled negotiation requires negotiators to recognise and understand emotions, both theirs and others.<sup>41</sup> To some extent, this is consistent with feminist methodology, which recognises the reality and importance of feelings.<sup>42</sup>

However, principled negotiation adopts the traditional dichotomy by treating emotions as the opposite of rationality.<sup>43</sup> Hence emotions are seen as something to be defused before the real work of "rational" negotiation begins. Most feminist analyses would reject both the dichotomy itself, and the privileging of rationality (usually seen as a male trait) over emotions (usually seen as a female trait).

Many feminists see emotion as inseparable from rationality, arguing that ignoring emotions results in "an impoverished view of reason and understanding."<sup>44</sup> This is apparent when we consider that society has long been

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*ing Women* (Lexington Books, Lexington, 1986) 135 at 141. The fact that Fisher and Ury had to specifically explain the use of a traditionally "female" skill shows the assumed male norm among the audience.

<sup>38</sup> This rather obvious point was not covered until the second edition.

<sup>39</sup> Fisher & Ury, *supra* n 2 at 167-168. Stereotypes harming women include the negative perception of women who are "too aggressive". See *supra* n 27.

<sup>40</sup> Belle R Ragins & Eric Sundstrom, "Gender and Power in Organizations: A Longitudinal Perspective" (1989) 105 *Psychol Bull* 51 at 71.

<sup>41</sup> Fisher & Ury, *supra* n 2 at 29.

<sup>42</sup> Becker et al, *supra* n 33 at 58.

<sup>43</sup> For example, Fisher and Ury state that "[l]etting off steam may make it easier to talk rationally later", Fisher & Ury, *supra* n 2 at 31, and that "[f]reed from the burden of unexpressed emotions, people will become more likely to work on the problem" (at 30), and they list as a relationship issue the "[b]alance of emotion and reason" (at 158). Thus they seem to treat emotions as an impediment to be dealt with.

<sup>44</sup> Henderson, *supra* n 34 at 1575. Miller states that "[Emotionality] has not been

dominated by men, so that the only or dominant discourse in many contexts is based on male perspectives. When women wish to present an alternative to the dominant discourse, there is often no settled pattern of "logic" with which to do this, and sometimes even no words.<sup>45</sup> This leaves women's articulation of their experience open to the amorphous label of "emotions." Even when articulation is possible, accompanying emotions are often needed to fully convey the "rational" meaning. "Emotions" are often vital to understanding.

As well as enhancing understanding, emotions are likely to be valuable in other ways in negotiations. For example, Kolb points out that, by seeing emotions as relevant only insofar as they reveal what people are thinking and feeling, Fisher and Ury "render[] invisible how emotions serve creative functions in negotiations and the actions negotiators take to create a socioemotional context in which negotiations can occur."<sup>46</sup>

Thus, while principled negotiation is an improvement on adversarial bargaining in that it recognises the importance of emotions, it adopts a male viewpoint insofar as it treats emotions and rationality as separate, and the former as inferior to the latter. This could result in women discounting considerations important to them on the basis that they are mere "emotions" which ought to be disregarded when dealing with the substance of the negotiation. Therefore, feminist theory suggests that negotiating techniques must transcend the traditional and limited view of emotions and rationality if such techniques are to be effective for women as well as men.

#### 4 Communication

Fisher and Ury claim that there are three big problems in communication:<sup>47</sup> negotiators may not be talking to each other (but merely to impress third parties or their own constituency), the other side may not be hearing, and the negotiators may misunderstand each other (for example, when parties speak different

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seen as an aid to understanding and action, but rather as an impediment, even an evil. We have a long tradition of trying to dispense with, or at least to control or neutralize, emotionality, rather than valuing, embracing, and cultivating its contributing strengths." Miller, *supra* n 25 at 38.

<sup>45</sup> See, eg, Betty Freidan, *The Feminine Mystique* (Penguin, Middlesex, 1963) at ch 1 ("The Problem that Has No Name.") Even when women articulate their experience, Gilligan notes that her research "suggests that men and women may speak different languages that they assume are the same, using similar words to encode disparate experiences of self and social relationships. Because these languages share an overlapping moral vocabulary, they contain a propensity for systematic mistranslation, creating misunderstandings which impede communication and limit the potential for cooperation and care in relationships." Gilligan, *supra* n 12 at 173.

<sup>46</sup> Kolb, *supra* n 23 at 28. This includes taking breaks, which can result in new ways of thinking (at 29).

<sup>47</sup> Fisher & Ury, *supra* n 2 at 32-33. In the material added in the second edition, Fisher and Ury note that people have different styles of communication (eg that some are blunt and others more direct and tactful and that research suggests that women may gather information in a more structured and less open way), advising negotiators to be sensitive to the norms of others. *Supra* n 2 at 166-167. How-

languages).<sup>48</sup> Therefore, principled negotiation puts a significant emphasis on listening skills.<sup>49</sup>

This explanation of communication problems misses a crucial prerequisite to a meaningful analysis of communication: the issue of who gets to speak during a negotiation. Many studies show that women speak less in negotiations.<sup>50</sup> This is consistent with findings that men are more talkative in formal interactions, with women perceived as dominating as soon as they speak half as much.<sup>51</sup> Therefore, principled negotiation's emphasis on listening may not be helpful advice for women. Rather, in negotiations involving both sexes, it may be necessary to use a structured process so that women get a fair chance to speak.<sup>52</sup> We cannot be confident that substantive issues in the negotiation are being resolved independently of the relationship between the negotiators if there is not true reciprocity of communication.

