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# Commentary on Jan Albert van Laar and Erik C. W. Krabbe, “Splitting a Difference of Opinion”

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## 1. Introduction

Jan Albert van Laar and Erik Krabbe’s paper “Splitting a difference of opinion” studies an important type of dialogue shift, namely that from a deliberation dialogue over action or policy options where critical and persuasive argumentation is exchanged about the rational acceptability of the policy options proposed by various parties, to a negotiation dialogue where agreement is reached by a series of compromises, or trade-offs, on the part of each side in the disagreement.

Van Laar and Krabbe identify and analyze two fallacies that pertain to different aspects (or moments) of this dialogue shift, and they provide prescriptive advice for their avoidance. The first fallacy is that of *bargaining*, and concerns when the dialogue shift from a persuasion dialogue to a negotiation dialogue is licit rather than illicit. The fallacy of bargaining, they write (p. 7), involves “substituting offers for arguments,” and occurs when “the persuasion dialogue isn’t closed off properly at all and the [dialogue] shift [to negotiation] occurs without both participants being aware of it and agreeing to go along with it” (Walton and Krabbe 1995, p. 110; cf. van Laar and Krabbe, p. 7). The second fallacy is that of *middle ground*, and involves mistaking a compromise, which is analyzed as the resolution of some second-order disagreement, with the resolution of the first-order disagreement.

Van Laar and Krabbe argue for three main conclusions. First, they claim that there are situations in which this type of dialogue shift, from persuasion to negotiation, is legitimate. They (pp. 16-17) claim that

within a persuasion dialogue, participants may have good reasons for shifting towards a negotiation dialogue in which they cooperate to settle their different of opinion by way of compromise. Splitting a difference of opinion may be a sensible idea, and the shift towards negotiation can be made without committing the Fallacy of Bargaining.

Indeed, beyond participants having good reasons for such a shift, van Laar and Krabbe intimate (p. 4) that, at times, this type of shift may, in some contexts, be the *only* path to settling a disagreement between parties and thereby reaching an agreeable, actionable, policy option. Second, they (p. 17) argue that “a compromise that splits a difference of opinion is quite different from a resolution of a difference of opinion, and that splitting a difference of opinion does not imply that the Fallacy of Middle Ground has been committed,” but rather that “finding a

Bondy, P., & Benacquista, L. (Eds.), *Argumentation, Objectivity and Bias: Proceedings of the 11<sup>th</sup> International Conference of the Ontario Society for the Study of Argumentation (OSSA), 18-21 May 2016*. Windsor, ON: OSSA. pp. 1-9.

compromise implies that a potential second-order difference of opinion admits of a resolution.” Third, van Laar and Krabbe argue (p. 17) that, while negotiation involves argumentation about different kinds of things than did the initial persuasion dialogue, it involves rational argumentation nonetheless.

Having no disagreement with the third claim, in this brief commentary, I first offer a brief summary of the position van Laar and Krabbe advance in their paper, and I understand it. I then voice some concerns about the treatment they offer for each fallacy.

## **2. Splitting the difference of opinion: a brief summary**

### **2.1. The fallacy of bargaining**

In section 2 of their paper, van Laar and Krabbe (p. 2) address two questions concerning shifts from persuasion to negotiation dialogues: what legitimate reasons might there be for such shifts? and under what conditions would such shifts be legitimate? They (p. 2) are careful to distinguish between the resolution and the mere settling of a difference of opinion (citing van Eemeren and Grootendorst 2004, pp. 57-58), claiming that the shift to a negotiation dialogue does not provide a resolution to a difference of opinion, and indeed that it occurs only when a proper resolution is not attainable.<sup>1</sup> Their claim is that the move to a negotiation dialogue can settle an initial difference of opinion by resolving a different, but related difference of opinion.

Van Laar and Krabbe answer the second question as to the dialectical occasions that would legitimately authorize a shift from persuasion to negotiation dialogue by identifying the following possible outcome of a persuasion dialogue:

Each party (i) maintains its own, original standpoint (in the case of a mixed dispute), and (ii) maintains its critical stance towards the standpoint of the other party (p. 3).

In such situations, and in answer to their first question, van Laar and Krabbe (pp. 5-7) identify five reasons that parties might have for moving from a persuasion dialogue to a negotiation and for accepting a negotiated compromise in place of the result of the failed persuasion dialogue. Briefly, they are:

1. The strategic argument: “By arguing you achieve nothing. By negotiation you achieve at least something.”
2. The argument for principled consequentialism: “It would just be *wrong* to neglect the possibility of realizing at least part of your aims.”
3. The epistemic argument: “Neither of us can be sure of having a complete view of all aspects of the situation and a deal might do justice to a wider array of considerations.”
4. The democratic argument: “Making a deal with contributions from both sides is more democratic than a one-sided solution.”

