
Critical Moments Reconsidered: When We Say Yes and When We Say No

Carrie Menkel-Meadow

This article adds consideration of context to the continuing focus on critical moments. In particular, there are contextual circumstances and other factors in which a critical moment involves bringing things to a halt—saying “no.” This is contrary to the improvisational notion of “yes, and” and it is underappreciated in the negotiation literature.

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Negotiation theory (and practice) has long sought to find capacious and explanatory concepts and precepts to inform our thinking and doing. Druckman’s initial conceptualization of “critical moments” and “turning points,” memorialized on these pages (Druckman 2004) and elsewhere (Druckman and Olekalns 2013) is one such productive example. Every negotiation has *critical moments*—to agree or not agree, that is the question; *tipping points*—when perceptions and actions change in response to data or other changes (Gladwell 2000); and *turning points*—Should I stay or should I go? Should I escalate or should I make a peace offering or useful suggestion? (Rubin, Pruitt, and Kim 1994). Whether analysis of turning points, tipping points, or critical moments can help us decide what to do in the diplomatic negotiations (Vivet 2019), salary negotiations, lawsuit settlements, or interpersonal relations (crossing subject matters and scholarly disciplines) remains an exciting and enriching intellectual project, as our recent conference on critical moments redux (2019) illustrated. This work has taught us to see the silver

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linings of *impasses* (often leading to new breakthroughs and subsequent agreements), to try to judge when *moves and turns* (Kolb 2004) can effectively reorient negotiations, and to measure when disputes may be *ripe* (Zartman 2003) for productive interventions.

In this short essay I revisit some of my comments at the earlier conference on this subject (Menkel-Meadow 2004; Menkel-Meadow et al. 2005) in light of the different international and domestic situations in which we now find ourselves, raising for me the important question I have pursued in my work on negotiation—the role of *context* in our theoretical analysis and practice prescriptions (Menkel-Meadow 1983, 2001). As one who has spent a long career promoting “getting to YES” (Fisher, Ury, and Patton 2011) and problem-solving negotiation (Menkel-Meadow 1984), I turn to when it might be advisable, if not morally required, to “just say NO!” (Menkel-Meadow 2010; Luban 2019).

Many of our intellectual tropes in negotiation turn on binary concepts—distributive or integrative conflict resolution, cooperation, or defection, or Yes or No. But I usually have been drawn to the greater subtleties of scales, hybrids, sequences, and spectrums of choices, such as Lax and Sebenius’ “creating AND claiming” value (1986), and Walton and McKersie’s (1965) more complex understandings of how dualities could exist in the same situation (for example, both distributive and integrative issues in labor negotiations), where we put together more complex choices and variations of analysis and behaviors depending on with **whom** we are negotiating (the parties, businesses, adversaries, friends, or countries); **what** we are negotiating about (subject matters and stakes); **when** we are negotiating (crisis or iterative); and **how** we are negotiating (in person, online, in media, directly, or with representatives).

I often have said that my whole scholarly career can be summed up in the word “and.” Both sides have needs and interests; multiple conditions exist simultaneously; solutions should be “additive” and resource expanding, rather than dismissive and distributional. This notion of the positive use of “and” was illustrated on these pages when we turned to jazz and improvisation (Menkel-Meadow et al. 2005) as places where other fields use what has come before (musical notes or dramatic or comedic lines) to add new music or new scenarios to keep the conversation going. The “offer” in improvisation suggests that an actor say “and” and accept what has gone before to build a scenario. To say “no” is to change the topic or action and is a rejection of the creativity of she who has gone before. In jazz we take some notes and “riff” on them—keeping the themes alive and moving into different passages of instruments and tonalities, expecting at some point to return to the ongoing musical phrases. This is creative art—adding to what has gone before,

both iterative and creative, expanding what we see and hear, and using multiple voices and actions to deepen, color, and build upon what has begun. For many of us this is also the “art” of negotiation (Raiffa 1982), even in troublesome and seemingly intractable situations such as peace negotiations, labor-management negotiations, community negotiations, and lawsuit settlements. We hope to use the techniques of thoughtful improvisation to move out from chaos and unpredictability to productive engagement and new solutions (Wheeler 2013).

