Never Say No: The Law, Economics, and Psychology of Counteroffers

IAN AYRES*

It is such an honor to speak to you, especially since compared to the titans who have given the Schwartz Lecture in the past, I feel like an ADR manqué. I am going to proceed, nonetheless, and discuss the impact of counteroffers on negotiation. And I am going to try to convince you of four central claims:

- Legal claim: The counteroffer is governed by what I will call the "blow-up rule," which is a rare kind of double-jointed default.
- Informational claim: Offerees are the first people to know when there are gains of trade.
- Channeling claim: The blow-up rule dampens the incentive of offerees to inefficiently counter.
- Psychological claim: Rejection aversion and other behavioral "biases" tend to cause people to reject offers too often.

These counteroffer claims join together two disparate obsessions that I have with legal default rules and information forcing. The last claim even gives me a chance to indulge my penchant for why-not experimentation,[1] where I have tried to put into practice the never-say-no attitude.

After an offeree hears an offer, there are basically three things she can do. She can accept, counter, or reject the offer. One way to restate what I am saying here is to reformulate the foregoing four claims in terms of these three possible offeree reactions. I am going to suggest that there are too many counteroffers relative to acceptances. Secondly, I am going to suggest that there are too few counteroffers relative to rejections. Another way to put this is that the ratio of counteroffers to acceptances is too high and that the ratio of counteroffers to rejections is too low.

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* Based on the Schwartz Lecture on Dispute Resolution, delivered at The Ohio State University Moritz College of Law on April 2, 2009.

[1] BARRY NALEBUFF & IAN AYRES, WHY NOT?: HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL (2006).

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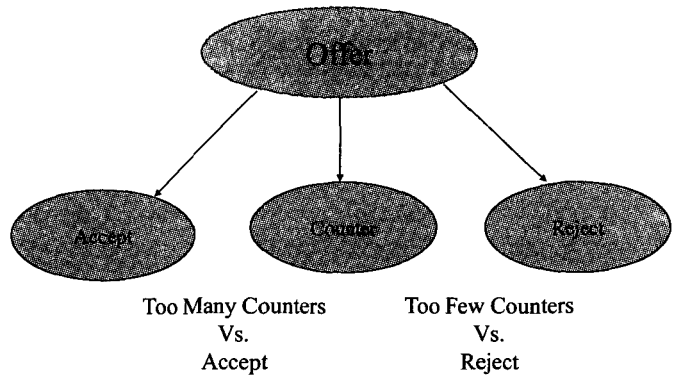
Tripartite Response



I will try to convince you that the tendency of offerees to inefficiently counter when they should accept is a consequence of my informational claim, and the tendency of offerees to inefficiently reject when they should counter is a consequence of my psychological claim. I should hasten to add that these efficiency claims are from the limited *ex post* perspective—taking the offer as given. Ultimately, I will argue that from a more dynamic, *ex ante* perspective, we may want some amount of *ex post* inefficiency in counteroffers to discipline offerors to make better offers to begin with.

I. LEGAL CLAIM: THE COUNTEROFFER BLOW-UP RULE IS A RARE KIND OF DOUBLE-JOINTED DEFAULT

Restatement (Second) of Contracts section 39(2) describes a central attribute of counteroffers, namely that "[a]n offeree's power of acceptance is terminated by his making of a counter-offer. . . ."[2] I will refer to this as the blow-up rule because it establishes that a counteroffer metaphorically blows up prior offers so that legally they no longer exist. But what really fascinates me is what comes after the ellipse. Section 39(2) states in full that "[a]n offeree's power of acceptance is terminated by his making of a counter-offer,

[2] RESTATEMENT (SECOND) OF CONTRACTS § 39(2) (1981).

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unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree."[3]

The first of these "unless" clauses is unexceptional. The blow-up rule is a default governing the formation of the contract; like other formation defaults,[4] it can be contracted around by one side of the potential contract. It should not be surprising that the offeror, as master of the offer, is able to change the conditions of acceptance. The offeror can unilaterally contract around the default that "an offer invites acceptance in any manner and by any medium reasonable in the circumstances"[5] by unambiguously indicating that the offer can only be accepted in a particular way, such as by skywriting, "I accept." Thus, if Smirgo offers to sell Bisko an oven for $1,000, and in making the offer indicates that it intends the offer to survive any counteroffer, then Bisko can counteroffer to buy for $700 and subsequently accept Smirgo's original $1,000 offer.[6]

The second "unless" clause is, however, surprising. On its face, it gives the counterofferor the ability to make a counteroffer without blowing up her right to subsequently accept the original offer. I refer to the blow-up rule as a double-jointed default because it allows either the offeree or the offeror to unilaterally displace the rule. But what happens if the offeror and the offeree manifest different intentions about blowing up the original offer? For example, imagine that Smirgo says to Bisko, "I offer to sell you an oven for $100,000, and I intend for your power of acceptance to terminate if you make a counteroffer." Bisko responds by saying, "I offer to buy an oven from you for $70,000, and in making this counteroffer, I intend to retain my power to accept your $100,000 offer."