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<sup>1</sup> Here, a resolution is understood as the normative end point of a critical discussion where a proponent either retracts a standpoint, having failed to successfully defend it from a respondent’s criticisms, or where a respondent accepts a standpoint on the basis of the argumentation offered by its proponent in response to the critical reactions of the respondent (cf. van Eemeren and Grootendorst 2004, p. 133).

5. The community-based argument: “To compromise would help to build a community.”

In view of considerations like these, van Laar and Krabbe argue, the shift from a persuasion dialogue to that of a negotiation can be legitimate, particularly in cases of practical contested reasoning about action prescriptions or policy options.

## **2.2. The fallacy of middle ground**

Once the shift to a negotiation dialogue occurs, the fallacy of middle ground becomes possible. It is introduced, in section 3, as “the fallacy of confusing a compromise with a first-order resolution of the difference of opinion that prompted the parties to compromise” (p. 9). Crucial to understanding this fallacy, then, is understanding the difference between a compromise and a resolution. Van Laar and Krabbe (p. 8) adopt Weinstock’s (2013, p. 539) characterization of a compromise as marked by two characteristics: it is inferior to the initial, preferred positions of each party in the debate, but nevertheless which each party has reason to accept instead of their favored position. Perhaps more accurately stated, this second condition is one where each party to the dispute has reason to accept the compromise position in place of their initial, preferred position rather than an outcome on which the first-order dispute remains unsettled such that no agreement is reached and no position is mutually adopted. As van Laar and Krabbe (p. 8) put it, “parties ... *only* subscribe to the compromise for the reason that each of them happens to be unable to realize the adoption of its own preferred policy.”

Van Laar and Krabbe (pp. 8-9) proceed to identify five characteristic features of compromises. (i) Compromises involve mutual concessions, and are different from resolutions because “Strictly speaking, a compromise does not end the disagreement” (Benjamin 1990, p. 7). (ii) Compromises are the result of free choices of discussants, rather than being imposed or coerced. (iii) Compromises involve both action commitments and propositional commitments on the part of the discussants. (iv) Compromises result from a quid pro quo exchange and thereby involve a kind a “commodification” of one’s opinions. Lastly, (v) “compromise implies a resolution of second-order issues” since “a compromise does seem to eliminate a potential disagreement of some sort, to wit a disagreement about the second-order issue of how to deal with the problem that the first order issue of what policy to pursue is irresolvable” (p. 9).

## **3. The fallacy of bargaining**

I have two concerns about the shifts from persuasion to negotiation dialogues that don’t seem to be covered in the discussion offered by van Laar and Krabbe. The first concerns the legitimacy of such dialogue shifts epistemic contexts, or contexts where epistemic considerations are relevant; the second concerns a kind of strategic maneuvering that is designed to shift a dialogue from what should, properly be a persuasion dialogue to a negotiation.

### **3.1. Epistemic contexts**

From an epistemic perspective, it is important that van Laar and Krabbe limit their consideration of standpoints at issue to those concerning “dialogues about an action proposal” (p. 4) – i.e.,

deliberation dialogues about policy options, directives, or prescriptive action proposals, and other claims of this sort.

In non-epistemic contexts, while one might construe the dispute as concerning the rational acceptability or merits of some policy proposal, what really seems to be at issue in the object-level dispute is the maximal satisfaction of competing sets of goals. At least, there is no fallacy involved in the shift from looking at the issue one way to looking at it in the other. By contrast, in epistemic contexts such shifts seem always to be illicit. After all, what is at issue in epistemic contexts are the rational merits of competing claims and these are not the sorts of things that can be gained through bargaining or traded away.

Consider two parties arguing over the acceptability of competing speculative hypotheses, for example. Suppose that the argumentative dialogue concludes with the situation van Laar and Krabbe envision, whereby each party retains their commitment to their initial standpoint, neither party accepts as satisfactory the other's replies to the critical considerations raised against their standpoint, and likewise neither party concedes any of the criticisms raised by the other. At one level, this might be seen as the failure of a critical discussion. Seemingly, something has gone wrong and the parties are simply being intransigent, or there is a deeper disagreement in need of resolution that underwrites the surface disagreement about the opposing standpoints.