Yet, as we positive-minded negotiation theorists and practitioners have plied our various trades, other scholars and practitioners have reminded us that sometimes we just have to say NO—no to bargaining with “the devil” (Mnookin 2010), or making “rotten compromises” (Margalit 2009), or complicity in evil regimes (Luban 2019). Since this journal’s last special issue on critical moments, published in 2004, two important historical developments have moved me, as well, to consider when we must say No: the Trump administration¹ and the #metoo movement (see, e.g., Farrow 2019; Kantor and Twohey 2019).

I began my essay in 2004 with one of my favorite passages in modern literature, from Ian McEwen’s *Enduring Love* (1997). McEwen gives a brilliant description of a prisoner’s dilemma game brought to real life, in which one must decide whether to join others (at some risk to self) in grabbing hold of a dangling rope from an air balloon as it flies above a dangerous escarpment with a young boy and his father inside, about to fall to their death. The narrator (a science writer) ruminates on the ongoing human dilemma of whether to join collective efforts to save lives or to maximize individual well-being. Are we innately selfish or trusting and caring? The actors in this scene (like improvisers or jazz musicians) must decide in a split second whether to rush into the field to help or watch as the balloon flies over the cliff:

[F]or there was a deeper covenant, ancient and automatic, written in our nature. Cooperation—the basis of our earliest hunting successes, the force behind our evolving capacity for language, the glue of our social cohesion.... [But] [s]elfishness is also written on our hearts. This is our mammalian conflict: what to give to the others and what to keep for yourself. Treading that line, keeping the others in check and being kept in check by them, is what we call morality.... A good society is one that makes sense of being good. Suddenly, hanging there below the basket, we were a bad society, we were disintegrating. Suddenly the sensible choice was to look out for yourself. (McEwen 1997: 15)

I won’t spoil the story by telling you what happens—read it for yourself!—but I will say that the outcome is closer to our Trumpian and

pre#metoo world than the “rose”-colored glasses² of *Getting to YES*. The story illustrates the power of our hopes for “theories in use”—schemas and organizing principles that will help us make good decisions and choices with others in dynamic communication and engagement (Schön 1983). How do we act when we see a more binary world of “defect or cooperate,” as prisoner’s dilemma theorists have defined it, and we have to make choices in different time frames (rapid decision making versus more deliberative thinking (Kahneman 2011)?

These days our public world is dominated by bullies, political dictators, and would-be dictators (Donald Trump and Vladimir Putin) and bigger-than-life media figures, both in front of and behind the camera, including Harvey Weinstein, Roger Ailes, Bill O’Reilly, Bill Cosby, Matt Lauer, and Charlie Rose to name but a few. We must also contend with diplomatic, as well as capitalist and economic dominators; consider the monopolistic powers of Facebook, Microsoft, and Amazon³—gobbling up competition with aggressive buy outs and acquisitions.

As negotiation scholars and practitioners, what can we do to resist power moves, aggressive tactics, and overtly distributive goals? For example, Trump’s “Deny, deny, deny” in the face of allegations of sexual wrongdoing; and in the face of impeachment proceedings, his attack on the whole process as “unconstitutional” and a “hoax.” (For further explication of Trump’s often unsuccessful “tough” negotiation tactics, see Latz 2018). How should we deal with these extreme refusals to engage?

The dilemma here is when and how to “Just say NO!” When does an offensive or unjust situation merit a “turning point” requiring one to walk away or act outside of the given negotiation domain? One answer to this question, of course, is it depends. Despite our desires for universal or prescriptive theories for action, context matters completely. There are situations from which one cannot easily walk away; we find them in many contexts including families, workplaces, and diplomatic settings (for example, the Cuban missile crisis [Allison and Zelikow 1999]). But there are other settings where accepting the situations’s behavioral norms might call for a strong NO or at least the resistance of YES, BUT.