If Bisko follows up by saying, "I accept your $100,000 offer," has a contract been formed? I think the answer is slightly unclear. On its face, section 39(2)[7] seems to indicate, via the second "unless" clause, that a contract has been formed. But I tend to think that an offeror, as master of the offer, would be able to condition acceptance on the non-occurrence of a counteroffer before acceptance. If this is true, the blow-up rule represents one

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[3] *Id.* (emphasis added).

[4] *See generally* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989) (discussing the use of default and background rules in contract law).

[5] RESTATEMENT (SECOND) OF CONTRACTS § 30(2).

[6] The terms Smirgo and Bisko (whose first-letters helpfully correspond to "seller" and "buyer") and the oven selling hypothetical come from my recently departed coauthor, Richard Speidel. *See* IAN AYRES & RICHARD E. SPEIDEL, STUDIES IN CONTRACT LAW (7th ed. 2008).

[7] RESTATEMENT (SECOND) OF CONTRACTS § 39(2).

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of the few instances where a contracting party has a legal reason to reiterate a default. While reiterating or restating the blow-up rule in your offer is seemingly redundant, doing so may remove the offeree's power to unilaterally contract around it. From the offeree's perspective, an offeror reiterating the blow-up rule might transform the rule from a default to a mandatory rule, in that it removes the offeree's option to opt out.[8] Indeed, one could imagine nine different permutations of offeror and offeree remaining silent about survivability, or unilaterally indicating an intent that the initial offer will survive or terminate after a counteroffer.

Predicted Legal Treatment of Nine Different Permutations of Intent Indications or Silence

		Offeror Statement of Intent		
		Survive	*Silence*	*Terminate*
Offeree Statement of Intent	*Survive*	Survive	Survive	Terminate?
	Silent	Survive	Terminate	Terminate
	Terminate	Terminate?	Terminate	Terminate

As indicated in this table, it is also uncertain what would happen if a Bisko offer indicated an intent to have power of acceptance survive any counteroffer, but Smirgo's counteroffer indicated an intent to have its power of acceptance terminate. Again, notwithstanding the operation of the first unless clause of section 39(2),[9] I tend to think that courts would not find formation in a subsequent attempted acceptance of the original offer. In part because the offeree is master of his or her rejection, the offeree who chooses to reject and counter should have the right to terminate her own future power of acceptance. But the big news of this section is that the blow-up rule is an unusual default rule because either the offeree or the offeror can unilaterally contract around it, and because the offeror who likes the default may have some incentive to expressly reiterate it in making the original offer.

II. INFORMATIONAL CLAIM: OFFEREES ARE THE FIRST PEOPLE TO KNOW WHEN THERE ARE GAINS OF TRADE

If you are obsessed with defaults, the blow-up rule will hold your attention. But you might be asking yourself what the heck this has to do with

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[8] I thank Wendy Zupac for this point and more generally my 2009 contracts class for helping me think through this issue.

[9] RESTATEMENT (SECOND) OF CONTRACTS § 39(2).

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ADR and negotiations. An important step in that direction is to lay out a very simple, but overlooked, informational asymmetry between offerors and offerees.

Imagine that our friends Smirgo and Bisko are negotiating whether Smirgo will manufacture a new kind of flash oven for Bisko. Both negotiating parties have privately known reservation prices: Smirgo has a minimum amount that it needs to make the manufacturing worthwhile, and Bisko has a maximum amount that it is willing to pay. Integrative bargaining—where parties search for bigger gains of trade—is of course important too, but in this hypothetical, the parties are engaged in distributional bargaining where they are trying to figure out how to split fixed gains of trade.[10] Because their reservation prices are initially private, they are uncertain whether there are in fact gains of trade.