Principled negotiation is deficient in another important respect, as it ignores a common source of misunderstanding - the different speaking styles of men and women. For example, Lakoff explains that women use a "polite" style of speech characterised by ambiguity to help build relationships with others, while men use unambiguous sentences.<sup>53</sup> Indirectness in women's speech is often misunderstood as uncertainty, lack of self-confidence<sup>54</sup> or lack of credibility.<sup>55</sup>

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ever, effective negotiating advice requires more than Fisher and Ury's superficial discussion.

<sup>48</sup> Ibid at 33.

<sup>49</sup> Ibid at 34-35.

<sup>50</sup> See, eg, Melvin J Kimmel et al, "Effects of Trust, Aspiration, and Gender on Negotiation Tactics" (1980) 38 J Personality and Soc Psychol 9 at 22; Kolb & Coolidge, supra n 13 at 69.

<sup>51</sup> See Peggy C Davis, "Contextual Legal Criticism: A Demonstration Exploring Hierarchy and 'Feminine' Style" (1991) 66 NYUL Rev 1635 at 1648-1649 nn 73-74 and sources cited therein - especially Dale Spender, *Invisible Women: The Schooling Scandal* (Writers and Readers Pub Cooperative Society, London, 1982). Tannen argues that "conversational-style differences result in unequal opportunity." Tannen, supra n 27 at 293. She points to studies of graduate students in a free-for-all discussion showing that women "tended to acquiesce more, to be interrupted more, and to initiate less," whereas men are more likely to persist in the face of interruptions until they made their points (at 293). She also explains that "[a]lthough the ways women speak may contribute to their not being listened to, research shows that, all else being equal, women are not as likely to be listened to as men, regardless of how they speak or what they say" (at 284).

<sup>52</sup> Tannen discusses a study showing that women speak more in a structured discussion in which people take turns and concludes that managers may be able to improve participation in meetings by inviting people to speak in turn. Tannen, supra n 27 at 293 and 304-305.

<sup>53</sup> R Lakoff, *Language and Woman's Place* (Harper and Row, New York, 1975) at 74. "Polite" speech has features such as tag questions (eg "John is here, isn't he?"), rising intonations, requests framed as questions (eg "Will you close the door?") and various hedges (eg "kinda") (at 14-19 and 53). See also Tannen, supra n 27 at 78-79 and 142-143; Nicole Schapiro, *Negotiating for Your Life: New Success Strategies for Women* (Henry Holt, New York, 1993) 39 at 68 (noting the indirectness of women's language in negotiations).

<sup>54</sup> Lakoff, *ibid* at 17; Tannen, supra n 27 at 35 and 142-143.

<sup>55</sup> Kathy Mack, "Alternative Dispute Resolution and Access to Justice for Women"

Some argue that women's style of speaking is a weakness, as it inhibits clarity and gets in the way of issues, so that the solution is for women to communicate directly and authoritatively about their feelings and interests.<sup>56</sup> Others argue that neither style is better, but that the key lies in understanding the different styles.<sup>57</sup> In the author's view, different communication styles will be appropriate in different circumstances, with a skilled negotiator being able to recognise and use a variety of "male" and "female" styles. Irrespective of where one stands in this debate,<sup>58</sup> resolving communication problems in negotiations requires an understanding of these different speaking styles.

Fisher and Ury's failure to address communication issues relevant to women and their giving advice in areas where men tend to have greater need to modify their negotiating style<sup>59</sup> suggest that they are assuming that male behaviour is the norm. However, they are to be applauded insofar as they seek to make negotiation more inclusive of qualities women, in general, find important.

Principled negotiation's treatment of perception, emotions and communication highlights many issues important to maintaining a good relationship between negotiators. However, in many respects the analysis is incomplete. Therefore, we must look beyond this advice if we are to properly address relationship issues so as to avoid distorting the resolution of substantive issues.

## V Focus on Interests, Not Positions

### 1 *Interests versus Positions*

Principled negotiation requires negotiators to focus on interests, not positions. A position is an outcome that a negotiator seeks (whether this be the ultimate outcome sought, or an outcome on any other matter to be decided during the negotiation), while interests are the underlying needs and desires which have led the negotiator to seek that outcome.<sup>60</sup> For example, residents may oppose a real estate development next door (their position), because they want peace and quiet (their interest).<sup>61</sup> The thesis underlying this precept is that a mutually

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(1995) 17 Adelaide L Rev 123 at 129-132.

<sup>56</sup> Deborah M Kolb & Gloria G Coolidge, "Her Place at the Table" (1991) 64 J St Gov't 68 at 69.

<sup>57</sup> Tannen, *supra* n 27 at 23 and 102-106.