The recent #metoo movement exemplifies a “tipping point” that might be changing some cultural norms and behavioral rules. Although sexual harassment, misconduct, and assault have occurred in epidemic numbers since time began, the recent public acknowledgments of such practices by employers, false mentors, and others who control workplaces and related arenas have demonstrated irrefutably the widespread suppression or silencing of many people’s “No.” These individuals (mostly, but not exclusively, women) did not say No for fear of reprisals including loss of employment or reduction in opportunities, status, or pay; said No only to have their No ignored, as in cases of rape; or

were not legally able to say No or Yes. (See Gladwell 2019 on extent of alcohol use on college campuses eliminating the possibility of real consent).⁴ Whether the triggering event in American culture was media coverage of multiple allegations of sexual assault and harassment against Cosby, Weinstein, Ailes, and others—or whether it was a broader shift in sociopolitical and economic paradigms—the legal and social culture clearly reached a “tipping point” when so many victims came forward in media reports (Farrow 2019; Kantor and Twohey 2019) and then were heard in legal proceedings against the perpetrators, many of whom lost their jobs. As these scandals and accusations play out in our courts and in media coverage, there is now a healthy conversation (if no clear agreement) on when No means No, when Yes is coerced and so does not mean Yes, and how we might really listen to and understand each other across all kinds of inappropriate assumptions and conclusions. (See Gladwell 2019 on police stops, mixed and misinterpreted communications, and detection of liars and fraud.)

As many negotiation theorists and practitioners have noted for decades, negotiation theory cannot presume (as it often does) that there is no power differential (however socially, politically, or economically structured) between the negotiating counterparties. How those who are “one-down” in the negotiation power hierarchy can choose their behaviors (whether smaller nations in diplomacy, women in sexual encounters with men, or minorities engaged with police officers) varies enormously, influenced by both the explicit and implicit threats that attend such situations. Sexual relations “negotiations” are not the same as diplomatic negotiations, but within micro (psychological), meso (social), and macro (political) conceptualizations of negotiation, all three levels may be present in many kinds of negotiation. The ability to aggregate issues and claims, as the use of social media has recently accomplished in the #metoo and Black Lives Matter movements, demonstrates that where individual negotiations may fail or be encumbered by power disparities, changing the levels of engagement from individual to social to political may be one way to readjust some structural barriers in negotiation. The new collective “NO!” may be heard in ways that individual No’s were not.⁵

As the history of social movements in the United States amply demonstrates, expressions of NO—refusing to go to the back of the bus or move from segregated lunch counters, refusing to stay in the kitchen, refusing to conform to socially conventional sex categories, refusing to go to war (through draft avoidance in the 1960s and 1970s)—have served as consolidating “moves” that change social and legal norms through aggregations of activists who do not conform or agree to expectations. We will never know what would have happened if Chamberlain had said

No to Hitler in Munich (probably nothing significantly different when dealing with a truly evil and powerful adversary), but it is important to ask what the “power of No” can be to crystallize issues and rebalance power in some settings, to improve “deals” to clarify values, and to refuse that which is immoral or antithetical to parties’ needs and interests, as Bill Ury, author of *Getting to YES* has noted in *The Power of a Positive No* (Ury 2007).

My colleague David Luban, a moral philosopher, recently studied the behavior of two lawyers in the Nazi regime (2019) to explore whether they should have just said No to work within that evil regime, or remained within (saying a sort of Yes) to try to mitigate harm from within (desk perpetrators versus desk mitigators). Bernhard Lösener was a drafter of the Nuremberg Jewish “blood” laws who tried to mitigate their definitions and effects while remaining in the service of the regime. Luban contrasted Lösener to Helmuth James Motke, a German aristocrat who belonged to a family of distinguished military heroes. Motke became an active resister, left his high-level job, and eventually was executed as part of the Nazi resistance group the *Wilderstand*. Extending the work of Hannah Arendt who argued that any obedience or participation in an evil regime is necessarily support and should be soundly rejected, Luban argued that we should be more context sensitive in assessing when to say a conditional yes within evil regimes. One may also consider context when evaluating the conditional yes of assistants and family members of outright evil doers such as sexual predators Harvey Weinstein and Roger Ailes. When should one say No and refuse to abet evil? Luban suggests that saying No is appropriate under the following circumstances:

1. when it is no longer possible to mitigate evil from within;
2. when leaving in protest would produce a good (such as inspiring others to do the same);
3. when it is necessary to prevent true complicity by having one’s own values corrupted; or
4. when remaining within the evil doer’s orbit is tantamount to condoning bad acts by others and therefore contributing to their moral breakdown.