Imagine in this negotiation that you are Bisko and that Smirgo moves first and offers to sell you a flash oven for $80,000. My very simple point is that you, as the offeree, are in one of two very different informational positions. Either you know that your reservation price overlaps with the offered price, or you know that it does not. If your reservation price as a buyer is above $80,000, then you know there are gains of trade. Because Smirgo is willing to offer to sell at $80,000, you know that its reservation price is less than or equal to $80,000. Your reservation price overlaps the offer in the sense that you know there are a range of prices between the offered price and your reservation price that would be mutually beneficial. If your reservation price is above $80,000, then the moment you hear the offer, you know that there are gains of trade. If this is true, you as the offeree are the first person in the universe to know this socially valuable piece of information because no one else, including Smirgo at the moment of its offer, is privy to your reservation price.

The inverse, however, is not true. If your reservation price does not overlap with the offered price—your reservation price is less than $80,000—then you cannot conclude that there are not gains of trade. For example, if your reservation price as a potential buyer is $75,000 and you hear an offer to sell at $80,000, it is possible that there are still gains of trade and that the offer does not overlap with your reservation price merely because the seller's

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[10] ROGER FISHER, ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 56–72 (2d ed. 1991); RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 34–35, 184 (2002). The idea that integrative or interest-based bargaining will always include distributive bargaining too was originally put forth in DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN 119–21 (1986).

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self-engrossing offer exceeds his or her reservation. A deal might still be struck at a lower price of, say, $72,000.

This simple example suggests that although offerees have three possible responses to an offer—to accept, to reject, or to counteroffer—offerees engaged in distributive bargaining will usually have only two plausible responses to a particular offer. For non-overlapping offers, distributive offerees will choose between rejecting and counteroffering. For overlapping offers, they will choose between accepting and counteroffering (and, as I will emphasize below, for integrative bargaining, they might also counteroffer).

The informational advantage of offerees is important because, taking the offers as given, it is socially inefficient for offerees to engage in distributional bargaining—to make counteroffers changing the price—when they have received an overlapping offer and already know that there are gains of trade. The time and expense spent on additional negotiations are a deadweight loss that do not increase the gains of trade but merely impact how those gains are distributed. My earlier claim that there are too few acceptances relative to counteroffers comes from the economic incentives of offerees hearing overlapping offers to inefficiently counteroffer.

In contrast, it can be socially efficient for offerees to make counteroffers when they receive non-overlapping offers. Counteroffers that merely alter the price in response to a non-overlapping offer help the parties discover whether there are gains of trade. Thus, if Smirgo offers to sell for $80,000 and Bisko—with a private reservation price of $75,000—counteroffers at $72,000, then Smirgo as the new offeree may be the first to learn that there are gains of trade (for example, if Smirgo's reservation price is $60,000).

Efficiency-minded lawmakers might look for ways to encourage counteroffers in response to non-overlapping offers but discourage counteroffers in response to overlapping offers. This seems like a laudable but daunting task. How can government officials with even more limited information craft policy to encourage the right kind of counteroffers? Surprisingly, the blow-up rule in a small way accomplishes just this result.

III. CHANNELING CLAIM: THE BLOW-UP RULE DAMPENS THE INCENTIVE OF OFFEREES TO INEFFICIENTLY COUNTER

The simplest normative justification for the blow-up rule is as an evidence rule to simplify and disambiguate what offers remain on the table during a negotiation. Without the blow-up rule, a protracted negotiation with a series of offers and counteroffers would keep alive several outstanding offers. If a negotiator finally shouted, "I accept," it would be difficult for the other side or for the court to know which of the previous offers was being

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accepted. One important benefit of the blow-up rule is that courts just need to look at the last offer before the acceptance.

A very different kind of justification for the blow-up rule comes from trying to craft a law that discourages counteroffers after an offeree hears an overlapping offer without discouraging offerees from countering after hearing a non-overlapping offer. An offeree who hears an overlapping offer has to somewhat fear the application of the blow-up rule. For example, a Bisko offeree, who has a $100,000 reservation price and hears an $80,000 offer to sell from Smirgo, should be worried that countering with an offer to purchase at $70,000 will remove the valuable option to accept at $80,000. The risk is that Smirgo will not only refuse to sell at the lower counteroffer price but will refuse to sell at the original offer price of $80,000. In sharp contrast, an offeree who receives a non-overlapping offer should feel no opportunity cost of blowing up the initial offer for the simple reason that the offeree would never want to accept that offer. A Bisko offeree with a reservation price of $75,000 would not feel the slightest economic disincentive to blow up the offered $80,000 price.

So voila, the blow-up rule does the seemingly impossible. Without knowing the private valuations of the negotiators, the law can nonetheless mildly discourage counteroffers after overlapping offers without discouraging counteroffers after non-overlapping offers. It mildly channels offerees who know there are gains of trade toward acceptance without deterring the search for gains of trade that can be accomplished by counteroffers after an offeree hears a non-overlapping offer.