<sup>58</sup> See Lucie E White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G" (1990) 38 Buff L Rev 1 at 15 n 59 for a discussion of many relevant issues. Most significantly for present purposes, White recognises the argument that women's speaking style ought to be encouraged because it attends to others in relationships. Extending White's analysis, it could be argued that women's speaking style is more consistent with principled negotiation's emphasis on maintaining the relationship and thus ought to be fostered as part of principled negotiation.

<sup>59</sup> For example, the importance of listening. Fisher & Ury, *supra* n 2 at 34-35. There is evidence that women negotiators are better listeners than men. Morrison & Calero, *supra* n 29 at 200-201.

<sup>60</sup> Or, as Fisher & Ury express it, a position is something you have decided upon, whereas your interests are what caused you to so decide. *Supra* n 2 at 41.

<sup>61</sup> *Ibid* at 41.

satisfactory solution can often be found for seemingly irreconcilable positions by considering how to satisfy the underlying interests.

There is some evidence that examining underlying interests is consistent with a style of negotiation more common among women.<sup>62</sup> As this aspect of principled negotiation draws on skills which appear to be more common among women than men, it is likely to be a useful style of negotiating for women.

## 2 *Explaining your Interests*

Interests are ascertained by asking questions, which depends on all negotiators being reasonably open in sharing information.<sup>63</sup> There is evidence that women tend to ask more questions<sup>64</sup> and share information more readily than men.<sup>65</sup> Therefore, principled negotiation uses skills more familiar to women, given that women tend to be better than men at assessing others' underlying interests.<sup>66</sup>

Principled negotiation involves negotiators looking for underlying human needs when examining interests and being specific when explaining interests.<sup>67</sup> This is consistent with feminist methodology's emphasis on feelings and concrete details. For example, consciousness raising groups focus on "specific incidents and internal dialogue: what happened today, how did it make you feel, why did you feel that way, how do you feel now?"<sup>68</sup>

As already discussed, women's perspectives are less likely to be known to men than vice versa. Therefore, bringing negotiations down to a concrete level is likely to empower women as it enables them to explain their interests without having to resort to general conceptualizations (with the latter likely to be based on male experience<sup>69</sup>). In particular, "hedonic feminism" postulates that, because women's pains and pleasures are not recognised in society, women need to talk

<sup>62</sup> Tannen gives an example of two co-workers negotiating over how to divide up a job: the man took a positional stance by saying that he will do parts X and Y, while the woman preferred to talk about their interests, experience and aspirations. Tannen, *supra* n 27 at 29-30.

<sup>63</sup> Fisher & Ury, *supra* n 2 at 44 and 50.

<sup>64</sup> See Greenhalgh & Gilkey, *supra* n 37 at 135 and 141 (noting that in negotiations women have a greater tendency to enquire about the other's needs). Possible reasons that women ask more questions are that women are less concerned about showing gaps in their knowledge, Tannen, *supra* n 27 at 26, and that women like to personalise and contextualise problems: Menkel-Meadow, *supra* n 7 at 58; Kolb & Coolidge, *supra* n 13 at 264-265.

<sup>65</sup> John E Baird, Jr & Patricia H Bradley, "Styles of Management and Communication: A Comparative Study of Men and Women" (1979) 46 *Comm Monographs* 101 at 108.

<sup>66</sup> Kasten, *supra* n 29 at 123; Miller, *supra* n 25 at 61. But cf Kolb & Coolidge, *supra* n 13 at 68-69 (claiming that women and men are just as good at recognising others' feelings, but that women are more likely to act on this).

<sup>67</sup> Fisher & Ury, *supra* n 2 at 48-51.

<sup>68</sup> MacKinnon, *supra* n 33 at 87.

<sup>69</sup> Miller, *supra* n 25 at 61 states "[w]hen . . . we can think only in terms given by the dominant culture, and when that culture not only does not attend to our own experiences but specifically denies and devalues them, we are left with no way of conceptualizing our lives." The purpose of consciousness raising groups is to ex-

about their pains and pleasures more.<sup>70</sup> Therefore, a form of negotiation that encourages parties to explain their interests, rather than assuming that each can guess others' interests (or, even worse, not care about them) advantages those in society whose perspective has not been heard - including women.

### 3 *Ascertaining your Own Interests*

Although principled negotiation has much to say on how to talk about your own interests and how to ascertain others' interests, it puts little emphasis on how to *discover* your own interests.<sup>71</sup> Perhaps Fisher and Ury assume that identifying your own interests is relatively easy.

This assumption may not be true for many women in some contexts. Gilligan relates women's difficulty in listening to themselves, because their tendency to focus on connection with others makes it seem selfish to consider their own needs.<sup>72</sup> Therefore, effective advice for women negotiators must address how women can identify their own interests, rather than assuming that this is easily done.<sup>73</sup> Without a means for women to discover their own interests, principled negotiation's advice to consider others' interests could be detrimental if it encourages women to give even greater relative weight to others' interests and subordinate their own.<sup>74</sup>

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amine the specific to draw new conclusions. MacKinnon, *supra* n 33 at 93 (noting that the most pervasive realisation of consciousness raising was that men as a group benefit from those same arrangements by which women are deprived).