Unlike Arendt, Luban concludes that sometimes evil can be mitigated by a conditional yes, and that decisions about when to say No or Yes are much more variegated, subtle, and context based than simple abstract prescriptions will allow.

“Critical masses” (Kanter 1993) may be necessary to consider when there are critical moments—how many people (Nazis) or how many incidents (of sexual harassment or assault, or self-aggrandizement in

government) should provoke an actor (whether a principal or a complicit assistant) to just say NO?

Not every negotiation is a choice about whether to grab a dangling rope to save another human life while risking one's own, or to leave an illegitimate or harm-perpetrating regime, corporation, business, or country. But for all that we examine critical moments and turning points to pursue opportunities to change the conversation and move productively forward, I think we must also, especially now, with so much harm and evil in the world, learn to identify the critical moments of bad actors and bad regimes and study how and when to just say NO effectively. Sometimes we must make a critical movement to walk away and hope we can provoke more productive behavior by not staying in the negotiation. As a negotiation ethicist, I have asked (with my coauthor, Mike Wheeler), *What's Fair?* (2004) in negotiation behavior.

It may be quite difficult to assess the need to assert “No” in the moments of dangling ropes or sexual assault—in situations where there is not enough time for thorough deliberate thought. What is possible in these moments stands in contrast with the kinds of responses to evil regimes contemplated by Luban, Mnookin, and Margalit. There are moments when one makes choices (either way—Yes or No) that only later reveal themselves to be consequential, choices that may only be evaluated with the passage of time (as happened in McEwen's novel, with many aftereffects of decisions made). Especially in situations of unequal power, the possibilities of action and choice may be constrained. In some situations it might make sense for a strong signal of disruption of norms (as House Speaker Nancy Pelosi demonstrated by recently ripping up her copy of President Trump's State of the Union address on public view); in other circumstances it may make more sense to say NO quietly and individually. Disruption of accepted norms might be necessary for self-preservation or some other interest, but may not be appropriate at other times or by other people. The point here is that our hopes for Getting to YES or achieving mutual gains are often useful starting points, but they may need to be altered in both theory and practice, in particular contextual settings. Among other theorists (who come from practice), Mary Rowe has pushed us into analysis of what she calls “negative territory” (on the Thomas-Kilman dual concerns map (Thomas 1992)), where we might need to protect ourselves, even in some settings by harming others (Rowe 2015). Self-defense is a defense in my field (law) and it probably needs more explicit theorization in both personal (whether dyadic or multiparty), organizational, and international negotiations. Most of us want to get to human YES (peace and mutual gains) but in order to get there, in some settings, we may need more varied

tools and strategies that require more layered analysis of both situations and parties.

Perhaps we need to continue to study the empirics and morality of the effects of both Yes's and No's in the many places where negotiation (decision making with others) is employed.

NOTES

1. See *Negotiation Journal* 35(1) (January 2019), special issue on "Negotiation and Conflict Resolution in the Age of Trump."

2. I can't resist the pun here—the science writer character/narrator in *Enduring Love* is named Joe Rose!

3. The irony of what Amazon has done to book buying should be noticed by any reader of this journal. Having almost destroyed the independent bookstore and many larger book chains, Amazon now operates physical bookstores in many cities to continue to undersell booksellers and promote in physical space, for those who still want them, its own book-substituting products such as Alexa, e-readers, and other electronics.

4. While reviewing alcohol use by both men and women, Gladwell suggests that in sexual encounters with "strangers" (or dates) in which both parties are drunk, neither is really capable of making conscious decisions. Alcohol use is just one cause of impaired judgment or power imbalance that makes any conscious "negotiation" about decision-making highly suspect.

5. I do not in this short essay take on the very important issue of how collective actions (for example, through social media) must also deal with legal issues such as individual due process (see, e.g., Tuerkheimer 2019).

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