I should emphasize that the dampening effect of the blow-up rule on counteroffers after an offeree knows there are gains of trade may be quite small. An offeree might correctly suspect that the offeror who found it worthwhile to make an original $80,000 offer is likely to be willing to re-offer that price even if the original offer is blown up, or is likely to be willing to accept a subsequent counteroffer at that price. But an offeree who subsequently offers the original price or solicits a new offer at that price reveals that he or she had been engaging in distributive bargaining—not in the search for greater gains of trade but merely to increase her share of the pie. The possibility, however, that some offerors may be annoyed at an offeree who is shown to have engaged in this behavior and refuse to contract at the original price is likely to be enough to discourage some of the socially inefficient distributive bargaining. The mere possibility of offeror enmity slightly disciplines the offeree from inefficiently counteroffering merely to gain a larger share of certain gains of trade.

Of course, the blow-up rule as we have already learned is merely a default. Offerees can avoid the disciplining effect by exercising their option

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to keep the original offer alive notwithstanding their counteroffer. But, during distributive bargaining, an offeree's choice to preserve the original offer itself signals that the original offer is potentially acceptable and therefore still dampens the likelihood that an offeree will contract around the blow-up rule as a rational part of distributive bargaining. For example, after Smirgo offers to sell at $80,000, then an offeree who counters at $75,000, but adds a proviso to preserve the right to accept the $80,000 offer, strongly signals to the seller that the offeree's reservation price is above $80,000. Smirgo would be advised to reject the counteroffer and await the buyer's acceptance of the original offer.

An appreciation of ADR theory, however, suggests that the blow-up default might not be appropriate with regard to a different type of counteroffer, which I will call an integrative counteroffer. Stepping back, a distributive counteroffer is one where only the price term is altered to favor the offeree. A major point of my analysis is that distributive counteroffers can be used to discover gains of trade. An offeree who hears a non-overlapping offer searches for gains of trade by countering at a more favorable price. In contrast, an integrative counteroffer explores the possibility of greater gains of trade by altering a non-price term of the offer.[11] Efficiency-minded lawmakers should be chary to discourage integrative counteroffers even as a response to an overlapping offer. But by default, the blow-up rule does just this because it renders unacceptable any original offer after a counteroffer is made.

Appreciating the difference between integrative and distributive bargaining, one might imagine a more limited blow-up rule, which only operated to blow-up offers after distributive counteroffers. Thus, if Smirgo offers to sell at $80,000, and Bisko responds with an integrative counteroffer—for example, Bisko might counter to pay $82,000 for an oven that added on a high-speed, convection fan—then under the alternative rule, the original $80,000 would live for Bisko to accept. Interestingly, the restatement has already moved a step in this direction because it empowers an offeree to make independent offers not "relating to the same matter as the original offer,"[12] which do not blow up the original offer. So currently, the line between offeree offers which blow up and offeree offers that do not blow up turns on whether the offeree offer is independent or not. But courts might promote efficiency by redrawing the line to turn on whether the offer by the

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[11] In some contexts, altering the quantity would be equivalent to altering a price term in the sense that it would alter the unit price offered. Thus, if Smirgo offered to sell 100 ovens for a million dollars, and Bisko countered with an offer to buy 200 ovens for a million dollars, Bisko would by my lights be making a distributive counteroffer.

[12] RESTATEMENT (SECOND) OF CONTRACTS § 39(1).

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offeree was integrative or distributive. Courts have the institutional competence to make this distinction because it simply asks whether the offeree's offers altered non-price terms. If so, it is an integrative counteroffer that would not render the original offer unacceptable. This definition of integrative counteroffers would naturally subsume independent offers because they always alter some non-price terms.

Even without altering the current blow-up rule, offerees can achieve the same result by merely signaling that they want to retain the option of accepting an original offer when they make an integrative counteroffer. Offerees should feel more freedom to opt out of the blow-up rule with regard to integrative counteroffers than with regard to distributive counteroffers. A Bisko who counteroffers at $75,000 but tries to retain the option to buy at $80,000 signals that its value is above $80,000. But a Bisko who counteroffers at $82,000 with an additional convection feature while preserving its option to buy at $80,000 is merely signaling that there might be another contract with even larger gains of trade. Still in a world where many bargainers forget to explore integrative bargaining, flipping the default with regard to integrative counteroffers—exempting them by default from the blow-up rule—might slightly promote socially beneficial integrative bargaining.

