

BARGAINING WITH A HUGGER:¹ THE WEAKNESSES AND LIMITATIONS OF A COMMUNITARIAN CONCEPTION OF LEGAL DISPUTE BARGAINING, OR WHY WE CAN'T ALL JUST GET ALONG²

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I. INTRODUCTION

The communitarian³ conception of bargaining now popular with legal academics presupposes a world in which people are al-

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² Apologies to Professor Alshuler. See Albert W. Alshuler, *MEDIATION with a MUGGER: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986).

² Apologies here to Rodney King and the twenty-six million or so others whom Google indicates have used or repeated one or another version of this question/expression. See, e.g., Stanley Fish, *Why We Can't All Just Get Along*, 60 FIRST THINGS 18 (1996) (describing the impossibility of a union of religiosity and rationalism).

³ I use “communitarian” to make the link with the social and political theory that [B]egan in the upper reaches of Anglo-American academia in the form of a critical reaction to John Rawls’ landmark 1971 book *A Theory of Justice* [and draws] primarily upon the insights of Aristotle and Hegel . . . [to] dispute Rawls’ assumption that the principal task of government is to secure and distribute fairly the liberties and economic resources individuals need to lead freely chosen lives. [The theory is grounded on] . . . methodological claims about the importance of tradition and social context for moral and political reasoning, ontological or metaphysical claims about the social nature of the self, and normative claims about the value of community.

Id. Daniel Bell, *Communitarianism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 1995), available at <http://plato.stanford.edu/entries/communitarianism>. See generally DANIEL BELL, *COMMUNITARIANISM AND ITS CRITICS* (1993); AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993); ROBERT NISBET, *THE QUEST FOR COMMUNITY* (1953); ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* (1991); and DEREK L. PHILLIPS, *LOOKING BACKWARD: A CRITICAL APPRAISAL OF COMMUNITARIAN THOUGHT* (1993). In legal scholarship the theory often is discussed under the rubric of civic republicanism. See generally Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988); Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); and Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985). But see Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 804 (1993) (arguing that “modern civic republican[ism]

ways at their best.⁴ Clients and lawyers share information about themselves and their situations candidly and fully, construct agreements from the perspective of their common interests and resolve differences according to objectively derived and jointly agreed upon substantive standards. They “connect”⁵ as persons and in the process convert what in lesser hands might be a form of stylized combat into a kind of joint venture,⁶ and sometimes even a lasting

is] insufficiently sensitive to the democratic mandate of constant change and flux . . . to be a truly democratic theory”); Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 *FORDHAM L. REV.* 1397 (2003) (arguing that the “concept of lawyering so often said to prevail among nineteenth-century civic republican legal elites is more mythical than real”) The legal bargaining literature variously refers to the theory as “collectivist,” see Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 *MARQ. L. REV.* 753 (2004), “cooperative,” “integrative,” “coordinative,” “collaborative” and the like. See James K.L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 *OHIO ST. J. ON DISP. RESOL.* 431 (2002) (describing the self-styled “collaborative law” movement); Pauline H. Tesler, *Collaborative Law: A New Approach to Family Law ADR*, 2 *CONFLICT MGMT.* 12 (1996) (same). A communitarian approach to bargaining is characterized principally by a commitment to resolving disputes from the perspective of what is good for the social group, on the basis of consensus norms, rather than from the perspective of what is good for the individual bargainer, on the basis of rights claims. Some have suggested to me that it is unfair to blame communitarian political theory generally for the sins of its poor legal bargaining relation, and in a way that is true, but the legal bargaining theory I will discuss sees itself as communitarian, see Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 *GEO. L. J.* 1789, 1821 (2000) (describing negotiator motives as either “communitarian or individualistic”), and it is hard to find a better term to describe it. If you want, think of it as communitarianism lite.