<sup>70</sup> Robin West, "Jurisprudence and Gender" (1988) 55 U Chi L Rev 1.

<sup>71</sup> The discussion in *Getting to YES* is almost exclusively focused on determining *the other side's* interests. Fisher & Ury, *supra* n 2 at 44-50.

<sup>72</sup> Gilligan, *supra* n 12 at 51, 74, 131 and 138. See also Miller, *supra* n 25 at 62-63 (contrary to the assumption of enlightened self-interest, many women cannot allow themselves to feel that their life activities are for themselves); Kolb & Coolidge, *supra* n 13 at 69 (women tend to undervalue their own interests and not develop self empathy and women often do better when representing others' interests than when representing their own); Kolb, *supra* n 23 at 16-18 (challenging the assumption of self-interest); Kolb & Coolidge, *supra* n 13 at 267 (challenging the assumption that interests are relatively fixed and potentially known by the parties); Kasten, *supra* n 29 at 131 (referring to women's fear of asking for what they want when negotiating).

<sup>73</sup> This process might involve women gradually coming to understand their needs, rather than adopting the most obvious analysis. This would be consistent with the methodology of consciousness raising groups, which involves not only speaking one's thoughts, but also "discovering one's thoughts with the support and assistance of the other participants' tentative reports and statements." Goldfarb, *supra* n 36 at 1627-1628. See also Kolb & Coolidge, *supra* n 13 at 266 (citing a study which concluded that women seek to engage others in a joint exploration of ideas where understanding is progressively clarified through interaction).

<sup>74</sup> Kolb & Coolidge, *supra* n 13 at 269 (referring to empathy as a double-edged sword for women).

## VI Invent Options for Mutual Gain

Principled negotiation requires negotiators to generate many possible solutions, pursuing all possibilities for mutual gain, and then to evaluate those options. The objective is to generate creative options that will meet the underlying interests of all parties. Fisher and Ury identify many possible obstacles to putting this precept into practice.

For example, Fisher and Ury claim that this aspect of principled negotiation is difficult because negotiators tend to be concerned only with their own interests and have a psychological reluctance to accord any legitimacy to the views of the other side.<sup>75</sup> However, Gilligan's work suggests that this may be less true for women than for men, as women tend to focus on meeting the needs of others.<sup>76</sup> This is confirmed by studies showing that women generally negotiate more co-operatively by seeking to meet mutual needs,<sup>77</sup> tend to comment on areas of agreement more than men do<sup>78</sup> and are more receptive to ideas.<sup>79</sup> This provides further evidence that Fisher and Ury were assuming a male norm among their readers, given that this aspect of principled negotiation draws on skills that, in general, are already familiar to women.

Fisher and Ury also contend that negotiators often see the choice as one between winning and losing and that neither side will agree to lose.<sup>80</sup> This conclusion also appears to be based on a male norm. Studies have shown that women often fear success, at least when their achievement is directly competitive, ie when they succeed at the expense of another's failure.<sup>81</sup> This suggests that women, in general, may be more comfortable with a style of negotiation such as principled negotiation that does not result in a "winner" and a "loser."

Inventing options for mutual gain is consistent with the feminist methodology of contextual reasoning, ie "on understanding the intricate details of complex human situations that give rise to legal or other conflicts and, with the aid of

<sup>75</sup> Fisher & Ury, supra n 2 at 59.

<sup>76</sup> See supra n 72 and accompanying text.

<sup>77</sup> Greenhalgh & Gilkey, supra n 37 at 137 and 141; Rubin & Brown, supra n 13 at 171. Rubin and Brown do not argue that men and women differ in their inherent propensity to negotiate co-operatively, but that men seek to maximise their earnings, so will compete or co-operate depending on which style is more likely to satisfy this goal, while women are more sensitive to the interpersonal aspects of their relationship with the other side (at 173). Meeting the interests of all parties is consistent with feminist theory. Kolb & Coolidge, supra n 13 at 262.

<sup>78</sup> Kasten, supra n 29 at 131.

<sup>79</sup> Baird & Bradley, supra n 65 at 108. This is consistent with Piaget's observations on how girls play: they are more tolerant toward rules and more open to innovations. Jean Piaget, *The Moral Judgment of the Child* (The Free Press, New York, 1932) at 77, discussed in Gilligan, supra n 12 at 10.

<sup>80</sup> Fisher & Ury, supra n 2 at 56.