So let us review the bidding. Strategic offerees who have heard overlapping offers, and hence are the first to learn that there are gains of trade, may inefficiently counteroffer to try to increase their share of gains of trade. This is the basis for my claim that we may hear too many distributive counteroffers relative to acceptance. The blow-up rule, as a theoretical matter, may modestly dampen but not extinguish this effect. But the current blow-up rule might unhelpfully dampen the willingness of offerees to make integrative counteroffers. A slightly better default might only blow up offers followed by distributive counteroffers but leave offers followed by integrative counteroffers unaffected.

Before switching gears, let me emphasize that all of the foregoing normative analysis is limited because it takes an *ex-post*-the-initial-offer perspective. It takes as a given that an overlapping offer has been made. But from an *ex ante* perspective it is possible that it is efficient for offerees to bargain for a higher share of the gains of trade. For example, allowing an offeree/seller to "piggishly" bargain for higher shares of the gains of trade may give this potential seller better incentives to create the very asset that is being bargained over. Indeed, the normative analysis of the last two sections in many ways parallels the tender offer passivity debate spurred by Ron

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Gilson, Frank Easterbrook, and Dan Fischel.[13] In the corporate takeover context, when a tender offeror placed a bid to buy a firm at a 50% premium over its current stock price, there was pretty powerful evidence that the tender offer is overlapping. Gilson argued that offeree resistance, including counteroffers, to these initial offers was inefficient and should be deterred. But David Haddock, Jon Macey, and Fred McChesney, in a devastating critique, pointed out that from an *ex ante* perspective, it is more ambiguous whether promoting passive acceptance in fact promotes efficiency.[14]

IV. PSYCHOLOGICAL CLAIM: REJECTION AVERSION AND OTHER BEHAVIORAL "BIASES" TEND TO CAUSE PEOPLE TO REJECT NON-OVERLAPPING OFFERS TOO OFTEN

The last two sections' analysis of the blow-up rule relies on traditional game-theoretic assumptions of hyper-rationality and narrow financial self interest, and focused on how narrow financial self-interest might cause offerees hearing overlapping offers to respond by inefficiently counteroffering. In contrast, this section focuses on non-overlapping offers and takes a more psychological approach. This section hopes to be a modest contribution to the "barriers to negotiation" literature by focusing on a particular moment in the negotiation process.[15] I am interested in barriers to counteroffering. Offerees hearing non-overlapping offers are, I conjecture, too likely to reject—instead of more efficiently searching for gains of trade with distributive counteroffers, integrative counteroffers, or both—because they are likely to be subject to rejection aversion and overestimate the offeror's reservation prices. Let me be clear that these are just conjectures and at best set out a research agenda for future testing.

Rejection aversion is the psychological disutility some people experience from being rejected. In addition to the wasted cost of preparing an offer and the loss of any expected private gains from contracting, casual observation suggests that some people dislike being turned down. Sometimes we just do

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[13] Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1194–1204 (1981). *See generally* Ronald J. Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51, 51–67 (1982) (arguing for a form of limited tender offer passivity that falls short of the pure passivity advanced by Easterbrook and Fischel).

[14] David D. Haddock, Jonathan R. Macey & Fred S. McChesney, *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 708–09 (1987).

[15] *See generally* BARRIERS TO CONFLICT RESOLUTION (Kenneth J. Arrow et al. eds., 1995) [hereinafter BARRIERS].

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not want to put ourselves out there. The rejection averse sometimes are not willing to make initial offers. At the lecture, one of my student interlocutors admitted that he had sometimes forgone asking somebody out on a date because of rejection aversion. This disinclination might be even more pronounced for offerees who are scared to counter. Electronic stores like Circuit City and Best Buy will routinely take ten or fifteen dollars off the posted price for a DVD player if you just ask with a counteroffer.[16] But many, many friends of mine, even armed with this information that their counteroffer will not be rejected, still cannot bring themselves to ask. Making a counteroffer is perceived as norm-breaking.

A second and related barrier to countering arises from some people's tendency to overestimate the reservation price of the other side. This is particularly likely if the offeree mistakes the other side's offer to be its reservation terms. Mistaking offered prices for reservation prices leaves no room for distributive bargaining. For example, if Grace offers to sell Will a painting for $500, Will is unlikely to make a counteroffer if the most he would pay for the painting is $200. He may feel it is not worth the trouble because there is such a low probability that Grace would be willing to accept an offer less than $200. This inference is strengthened by the possibility that Grace will be embarrassed to cut her price so dramatically because Grace's willingness to sell for less than $200 might be an indication that her initial offer of $500 was unreasonable. Will might believe that Grace would experience a loss of face if she cut her asking price that much.