⁴ Hippolyte Jean Giraudoux, a French dramatist writing between the First and Second World Wars, is reputed to have remarked that “only the mediocre are always at their best,” though it is difficult to find where or when he said this. See *Chapter & Verse*, 109 *HARV. MAG.* 31 (March–April, 2007) (“many websites attribute this judgment to Jean Giraudoux, but fail to provide a precise source.”). Even the redoubtable Wikipedia fails in this regard. See *Wikipedia*, http://en.wikiquote.org/wiki/Jean_Giraudoux (last visited March 10, 2007). The Yale Book of Quotations suggests two other possible sources for the statement: Max Beerbohm (“[o]nly mediocrity can be trusted to be always at its best. Genius must always have lapses proportionate to its triumphs,” in *The Saturday Review*, Nov. 5, 1904), and Somerset Maugham (“[o]nly a mediocre writer is always at his best,” in the *Introduction to the Portable Dorothy Parker*). *THE YALE BOOK OF QUOTATIONS* 50, 502 (Fred Shapiro ed., 2006).

⁵ Leonard R. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 *HARV. NEGOT. L. REV.* 1, 56 (2002) (describing how applying the techniques of mindfulness meditation in negotiation will help a lawyer develop “a sense of . . . connection with other people”); Deborah M. Kolb & Linda L. Putnam, “*La Négociation: Une Question de Genre?*” 2 *NEGOCIATION* 59 (2004), reprinted in CHARLES B. WIGGINS & L. RANDOLPH LOWRY, *NEGOTIATION AND SETTLEMENT ADVOCACY: A BOOK OF READINGS* 468, 472–74 (2d ed. 2005) (describing the concept of connectedness in negotiation through the lens of gender).

⁶ John Stuart Mill’s description of his working relationship with Harriet Taylor captures the particular understanding of joint venture that I have in mind:

When two persons have their thoughts and speculations completely in common; when all subjects of intellectual or moral interest are discussed between them in daily life . . . when they set out from the same principles, and arrive at their conclusions by

friendship.⁷ This, in turn, takes the hard edge off their disputing⁸ and makes it less antagonistic, less competitive, less deceptive, less manipulative and less mean-spirited than it otherwise might be. One might even say that communitarian bargainers create a kind of dispute-settlement Nirvana (or Eden),⁹ where self-interest is not

processes pursued jointly, it is of little consequence in respect to the question of originality, which of them holds the pen

JOHN STUART MILL, *AUTOBIOGRAPHY* 183–84 (Penguin Classics 1989) (1873). For an interpretive example, see W. Bradley Wendell, *The Jurisprudence of Enron: Professionalism as Interpretation*, <http://ssrn.com/abstract=579122> (last visited Jan. 5, 2006) (“[i]nterpretation is not a function of a single judicial mind, acting alone. Rather, it is a community-bound enterprise, in which the criteria for reasonable exercise of judgment are elaborated intersubjectively, among an interpretive community that is constituted by fidelity to law.”).

⁷ See, e.g., ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 7 (1991) (“[m]any people recognize the high costs of hard positional bargaining . . . [and] . . . hope to avoid them by following a more gentle style of negotiation. Instead of seeing the other side as adversaries, they prefer to see them as friends.”). On the nature of friendship, see Robert J. Condlin, “*What’s Love Got To Do With It?*” “*It’s Not Like They’re Your Friends For Christ’s Sake*”: *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 250–70 (2004).

⁸ Throughout this article I will limit my discussion to dispute-bargaining. Transactional bargaining is different in several significant respects. See Robert J. Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 65 n.1 (1985) (describing the differences between “dispute negotiation” and “rulemaking negotiation”).