<sup>81</sup> Matina S Horner, "Toward an Understanding of Achievement-related Conflicts in Women" (1972) 28 J Soc Issues 157; Georgia Sassen, "Success Anxiety in Women: A Constructivist Interpretation of Its Sources and Its Significance" (1980) 50 Harvard Educ Rev 13. This appears to be due to a perceived conflict between femininity and success. Gilligan, supra n 12 at 14. See also Kasten, supra n 29 at 128 (noting that women often have the belief that winning produces guilt).

prior wisdom and experience, using this understanding to find solutions that are tailored to the particularities of the situation.”<sup>82</sup> Fisher and Ury’s advice to look for differences in interests, beliefs, values, forecasts and aversions to risk helps negotiators to seek contextual solutions.<sup>83</sup>

Incorporating “female” values of caring for the relationship and listening to others is also likely to assist in generating creative options, due to the inclusion of other perspectives.<sup>84</sup>

In some respects, inventing options for mutual gain could improve women’s outcomes in negotiation. This is because principled negotiation requires negotiators to separate inventing options from evaluating and deciding, as judgment hinders imagination.<sup>85</sup> This could empower women who, as a group, have been socialised to defer to the judgment of men and who might thus be more likely than men to be deterred by the premature judgments of others. Furthermore, making suggestions rather than telling others what is right or best is consistent with a style of communication more common among women than among men.<sup>86</sup>

Therefore, inventing options for mutual gain is likely to be a helpful technique for women negotiators.

## VII Use Objective Criteria

### 1 *What are Objective Criteria?*

Although principled negotiation seeks to mitigate conflicting demands by seeking shared or reconcilable underlying interests, it is inevitable that interests

<sup>82</sup> Goldfarb, *supra* n 36 at 1636-1637. There is evidence that women are more likely to look at the context when negotiating. Kolb explains that women are more likely to consider the history behind the negotiation and that this tendency to see the historical context can help the parties by enlarging the frame of reference. “Women at the Table,” *Psychology Today*, Sept-Oct 1992, at 11.

<sup>83</sup> Fisher and Ury, *supra* n 2 at 73-75. See Hill, *supra* n 26 at 372 (stating that principled negotiation, by refusing to assume that the parties value the same things equally and exclusively, is consistent with the female perspective’s insistence on considering context rather than general abstractions).

<sup>84</sup> Gilligan gives the example of two four-year-olds playing together. The girl wanted to play neighbours, the boy pirates. “Okay,” says the girl, “then you can be the pirate who lives next door.” Gilligan calls this “an inclusive solution”, which arose through including two types of voice in the interaction. Gilligan in DuBois et al, *supra* n 17 at 45. Miller argues that women have more potential for creativity because they are struggling to create a new concept of personhood and because, even in the past, they had to be innovative to survive within the dominant culture. Miller, *supra* n 25 at 44. Fisher and Ury advise negotiators to generate further options by examining the problem from the perspective of different professions and disciplines (including a feminist). Fisher & Ury, *supra* n 2 at 69. While this is helpful advice, it should not be a substitute for using the perspective of all negotiators at the table, including women, which may involve strategies not discussed by Fisher and Ury.

<sup>85</sup> Fisher & Ury, *supra* n 2 at 60.

<sup>86</sup> Tannen, *supra* n 27 at 39 (noting that girls get better results by phrasing their ideas as suggestions rather than orders).

will sometimes conflict. In such cases, principled negotiation requires negotiators to use objective criteria.<sup>87</sup>

The more you bring standards of fairness, efficiency, or scientific merit to bear on your particular problem, the more likely you are to produce a final package that is wise and fair. The more you and the other side refer to precedent and community practice, the greater your chance of benefiting from past experience.

A basis for deciding between objective standards is to look at which standard is more widely applied.<sup>88</sup>

## 2 Problems with "Objective" Criteria

Relying on objective criteria is likely to be better for women than adversarial bargaining, as women are more likely to give in to pressure.<sup>89</sup> Nevertheless, women have good reason to be concerned about relying on "fairness", "efficiency", "scientific merit", "precedent" and "community practice" as such elements often favour or are interpreted to favour men. As a matter of feminist theory, MacKinnon states that "objectivity as a stance [is] specifically male."<sup>90</sup> Furthermore, using objective criteria is contrary to feminist methodology's emphasis on examining the particular context of each situation.<sup>91</sup>

The theory is borne out in practice. Following her classic study, Gilligan suggested that the logic of fairness and other external standards may be more comfortable for men than for women and that women may define "fairness" differently.<sup>92</sup> She examined how two eleven-year-olds, Jake and Amy, analysed a moral dilemma - whether a man should steal a drug that he could not afford to buy in order to save the life of his wife.<sup>93</sup> Jake's reasoning process was as follows: "[H]e defuses a potentially explosive conflict between people by casting it as an impersonal conflict of claims. In this way, he abstracts the moral problem from the interpersonal situation, finding in the logic of fairness an objective way to decide who will win the dispute."<sup>94</sup> In contrast, Amy sees morality as arising from relationships and sees communication as the mode of conflict resolution.<sup>95</sup>

<sup>87</sup> Fisher & Ury, *supra* n 2 at 83.

<sup>88</sup> *Ibid* at 89.

<sup>89</sup> This is seen in women making more concessions. Morrison & Calero, *supra* n 29 at 196.

<sup>90</sup> Catharine A MacKinnon, *Feminism Unmodified* (Harvard, Cambridge, 1987) at 54.

<sup>91</sup> "Women solve problems by seeking to understand the context and relationships involved and understand that universal rules may be impossible." Menkel-Meadow, *supra* n 7 at 48.

<sup>92</sup> Gilligan, *supra* n 12 at 43-44.

<sup>93</sup> *Ibid* at 25.