Yet, in such a context, the arguments for moving to a negotiated compromise all seem to fail. Arguments 1, 2, 4, and 5 all fail because they reference the wrong kind of criteria for the *epistemic* acceptability of some position. In such a situation, it is better to either stick to one's guns (maintain steadfast commitment) or to suspend judgement (withdraw commitment), each in the name of continued inquiry, rather than to move to adopt some middle ground judgement. Against the strategic argument, epistemically speaking, nothing is achieved by negotiation – at least nothing epistemically worthwhile. Against the argument from principled consequentialism, in inquiry one's epistemic aims are to accept all and only true claims (for which one has adequate reason to believe), and those ends are not advanced by compromising epistemic standards, or trading-off the contents of positions, in the name of expediency or agreement. Against the democratic argument, truth does not side with a majority, or multi-sided opinion. Rather, we explain the rightness of the opinions of the many in terms of their truth; not the truth of opinions in terms of their being held by the many. Against the community argument, epistemically speaking building a community around a falsehood, or a truth for which we lack adequate reason to believe, is not to be preferred over having justified truths which may divide a community. Building good community relations is not an epistemically good reason for holding false or unjustifiable opinions. In each case, the kinds of considerations cited for concession and moving to a negotiated settlement are epistemically irrelevant. Of the reasons to move to a negotiation, then, only the epistemic argument remains. And, while this argument cites epistemically relevant considerations – that our own views are incomplete and fallible, epistemically speaking – those considerations do not warrant a dialogue shift from a persuasion dialogue (be it a critical discussion or inquiry) to a negotiation. Merely incorporating a broader range of considerations is not a good epistemic reason for altering one's position, unless one also believes that those other considerations are epistemically sound and well-taken. In which case, the epistemically correct course of action is to moderate one's commitments in proportion to the evidence one has for them, not to commodify one's opinions as though one could barter one's way to the truth.

Epistemically speaking, the only positions worthy of endorsement are those that are best supported by the evidence. Yet, by hypothesis, negotiation dialogue does not proceed according

to those object-level considerations about the rational or evidential merits of either position; rather it proceeds according to second-level considerations about goal satisfaction. Yet, if the goal is to attain true, rationally justified views, then acting to satisfy that goal would prescribe returning to the object-level dispute in search of a resolution, or at least further inquiry and evidence, rather than any dialogue shift from truth-directed persuasion to negotiation. In such contexts, a compromise is not an epistemically sound outcome, and negotiation is not an epistemically responsible course of action.

And, to the extent that the relative merits of policy or action-proposals depend on epistemic considerations, this same problem would resurface. For example, consider two parents going through a bitter separation, each of whom are making a case for sole custody of the children (an action outcome, or policy decision) by claiming that the other is an unfit parent (a factual claim). Suppose further that the issue is to be resolved by mediation, and that over the course of the mediated proceedings, neither side gives an inch: neither manages to establish their case to the satisfaction of the other, yet neither gives up their position, nor their criticisms of the other's position. Suppose they now opt for shared custody as a negotiated concession. While this might be a compromise each is willing to make rather than lose custody entirely (such that each has a reason to opt for it as a concession), given that it does not resolve the issue of their fitness as parents, such a settlement ought to be manifestly unacceptable to any rational, third-party judge. Rather, joint custody should *only* be a viable option in the case where each parent is actually a fit parent—i.e., in the case where the first-level issues are actually resolved.<sup>2</sup>

### **3.2. Prosecutorial overcharging and the plea bargain to be read in the presentation**

Disputes like this suggest another context that represents a moral hazard for dialogue shifts of this kind. The practice of overcharging defendants accused of crimes is woefully common, particularly in North America. Benjamin Theule (2012) describes the practice in this way:

One of the most common strategies used by prosecutors is to “overcharge” a defendant. There are a number of strategic reasons why prosecutors may overcharge those accused of a crime. The key reason is that deputy district attorneys know that they must move a large volume of cases through the court system. The way this is accomplished is via plea bargaining and negotiation. Prosecutors know that when they overcharge cases (e.g. charging a felony for a true misdemeanor violation) this encourages a guilty plea in exchange for a reduction in the charge to the offense that should have been charged originally.

Theule (2012) gives the following as an example: “Sometimes those who shoplift merchandise worth a relatively modest value will be charged with Burglary ... rather than the more appropriate charge of ... Petty Theft.”