⁹ Some claim “transformative” powers for communitarian bargaining, seeing it as a means of moral rebirth and growth for its participants. See, e.g., ROBERT BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994). Professors Baruch-Bush and Folger discuss mediation, but since mediation is just another form of multi-party bargaining, as this article’s discussion will show, their claim also would seem to apply to pure bargaining. For elaborations on the claim, see Jeffrey R. Seul, *How Transformative is Transformative Mediation?: A Constructive-Developmental Assessment*, 15 OHIO ST. J. ON DISP. RESOL. 135 (1999); Bruce Winick & David Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic* 3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=844386 (last visited Nov. 23, 2007) (“lawyers thus inevitably are therapeutic agents. Once this insight is absorbed, it is transformative.”); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 SO. CAL. L. REV. 1009, 1021 (1999) (describing how the communitarian move of apologizing in negotiation “may . . . offer paths for spiritual and psychological growth”). Much of the feminist literature on legal bargaining makes a similar claim. See, e.g., Kolb & Putnam, *supra* note 5, at 472–74 (describing the relationship among “[g]ender, interdependence, and the possibilities for transformative outcomes”). Professors Shaffer and Cochran defend a large scale version of the claim grounded in religious doctrine, though they see transformation as an experience visited by lawyers upon clients for the clients’ own good. See Condlin, *supra* note 7, at 273–97 (describing the Shaffer/Cochran view). This “lawyer as savior” perspective has always been around and may be increasing in popularity. See, e.g., Kristin Huston, *The Lawyer as Savior: What Literature Says About the Attorney’s Role in Redemption*, 73 UMKC L. REV. 161, 163 (2004) (synopsizing the “salvation stories” of three of the usual suspects – Finch, Bartleby and Portia – as depicting lawyers as “a special kind of savior, able to protect, inform and aid in ways and at times when no one else can,” and suggesting that this image “instructs lawyers in the varying paths to be traveled” in life and “gives great meaning” to various lawyer roles.). For a critical discussion, see Condlin, *supra* note 7, at 280–95. Scott Peppet proposes that lawyers construct their own bargaining rules on the ground

naked, force is not brutish, entitlement claims are not legalistic, and everyone acts in the spirit and to the limits of her or his social potential. This is a wonderfully inspiring story, full of nobility and grandeur, and it would be a source of great comfort in an unfriendly and fractious world if it were true.¹⁰ But sadly, the assumptions communitarian bargaining theory makes about legal disputing are too idealized to serve as guides to real-life bargaining most of the time, and its foundational dogma, that bargaining distributions are natural, self-evident and complementary,¹¹ is based

that such a process would “facilitat[e] the moral development of [the legal profession].” See Scott R. Peppet, *Lawyers’ Bargaining Ethics, Contract, and Collaboration: The End of the Legal Profession and the Beginning of Professional Pluralism*, 90 IOWA L. REV. 475, 516 (2005). And Professor Menkel-Meadow seems to believe that communitarian methods are the answer to the problems with “deliberative democracy.” See Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347 (2005). While different in obvious respects, one might paraphrase the common theme in these arguments as: “Communitarianism, like Freud and Jesus, can save you from your sins.” In its own way, each of these proposals ignores the familiar dictum of not letting the perfect be the enemy of the good. For a discussion of the Nirvana fallacy, see Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1230 n.33 (1994).

¹⁰ Carrie Menkel-Meadow, *Legal Negotiation in Popular Culture: What Are We Bargaining For?*, in LAW AND POPULAR CULTURE 583, 584 (Michael Freeman ed., 2005) (“[analogies to] competitive sports or war-like struggles . . . no longer represent either the growing scholarship on effective, efficient and more just negotiation practices or the evolving practice of legal negotiation in the real world”). Professor Menkel-Meadow reads the “growing scholarship” on negotiation selectively, one might even say adversarially, to reach the conclusion that the communitarian model now predominates in the profession as well as in the academy. This is anomalous, not just because she spends much of her article berating lawyers for failing to adopt the more “evolved” communitarian view, suggesting that the model hasn’t quite taken over the world of actual practice after all (see Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want,”* 12 OHIO ST. J. ON DISP. RESOL. 253, 255 (1997) (finding that seventy-one percent of attorneys adopt a positional or hard bargaining strategy)), but also because one would expect a proponent of communitarian methods to approach bargaining scholarship in a slightly less adversarial spirit. Unfortunately, communitarians do not always follow their own espoused theory. This should not surprise us. Chris Argyris, one of the leading scholars in the study of the relationship between what he termed “espoused theory” (what people say they do), and “theory-in-use” (what people do), commonly used to remark that of all the different social groups he studied, academics were the ones least bothered, or motivated, by cognitive dissonance. See CHRIS ARGYRIS & DONALD A. SCHÖN, *THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS* 6–12 (1974) (describing the difference between espoused theory and theory in use).