<sup>94</sup> *Ibid* at 32. Jake analyses the dilemma as a conflict between property and life, in which life must prevail (at 26).

<sup>95</sup> Gilligan, *supra* n 12 at 30. Amy suggested that Heinz talk to the druggist to try to find a solution (at 28). Gilligan states that for women "the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract" (at 19).

Thus Fisher and Ury's advice to use objective criteria appears to be based on a male view of conflict resolution.<sup>96</sup>

Another important issue ignored by Fisher and Ury is that men and women may focus on different objective criteria, with women being less likely to use criteria favourable to themselves.<sup>97</sup>

### 3 *Is there an Alternative to using "Objective" Criteria?*

If women tend to be less comfortable than men in using objective criteria to resolve disputes, is there a better alternative? Gilligan's work suggests that women may be more comfortable with a style of negotiation that looks at the effect on relationships in deciding how to allocate value.<sup>98</sup>

However, just because women may feel more comfortable with such an approach, should they use it? The "feminine voice" identified by Gilligan has been roundly criticised by some feminists, including MacKinnon, who states:<sup>99</sup>

[Gilligan] achieves for moral reasoning . . . the affirmative rather than the negative valuation of that which has accurately distinguished women from men, by making it seem as though those attributes, with their consequences, really are somehow ours, rather than what male supremacy has attributed to us for its own use. . . . Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men.

MacKinnon's analysis shows the disadvantage of women's style of resolving conflicts, ie it can result in women subordinating their interests to the interests of others.<sup>100</sup> As already discussed in Part IV of this article, there is evidence that women are more likely to make concessions to maintain a relationship. Thus, while mitigating conflicting demands by looking to the effect on relationships may be desirable in theory, the reality of gender inequality could result in this working to women's disadvantage.<sup>101</sup>

<sup>96</sup> See Kolb & Coolidge, *supra* n 13 at 263 (noting that the advice to focus on objective criteria "gives a rationalized and objective cast to negotiation that may be quite different from the subjective and embedded forms of feminine understanding").

<sup>97</sup> Tannen explains that there is an expectation that women should not display their own accomplishments and that this has implications for negotiations. She gives an example of a woman negotiating for a raise who pointed to salaries earned by comparable workers rather than the value of her work to her employer, an example of how women tend to be less comfortable "blowing their own horn." Tannen, *supra* n 27 at 39.

<sup>98</sup> This is because women tend to see moral problems as "problem[s] of care and responsibility in relationships rather than as [problems] of rights and rules . . ." Gilligan, *supra* n 12 at 73.

<sup>99</sup> MacKinnon, *supra* n 90 at 38-39.

<sup>100</sup> See *supra* n 72 and accompanying text.

<sup>101</sup> For a discussion of the effects of power imbalances on alternative dispute resolution see Hilary Astor, "Feminist Issues in ADR" [1991] Law Institute Journal 69.

Therefore, when interests cannot be reconciled, the use of objective criteria could be potentially empowering for women, if this makes women less likely to subordinate their interests.<sup>102</sup> Many of Fisher and Ury's suggestions could help to achieve this. For example, they describe what is often called the "XY technique", ie parties negotiate a fair agreement before deciding on their respective roles in it.<sup>103</sup> The element of anonymity in this technique prevents women from subordinating their needs.

Therefore, using objective criteria may benefit women, provided they critically analyse proffered criteria for implicit male bias and guard against dismissing criteria favourable to themselves.<sup>104</sup>

### VIII The Negotiator's Dilemma and Feminist Analysis

Principled negotiation was a significant development, as it sought to counterbalance the prevailing positional bargaining styles. The earlier sections of this article have examined how, from a feminist perspective, there are shortcomings as well as strengths in principled negotiation. Principled negotiation has also been critiqued in other analyses of negotiation theory and practice. This section examines the primary objection to principled negotiation, in order to shed further light on the efficacy of principled negotiation for women negotiators.

Principled negotiation promotes "win-win" outcomes by encouraging creative problem solving that satisfies underlying interests. However, it has been criticised as not addressing the fundamental problem of the tension between co-operation and competition (called "the Negotiator's Dilemma" by Lax and Sebenius).<sup>105</sup> Lax and Sebenius state:<sup>106</sup>

That negotiation includes cooperation and competition, common and conflicting interests, is nothing new. In fact, it is typically understood that these elements are both present and can be disentangled. Deep down, however, some people believe

<sup>102</sup> Despite MacKinnon's criticism, this point is well recognized by Gilligan, who advocates that women learn to care for themselves as well as others by moderating the "female" voice with the "male" voice. Gilligan, *supra* n 12 at 149 and 174. See also Burton et al, *supra* n 13 at 240 (suggesting that negotiation analyses should move away from the idea of care and justice as opposites and toward a fuller explanation of both of these in negotiations).

<sup>103</sup> Fisher & Ury, *supra* n 2 at 87. This resonates with the problem of inclusion recognised by Gilligan, who states that this could be resolved through "the logic of justice, the fairness of equating other and self." Gilligan, *supra* n 12 at 134.