An important face-saving technique is to point out—even manifest—attributes of the product or service in question that would give the original offeror a plausible excuse to substantially change her offer. For example, Will might say, "You probably didn't realize this, but your painting doesn't have very much yellow in it, and it might not be worth as much as you originally thought."

At least since *Getting to Yes*, ADR scholars have pointed out that negotiators miss opportunities for discovering the full gains of trade.[17] The small contribution of this section is to notice that the problem can infect purely distributional bargaining where the offeree hears a non-overlapping offer. To counteract these psychological biases, it might be useful for offerees to develop a never-say-no impulse to pause and consider whether it would be better to counteroffer before rejecting an offer and walking away from a negotiation. Of course, there are some times when it is appropriate to

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[16] *See* Matt Richtel, *Even at Megastores, Hagglers Find No Price Is Set in Stone*, N.Y. TIMES, Mar. 23, 2008, at A1.

[17] *See* FISHER ET AL., *supra* note 10, at 56–80; KOROBKIN, *supra* note 10, at 111–47. *See generally* BARRIERS, *supra* note 15.

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say, "No," and break off negotiations. If both sides unthinkingly apply a never-say-no attitude, then contexts where there are no gains of trade would lead to an endlessly unproductive series of offers.

Moreover, the tendency of offerees to walk away from non-overlapping offers may help discipline offerors to be less piggish when choosing an initial price. From a truly *ex ante* perspective, it becomes more ambiguous whether a just-say-no attitude to unfair offers might better promote efficiency by prompting initial offerors to put more reasonable offers on the table to begin with. However, this possibility is likely to be muted in contexts of one-off bargaining or where the offeree is less able to establish a negotiation reputation.

V. "NEVER SAY NO" IN ACTION

Notwithstanding this theoretical ambiguity, I hope to convince you with a series of real world examples that a never-say-no attitude in negotiations can often improve your lives. In this section, I am going to talk about how I have responded to non-overlapping offers with counteroffers that have searched for gains of trade.

A. *The ReReRescheduled Interview*

In 2007, Simon Usborne, a reporter for the British newspaper, *The Independent*, asked if he could interview me for an article. But when the appointed time came, he never called. He emailed later to reschedule, but blew me off again.[18] When he asked to reschedule a third time, I felt a bit like Charlie Brown being asked by Lucy to trust her and go ahead and kick the football. But to be honest, I had a book, *Super Crunchers*, that I was trying to promote, and I gamely agreed. Once again, I was left standing at the altar. You would think this would be the end, but Simon (and this is his real name) emailed me:

> Ian,
>
> I feel very bad for putting you off once and then mixing up the times today.

[18] This interview story is based on a discussion in my forthcoming book, IAN AYRES, CARROTS AND STICKS: THE NEW SCIENCE OF HIGH-POWERED INCENTIVES (forthcoming Sept. 2010).

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> But things are now so busy that an interview would be rushed, and I'd much rather give it my full attention when it's less frantic. That is, of course, if you aren't fed up with me and we can find a new time that suits you.
>
> I'm away tomorrow and Friday. How does Tuesday 10 a.m. your time, 3 p.m. mine, sound?

Any sane person would have declined his kind offer. But I took a different tact. I counteroffered adding in a commitment provision to try to get him to change his low-down ways. So I emailed Simon back:

> Tuesday, Sept. 4 at 10 a.m. Eastern is fine by me.
>
> I'm not fed up. But I would appreciate trying to get it done then.
>
> How about promising to give 50 pounds to the Multiple Sclerosis society (my mom died of MS) if my office phone doesn't ring by 10:05?

I added the true detail about my mom to make clear that I was not kidding. I was not willing to agree to another appointment without something more, but the promise of my mom's charity earning some money if he missed was enough to make it worthwhile. A minute later, he replied, "Your phone will ring! Thanks Ian, Simon." By sticking with it, we had found a way to go forward to schedule another interview.[19]

B. *A Non-Discrimination Promise and Rejection as Psychological Palliative*

In 2006, when a partner from the Watton Law Group, a small law firm in Wisconsin, asked me for help as an economic expert on a case, I initially thought about declining because I was fairly overcommitted on academic projects. Indeed, after saying "no" on the phone, I caught myself and offered to do it if the firm would promise to adopt the Fair Employment mark that Jennifer Brown and I developed to protect workers from employment discrimination on the basis of sexual orientation.[20] Brown and I created a certification market (recognized now by the USPTO) that firms are licensed to use if they promise to abide by the provisions of the Employment Non-

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[19] You can learn more about what happened next (he did not follow through by calling) in AYRES, *supra* note 18.