¹¹ See, e.g., Carrie Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem-Solver*, 28 HOFSTRA L. REV. 905, 915 (2000) (describing the “important observation of social psychologist George Homans . . . [that] people often have complimentary interests . . . and do not always value things exactly the same [sic] way,” using the familiar icing/cake example as an illustration); Max H. Bazerman, *Negotiator Judgment: A Critical Look at the Rationality Assumption*, 27 AM. BEH. SCI. 211, 211–215 (1985) (criticizing the “mythical fixed-pie assumption” of distributive bargaining and implying that integrative trade-offs between bargainer interests are always preferable and available). This dogma may be true for disputes between what Anthony

on a vision of humans before the fall.¹² The communitarian view is more mythic than data-based, appealing mostly to those who have little direct experience with bargaining practice itself, those who have never entered the fray so to speak, or what's worse, have entered it, done badly and now want to change the ground rules so that they will do better in the future.¹³

Most lawyers recognize the limitations of the communitarian view and successfully resist its pull, clinging to various forms of old-fashioned, adversarial, bottom-line methods.¹⁴ Communitarians tend to see this as a failure to recognize one's own best interests, another example of "what's the matter with Kansas,"¹⁵ but in fact it

Appiah calls "constitutionally antagonistic groups," though even these groups sometimes want what the adversary wants simply because the adversary wants it. For a thoughtful discussion, see Kwame Anthony Appiah, *Negation as Affirmation*, in *THE ETHICS OF IDENTITY* 138–41 (2005). Communitarian bargaining theorists seem to assume a Jack Sprat world in which all bargainers, fortuitously, are paired with their constitutionally antagonistic opposites. The related phenomenon, of rejecting what adversaries want simply because they want it, is described in the negotiation literature as "reactive devaluation." For representative discussions, see Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 *MARQ. L. REV.* 795 (2004) ("a proposal can look less desirable than it otherwise would merely because a counterpart offered it"); Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in *KENNETH J. ARROW, BARRIERS TO CONFLICT RESOLUTION* 34–40 (1995) ("[s]everal theories of psychological consistency hold that any relevant object of judgment . . . will be evaluated more negatively as a consequence of its linkage to a negative source.").

¹² For well known depictions of the Abrahamic religions' story of the fall from grace, see http://upload.wikimedia.org/wikipedia/commons/1/12/Forbidden_fruit.jpg (last visited Mar. 11, 2007) (Michelangelo di Lodovico Buonarroti Simoni, called Michelangelo); http://upload.wikimedia.org/wikipedia/commons/6/61/Peter_Paul_Rubens_004.jpg (last visited Mar. 11, 2007) (Peter Paul Rubens); http://museoprado.mcu.es/icuadro_febrero_2002.html (last visited Mar. 11, 2007) (Tiziano Vecellio de Gregorio, called Titian).

¹³ See Peppet, *supra* note 9, at 516, 531 (describing how some lawyers do not "relish" the standard adversarial conception of lawyer bargaining role and would like to change it to create a work environment that is more personally compatible). Another strategy is to change the description of the bargaining universe on which the theory operates. Descriptions of bargaining practice in much of the academic literature are so airily ethereal, thin, or fanciful, that real life bargainers often would not recognize them as descriptions of bargaining. It's as if academic commentators reconstitute the world to fit their analytical categories rather than the other way around. It brings to mind a familiar aphorism, this version attributed to Abraham Maslow, that if you give a kid a hammer, soon he will discover that everything in the world needs pounding.