<sup>104</sup> See Hill, *supra* n 26 at 373 (arguing that "although . . . objective criteria are useful, they must be carefully examined and, whenever necessary, modified to take women's experience into account or discarded.") This is consistent with the observation by Fisher and Ury that one standard of legitimacy does not preclude others and that what the other side believes to be fair may not be what you believe to be fair. Fisher & Ury, *supra* n 2 at 88.

<sup>105</sup> David A Lax & James K Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (Macmillan, New York, 1986) at ch 2.

<sup>106</sup> *Ibid* at 29-30 (emphasis added).

that the elements of conflict are illusory, that meaningful communication will erase any such unfortunate misperceptions. Others see mainly competition and take the cooperative pieces to be minimal. Some overtly acknowledge the reality of each aspect but direct all their attention to one of them and wish, pretend, or act as if the other does not exist. Still others hold to a more balanced view that accepts both elements as significant but seeks to treat them separate. . . . [W]e argue that *all* these approaches are flawed.

A deeper analysis shows that the competitive and cooperative elements are inextricably intertwined. In practice, they cannot be separated. This bonding is fundamentally important to the analysis, structuring, and conduct of negotiation. There is a central, inescapable tension between cooperative moves to create value jointly and competitive moves to gain individual advantage. This tension affects virtually all tactical and strategic choice. Analysts must come to grips with it; negotiators must manage it. Neither denial nor discomfort will make it disappear.

Under this analysis, tactics for claiming value impede its creation, while attempts to create value are vulnerable to tactics for claiming value.<sup>107</sup> The first of these propositions is central to principled negotiation, the second virtually ignored by it. Thus, negotiators using principled negotiation can be exploited by others employing more competitive tactics.<sup>108</sup> Even if both negotiators use principled negotiation, they will ultimately have to divide the value they have created, and there may be no alternative to outright claiming tactics.<sup>109</sup>

Principled negotiation does not properly recognise the Negotiator's Dilemma, let alone provide a means of dealing with it. This omission is likely to be particularly significant for women. This article has discussed many ways in which principled negotiation encourages "female" behaviour in place of "male" behaviour, with the former being more open, co-operative and seeking to meet other parties' needs. As principled negotiation promotes many of the behavioural characteristics more likely to be found in women, it is women who are likely to suffer from adherence to principled negotiation's one-sided approach which ignores the reality of the hard decisions that must be made during negotiations. Thus, although women may feel comfortable with many aspects of principled negotiation, to develop effective negotiating skills they must look beyond it.

The creating/claiming dichotomy encapsulated in the Negotiator's Dilemma is consistent with a feminist analysis of principled negotiation. While feminists approve of tactics that create value, recognition of claiming tactics within the Negotiator's Dilemma closely correlates with another issue important to most feminists: the explicit and implicit allocation of power and resources. Feminists tend to advocate a greater focus on relationships and understanding others' perceptions and interests, yet also recognise the dangers in promoting such techniques in a society in which men have superior power and resources. This is because such actions tend to be undertaken or viewed in a way which suits men.<sup>110</sup>

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<sup>107</sup> Ibid at 34.

<sup>108</sup> Ibid at 155.

<sup>109</sup> Ibid at 156.

<sup>110</sup> A classic example is the perception of the role of emotions. Many people believe

The Negotiator's Dilemma is present in almost every move in a negotiation. Therefore, for each strategy or tactic discussed in the earlier sections of this article, the discourse of feminist analysis could be replaced with the discourse of the Negotiator's Dilemma. For example, the recognition of the biased nature of objective criteria could be rephrased in terms of particular criteria enabling one party to implicitly claim value from the other.

There is no pat answer to transform the Negotiator's Dilemma to the Negotiator's Solution. This is particularly so while systemic inequalities between men and women persist. However, negotiators should be aware of the Negotiator's Dilemma, so that distributing value during negotiation does not occur unconsciously or by default.

### IX Implications for Women Negotiators

How could principled negotiation be developed to make it more useful for women negotiators? On one level, feminist analysis suggests that this question is impossible to answer, or at the very least premature. While systemic inequalities persist - resulting in women being (for example) more likely than men to value personal relationships and to understand others' perspectives - some feminists would maintain that the focus should be on remedying the underlying causes of such inequalities, which in time would remove inequalities experienced specifically in the context of negotiation. While the ultimate goal is laudable, this approach offers no practical advice to assist women negotiating in the shadow<sup>111</sup> of male-dominated society *now*. Other feminists might consider the solution to be "reclaiming" and valuing "female" characteristics<sup>112</sup> - which to some extent is the approach taken by principled negotiation. However, as shown in Part VIII of this article, this ignores the Negotiator's Dilemma.

A "pragmatic feminist" approach,<sup>113</sup> while acknowledging the broader societal context and recognising that "female" characteristics have been devalued, focuses instead on *practical steps* that might improve the lot of women negotiators. Consistent with a "pragmatic feminist" approach, the author acknowledges that there is no one solution - various strategies and techniques will not be suitable for all women and in all contexts, and may become less, or more, appropriate as circumstances change over time. The following suggestions are offered merely

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that women are more skilled in the emotional arena than men. However, rather than this strength being treated as an advantage, it is often used as a reason to disadvantage women by labelling them too "emotional" to make decisions, assume responsibility etc. See, eg, Gill Gatfield, *Without Prejudice: Women in the Law* (Brooker's, Wellington, 1996) at 178-179 (arguing that women's skills in handling the emotional component in certain types of legal work are devalued because these skills are seen as "natural").