[20] *See generally* Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639 (2006) (describing the Fair Employment mark).

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Discrimination Act. Within hours, the firm had faxed in a signed copy of the Fair Employment license and became one of the earliest adopters of the mark. This is integrative bargaining at its best. By offering a seemingly unrelated condition, I transformed a losing proposition into one that garnered the eager consent of both sides.

A bigger surprise came when I tried the same tactic with UCLA law school. I received an offer to present a paper at UCLA. I was tempted because I have enjoyed and learned a lot from my prior visits to the school, but I had already agreed to give several other seminars that year and the prospect of another cross country trip away from my young kids put the option out of the money. Instead of saying "no," I once again offered to come if the law school would promise not to discriminate on the basis of sexual orientation. In some ways, I was not asking much. UCLA already included sexual orientation in its non-discrimination policy, and it was bound by state law not to discriminate in employment matters on the basis of sexual orientation. But then again, I was being high-maintenance. The professor who invited me quite appropriately indicated that she would need to check with her committee and get back to me.

When she called back, she indicated that the committee had decided that it would not be right to accede to the idiosyncratic demands of individual speakers. I responded, "I'm sorry you're turning down my offer." To which, she paused and then responded, "Well, I'm sorry you're turning down our offer."

The surprise here is how good I felt about the resolution, even though we had not come to terms. Another value of the never-say-no impulse is that it can make you feel better about a failed negotiation. Sometimes it is better to be rejected than to merely reject. If I had simply refused UCLA's kind initial offer, I would have felt somewhat guilty. But making a sincere, non-piggish counteroffer substantially reduced that guilt. As our ending colloquy made clear, we were both symmetrically rejecting each other's offer. In fact, the UCLA professor was a bit sheepish about rejecting me because her school was not willing to go beyond a policy to actually promise not to discriminate. The bigger point is that one way for offerees to overcome rejection aversion is to realize that being rejected is less painful than rejecting someone else. Instead of rejection aversion, I now sometimes am rejection seeking as a way of minimizing psychological discomfort.

For me, the key is that I must sincerely want to do the deal if they accede to my demand. Sometimes, I am truly agnostic about whether my counteroffer will be acceptable. For example, when a group of state court judges asked me to speak at their annual conference, I said I would if the judges would agree to anonymously participate in a social science

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experiment. In counteroffering, I was generally agnostic about whether the judges would agree or not (as of now the answer is "no").

But there are other contexts where I sincerely counteroffer even though I predict that the other side will almost certainly decline. For example, even when I am busy, I almost never decline consulting work. I instead counteroffer with exorbitant rates that would make me willing to take on the extra work. My counteroffer is almost always rejected, but in the rare case when it is not, I am happy to rearrange my schedule to receive the higher salary.

I am even willing to make sincere counteroffers when I am fairly confident that my counter will be rejected. For example, I am troubled by the unwillingness of most newspapers to compensate people who have been harmed by negligent misrepresentation in the publications. So when I am initially inclined to turn down an interview request, I sometimes respond by counteroffering:

> I would be happy to be interviewed. But I am concerned about the ability of the print media to harm public and non-public figures by negligent misrepresentations of fact without compensating them for their injury. I therefore propose the following contract that I have offered in the past:
>
> ***Agreement to Compensate for Negligent Misrepresentation***
>
> In this agreement: _____ shall be referred to as "the reporter"; _____ shall be referred to as "the publication"; and _____ shall be referred to as "the source."
>
> In return for the participation of the source as an interviewee, the publication promises to compensate anyone who is damaged by a factual misrepresentation printed in an article that expressly quotes the source. Compensation for factual misrepresentations is to be measured by the dollar amount required to make the damaged person whole, but in no event shall be less than $100. Damages might be mitigated by timely retractions of the misrepresentation. Anyone explicitly named in the article is an express third-party beneficiary of this contract and thereby has a right to directly sue the publication if it breaches its promise to compensate. The publication and the source intend for this to be a legally binding agreement. The reporter in agreeing to this contract on behalf of the publication represents that the reporter has actual and apparent authority to enter into this contract on behalf of the publication.
>
> To accept this contractual offer (and thereby create a legally binding contract between the publication and the source), please reply to this email

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> with a subject line that states "On behalf of the publication, I accept the Agreement to Compensate for Negligent Misrepresentation."

No reporter has ever accepted this counteroffer. But again, I feel better knowing that we did not do the interview because of their unwillingness to compensate victims of their negligent misrepresentation than because of my unwillingness to donate time to the free press.