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<sup>2</sup> I take it that analogous considerations could be raised with respect to things like the climate change example used in van Laar and Krabbe, and in other cases where the rightness or rational merits of policy options depend on the answers to questions of fact. It is not merely that the partial satisfaction of some goal set might be nil, such that any compromise actually be entirely unacceptable, as in the case of “half-measures” action on carbon emissions with respect to the devastating effects for human populations of climate change. Rather, it is that the acceptability of the policy options themselves are based on considerations that are inherently extraneous to, and not addressed in, negotiation dialogues.

Such a move might be considered a kind of strategic maneuvering by a proponent within argumentative dialogue. It involves putting forward an initial standpoint that (perhaps grossly) overstates one's position such that, while one might have little hope of successfully defending *it* as a standpoint, the *actual* standpoint one hopes to defend and establish represents a significant concession to the one initially asserted, and one which, the proponent hopes, they can negotiate to, rather than be obliged to argue for.

While it might seem that the increased burden of proof attached to making such assertions would be sufficient to deter arguers from overstating their positions in this way, social and institutional circumstances often make it entirely worthwhile for them to do so. For instance, in the case of prosecuting the burglary versus petty theft charge, the prosecutor will have to prove their accusations only when the case goes to trial. In the interim, though, several non-argumentative pressures will act to motivate the accused to simply accept (by pleading guilty to) the lesser charge, even though they might maintain their innocence even to it. For example, having been accused of the more serious crime, the defendant will have more onerous bail conditions, and will be more likely to be held in custody rather than released pending trial. This can have severe social consequences for them, such as losing their job, losing contact with their family or support network, not to mention their loss of liberty while their case is pending trial (Theule 2012). Similarly, the consequential risks of failing to defend against the more serious charges are dire. While conviction of the misdemeanor charge might only result in a short detention in a county jail, conviction on the felony charge might come with a much longer, perhaps mandatory, sentence in a state prison where the conditions of incarceration are much harsher (Theule 2012). As Theule (2012) points out, considerations like these exert coercive pressure upon the accused to agree to the lesser charge without argument, by plea bargaining—i.e., negotiation. While none of these are good reasons for the claim at issue – that the accused is guilty of either offence – they are each good practical reasons for the defendant to concede to the lesser offense, so long as truth is not their only, or predominant discursive goal. Ultimately, then, this strategy has the effect of relieving the proponent (the prosecutor, in this case) from ever having to make the case for their position (either the overstated or their 'actual' one), and from ever having to establish it argumentatively. Rather, by overstating their initial claim, they can coercively induce a negotiated settlement upon their actual, desired position without ever having to meet their argumentative obligations.

Now, it might be objected that this kind of case does not fit the proposed model precisely because the outcome is coerced, thereby failing to meet van Laar and Krabbe's "freely chosen" condition (ii) of compromises. Yet, if this kind of strategic maneuvering were really deemed coercive in the contexts in which it actually occurs, such as the example just discussed, then it would be prohibited. Yet, it is not. Indeed such plea bargained settlements can only be considered as just outcomes of the judicial process insofar as they are freely chosen by the accused, whose statement of guilt as part of plea agreement involves a tacit acceptance of the factual claim forming the substance of the charge. And, in argumentative situations that are less strictly regulated, such as those of everyday argumentation, or political policy debate, there is very little in the regulatory environment to prevent its employment. Given what I take to be the manifest normative unacceptability of such maneuvering, I would suggest that the transition from persuasion to negotiation dialogue is a far riskier transition than has been thus far recognized, and one deserving of greater regulation in institutional contexts and greater skepticism or reluctance in the contexts of much ordinary argumentation.

#### 4. The fallacy of middle ground

Let me now turn to considerations relating to the fallacy of middle ground as it is treated in van Laar and Krabbe's paper.

Recall that the fallacy of middle ground is introduced as "the fallacy of confusing a compromise with a first-order resolution of the difference of opinion that prompted the parties to compromise" (p. 9). Since, on van Laar's and Krabbe's account, a compromise, by its very nature, neither resolves nor eliminates a first-order disagreement, it might be asked: in what sense does it settle the matter?

Here, the answer seems to be that compromises are proposed as resolutions to "a disagreement about the second-order issue of how to deal with the problem that the first order issue of what policy to pursue is irresolvable" (p.9).