<sup>111</sup> This metaphor is based on Mnookin's metaphor of negotiating "in the shadow of the law." See, eg, Robert H Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L J 950.

<sup>112</sup> This is a "hedonic" feminist perspective. See supra n 70 and accompanying text.

<sup>113</sup> See supra notes 15 and 16 and accompanying text.

as a starting point, and should be treated as open to experimentation, evaluation and adaptation by each negotiator:<sup>114</sup>

- preparation is especially important for women negotiators. In preparing for a negotiation, women should pay particular attention to their interests by asking how they feel about the issues likely to arise and exploring *why* they feel that way. By recognising and (where justified) validating such concerns, women may feel more confident in pursuing their own interests in negotiation;
- women should be wary of seeking to empathise with and understand others' perspectives if there is no reciprocity - this could alter the balance of power in the negotiation to their disadvantage. One possible technique to encourage each negotiator to listen and understand the others is to ask each negotiator to summarise the other negotiators' interests;
- negotiators should ensure that everyone has an equal opportunity to speak. It may even be necessary to go so far as to allocate time in which each person can speak without interruption (except for minor points of clarification);
- women negotiators should be conscious of the different speaking styles typical of men and women, practise using a variety of styles and use different styles in various contexts to achieve the desired effect. For example, when a negotiator wishes to emphasise a point, a direct "male" speaking style may be more effective than a more equivocal "female" speaking style. Women should also be conscious of societal expectations - and conform with or violate these depending on which approach is likely to be more effective in the circumstances;
- women should be aware of their "emotions" during negotiation, as well as "rational" arguments. For example, if a negotiator feels uncomfortable about a seemingly "rational" proposal, she should consider whether that proposal is implicitly claiming value to her disadvantage;
- in inventing options for mutual gain, women negotiators should ensure that they promote options that further their own interests as well as others' interests; and
- in suggesting "objective" criteria, women should consider how different criteria distribute value. However, using the language of "objectivity" may be helpful in some circumstances.

## X Conclusion

*Getting to YES* was written for negotiators who just happened to have the characteristics (and dress sense<sup>115</sup>) of *male* negotiators. Thus principled negotiation spells out matters that may have been characteristic of the behaviour of many women, but were less obvious to many men. In this sense, principled

<sup>114</sup> See also Mark Story, "Negotiating to Win-Win", *NZ Business*, August 1995, 28 at 32.

<sup>115</sup> Fisher and Ury state that negotiators can create an informal atmosphere by taking off their ties and jackets. Fisher & Ury, *supra* n 2 at 61.

negotiation is more helpful to men. Ironically, however, this is part of the book's strength from a feminist perspective. By encouraging men to adopt traditionally "female" skills, principled negotiation could increase the status and value ascribed to such characteristics, so that women's skills receive more recognition and the negotiating table is transformed into a more "women-friendly" forum.

However, the implicit assumption of a reader with a "male" perspective results in serious shortcomings in Fisher and Ury's advice. Many of the important issues for women negotiators are not covered at all, and many of the techniques of principled negotiation are deficient when analysed from a feminist viewpoint. Where there are broad differences in behaviour or attitudes between men and women, advice given to the implicitly male reader may be detrimental to women negotiators. This problem is particularly cogent in light of new understandings of the dynamics of negotiation that are encapsulated in the Negotiator's Dilemma. Therefore, principled negotiation cannot, by itself, enable women to escape the "double bind."

Applying feminist analysis to principled negotiation reveals shortcomings in it. Applying other perspectives would reveal other shortcomings.<sup>116</sup> Furthermore, more sophisticated analysis in the form of "post-identity" analysis could be used to identify the pluralistic perspectives within a group such as "women", relevant to negotiation.<sup>117</sup> Such possibilities underscore the implausibility of the claim that principled negotiation is of near-universal application. Rather, negotiation analysis and practice must seek to balance the inherent tensions in negotiations so as to recognise, rather than suppress, multiple perspectives and experience. This may be difficult, but it is also necessary.

Principled negotiation was a significant breakthrough, containing in some respects helpful advice for women. However, women must read *Getting to YES* with a critical eye for how its advice impacts on women. Given its shortcomings, we can be far from certain that principled negotiation would have saved Eve.

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<sup>116</sup> For example, a cross-cultural analysis could be done. For a general discussion of cross-cultural communication in New Zealand see Joan Metge and Patricia Kinloch, *Talking Past Each Other!? Problems of Cross Cultural Communication!* (Victoria University Press, Wellington, 1978).

<sup>117</sup> See Dan Danielsen and Karen Engle, *After Identity: A Reader in Law and Culture* (Routledge, New York, 1995) for readings in "post-identity scholarship" which is described as scholarship that is based on the diversity of discourses enabled by identity politics, yet critiques the tendency of those discourses to obscure differences among women, among gays, among blacks and others (xiii).