C. *Counteroffer as Screen*

Many of these counteroffer examples can be seen as screening devices. I would not want to contract with an employer who is willing to discriminate against employees on the basis of sexual orientation or a newspaper that is unwilling to compensate people who have been harmed by the newspaper's negligence. But in other contexts, I use counteroffer screens to make sure that the offeror has requisite knowledge in the subject at hand. When a stock broker cold calls me and offers to give me investment advice, I often counteroffer by saying, I'll give you ten minutes of my time if you can tell me the beta on a well-diversified portfolio of NYSE equities. If the broker does not know that the answer is 1 (and fewer than 5% of cold callers do), then I do not want to talk.

Similarly, when Christians knock on my door offering spiritual advice, I often counter by saying, "I will give you twenty minutes of my time if you can answer five questions about the Bible (such as, who was the first person in the Bible to become drunk?)." Again, the counteroffer is a screen. I do not want to learn about the Bible from someone who might know less than I do. For me, it has helped to cultivate a never-say-no attitude by thinking of the negotiation process itself as an opportunity to collect data about the world. This in itself is integrative. When I hear an offer that does not meet my reservation conditions, I try to think what else this person has that I value, and the social science answer for me is often data.

I could go on and on. When my seven-year-old daughter pleaded for a puppy, my first reaction was to say, "Hell, no!" Our family travels a lot. Our lives are very full. It would be a huge burden to have to take care of a puppy. But instead of rejecting her offer out of hand, I thought long and hard about what Anna could do that would make getting a puppy worthwhile. In the end, I looked her in the eyes and said, "You can have a puppy if you publish an article in a peer-reviewed academic journal." You might think this was just a cruel and obnoxious way of saying "no." But I then worked with Anna and her older brother for the next two years—first teaching them statistics and then supervising their work on fairly sophisticated statistical study. Thanks to the never-say-no impulse, Anna, Henry, and I are now published in a journal

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of the American Statistical Association.[21] And our family is the proud owner of Cheby, a mongrel named after the great statistician, Pafnuty Chebyshev.

Imagine a world where law school admission offices literally never said no. Instead of rejecting candidates, they would counteroffer with different tuition prices: "You can still come to Yale, but with that abysmal LSAT score, you are going to need to pay $5 million in tuition." Most of the less qualified applicants would turn down the school's exorbitant counteroffer (and applicants' willingness to pay would importantly depend on whether future employers would learn the identity of these special admits). But if just a few counteroffers were accepted, a policy of universal admission—really universal counteroffers—might allow a law school to radically reduce the cost of going to school for the rest of the class.[22] I do not expect to see this thought-experiment coming into practice at law school anytime soon. But the point of these examples is to hammer home a point that ADR scholars have been pushing for a long time: in real world settings, there can be tremendous gains from using counteroffers to explore whether there are as of yet undiscovered gains of trade.

VI. CONCLUSION

I have tried here to tentatively argue that offerees should work against their first impulse to reject non-overlapping offers. Cultivating a never-say-no impulse can smoke out hidden gains of trade. Especially in contexts where you will feel guilty turning down the other side's offer, countering with sincere, alternative terms is a way to mitigate psychological discomfort regardless of whether your counteroffer is accepted.

But I have also suggested contexts where the law might want to dampen the impulse to counteroffer. Distributional counteroffers that follow overlapping offers stand on a very different footing than either distributional counteroffers following non-overlapping offers or integrative counteroffers. An offeree who hears an overlapping offer is uniquely situated to economize on negotiation costs by simply accepting the offer. Distributionally counteroffering after you know there are gains of trade is, from this *ex post* perspective, presumptively inefficient. Further distributional negotiation may

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[21] Ian Ayres, Antonia R. Ayres-Brown & Henry J. Ayres-Brown, *Seeing Significance: Is the 95% Probability Range Easier to Perceive?*, 20 CHANCE 11 (Winter 2007).

[22] The risk that too many applicants would accept the counteroffer is not a good objection. A school could just raise the price of the offered tuition for those who would have been rejected or delay a bit the timing of the counteroffers until the school has the risk under control.

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be justified by equity or *ex ante* efficiency concerns. Esau might have been justified in counteroffering even if he realizes that there are gains from trade in selling his birthright for food, not just because a better price might be more equitable, but it might have given Esau better incentives to create the trading opportunity in the first place.

The larger goal of this talk has been to start a conversation into the micro-foundations of negotiation. Methodologically, I hope to have convinced you that it is useful to freeze the conversation at the moment when an offeree first hears an offer and to think about economic and psychological influences on the offeree's choice to accept, reject, or counter.

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