If a compromise is the outcome of a conversation in which the parties have (also) exchanged arguments about the best way to deal with this second-order issue [just mentioned], the compromise will imply a special kind of resolution. ... [A] compromise that results from an argumentative exchange about the merits of this way of dealing with the first-order issue [i.e., shifting to a negotiation dialogue and going with the results of that instead of making further attempts to rationally resolve the first order disagreement] implies a second-order resolution. (p. 9)

And, more to the point, the negotiation process, if successful, results in settling, though, not resolving the first-order dispute by providing a mutually agreeable *first-order* action policy. Yet, the reason for classifying the agreement resulting from negotiation as different from a content-equivalent agreement resulting from persuasive argumentation seems to be based solely on *how* the agreement was reached, not on *what* is agreed upon, or on the *discursive standing* that the agreed-upon commitment will have going forward.

##### 4.1. Are negotiated settlements first- or second-order commitments?

At this point, the following question might be asked: are the concessions or compromises made during negotiations, moves made at the first or second level of debate? Effectively, the policy proposals resulting from negotiated settlements will function as, indeed, will take the place of, first-order policies. If concessions are second-order moves, it is difficult to see how they could settle first-order disagreements, and result in first-order action policies. So, if the reasons transacted over the course of the second-order negotiation dialogue are not also good reasons for a first-order resolution of the persuasive argumentation, it is difficult to understand why the result of that second-order dialogue should have standing as a first-order commitment. If, on the other hand, concessions are first-order moves, then it is difficult to understand why the first-order settlements resulting from negotiations are not thereby instances of the fallacy of middle ground. Which leads one to ask, is the fallacy of middle ground always a fallacious?

Previously, I argued that in certain kinds of disagreements, characterized by predominately epistemic ends, the kinds of considerations offered in support of a dialogue shift from a persuasion dialogue to a negotiation fail. Consider now cases where the kinds of considerations appealed to in making the case for the shift from a persuasion dialogue to a negotiation dialogue properly carry weight. That is, situations where strategic and principled

consequentialist considerations about the partial satisfaction of a goal set are good reasons for shifting the dialogue, and likewise where considerations as to the democratic inclusiveness or community-building ends motivating a compromise have merit, or finally where the mere inclusion of alternative perspectives and additional considerations are themselves good reasons for adopting a negotiated settlement. Why represent these considerations as reasons supporting a dialogue shift and a resolution of a second-order issue about the right way to solve an otherwise insoluble first-order disagreement? In these kinds of cases, it would seem that the very considerations motivating the dialogue shift speak just as well to the proper resolution of the first-order disagreement. If democratic inclusiveness is a good reason for a second-order compromise, it would seem to be an equally good reason for modifying one’s first-order position as to the rationally optimal policy. That is, it seems to speak directly to the object-level merits of the relevant policy options.

Take, for example, a modified prisoner’s dilemma where the prisoners are allowed to exchange arguments before deciding on their respective action policies. Suppose that the prisoner’s dilemma has the following outcome matrix:

Prisoner’s Dilemma		Prisoner B	
		Cooperate	Defect
Prisoner A	Cooperate	A3/B3	A0/B5
	Defect	A5/B0	A1/B1

Notice that, from each prisoner’s individual perspective, the preferred outcome is that they should defect while the other cooperates. Yet, these goal sets represent incompatible outcomes. Rationally speaking, the mutually optimal outcome is that each should cooperate. Suppose now that that the prisoners are able to exchange reasons about reaching a mutually optimal outcome, yet for some reason that discussion fails to reach a resolution. Each insists on sticking with their original position that they should defect while the other should cooperate. Suppose further that, at this point, they stop discussing the rational merits of each policy option, and instead move to a negotiation. Here, we can imagine a bargain of the sort where one prisoner says to the other, “If I think that you will defect then so will I, but if you commit to cooperating then so will I.” What should make that offer appealing to the other prisoner? Well, the fact that both will be better off if each cooperates rather than defects, and, indeed, that mutual cooperation rather than mutual defection represents the mutually optimal outcome in the situation. Yet, if this is correct, then the very same reasons that make a concession reasonable in this circumstance – i.e., that each should cooperate rather than defect and risk that the other will do the same – count equally as to what the rationally optimal policy solution is in the situation.

If this is correct, then in the kinds of cases where a shift from a persuasion to a negotiation dialogue is legitimate there is no fallacy of middle ground. Second-order rationally negotiated settlements seem to be coextensive with rationally acceptable resolutions to first-order disagreements, and the reasons properly motivating each seem also to be coextensive. What is perhaps more interesting is the rhetorical reason of why those reasons should have more purchase with arguers when transacted as concessions to an initial position of some opponent rather than as positive reasons supporting some third position that neither discussant initially held.

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