¹⁴ Huemann & Hyman, *supra* note 11, at 262–65 (lawyers describing why they continue to use adversarial bargaining methods). The issue is complicated by the fact that professional ethics norms require lawyers to provide loyal and diligent client representation and sometimes this is possible only through the use of non-communitarian methods. I discuss this point at length in Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51 *MD. L. REV.* 1, 78–86 (1992).

¹⁵ See THOMAS FRANK, *WHAT'S THE MATTER WITH KANSAS?: HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004). Professor Fisher's "clarification of areas of disagreement [with]" rather than "response to" Professor James White is a good example of this attitude in operation. As Fisher sees it, "White is more concerned with the way the world is, and I [Fisher]

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may indicate that lawyers understand something about real-life bargaining that communitarians do not. They understand that legal disputes are about real, not just perceived, conflicts and that the legitimate feelings of entitlement, disappointment and anger they evoke make bargaining stakes worth arguing over.¹⁶ Bargaining theory at its best, communitarian theory included, informs bargain-

am more concerned with what intelligent people ought to do . . . I want a student to negotiate better than his or her father.” Roger Fisher, Comment, 34 J. LEGAL EDUC. 120 (1984). (Professor Fisher presumably used the “his/her” pronoun construction to avoid sexist phraseology but, if alphabetical order is the default sequencing rule, the decision to place the male pronoun first is an instance of considered rather than habitual sexism. It also makes the sentence more cumbersome. In Professor Fisher’s (and others’) hands, this familiar linguistic gesture is an example of that oft-alleged but, in reality, rare phenomenon of a “politically correct” – in the pejorative sense – response. Also, why just fathers? Mothers never negotiate? See, e.g., LINDA BABCOCK & SARA LASCHEVER, *WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE* 12 (2003) (“I negotiate with my kids all the time,” quoting women subjects in the study). One could feel sorry for Professor White. He may be the most under-appreciated figure in modern legal bargaining scholarship. His review of Fisher and Ury’s *Getting to Yes*, for example, contains one of the most sophisticated and realistic descriptions of legal bargaining anywhere in the literature. See James J. White, *The Pros and Cons of “Getting to YES,”* 34 J. LEGAL EDUC. 115 (1984) (reviewing ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 11–12 (1981)); see also James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926 [hereinafter *Machiavelli*]; James Freund, *Bridging Troubled Waters: Negotiating Disputes*, 1985–86 LITIGATION 43–46. Yet his views routinely are caricatured and vilified by proponents of communitarian methods, principally for not anticipating the communitarian ascendance. See Carrie Menkel-Meadow, *Why Hasn’t the World Gotten to Yes? An Appreciation and Some Reflections*, 22 NEGOT. J. 485, 491 (2006) (describing White as someone who sees “the world as dark, competitive, and brutish.”). He deserves much better. His writing has more to teach modern bargainers than most of the communitarian panegyrics combined. He and Judge Edwards had the first major negotiation course book and almost the first one altogether. See HARRY T. EDWARDS & JAMES J. WHITE, *THE LAWYER AS NEGOTIATOR* (1977); CORNELIUS J. PECK, *CASES AND MATERIALS ON NEGOTIATION* (1972).

¹⁶ Describing lessons learned from his father, John Stuart Mill once explained why this is so: Those, who having opinions which they hold to be immensely important, and their contraries to be prodigiously hurtful, and [who] have any deep regard for the general good, will necessarily dislike, as a class and in the abstract, those who think wrong what they think right, and right what they think wrong . . .

MILL, *supra* note 6, at 57. Such an aversion to error, continued Mill, partakes “in a certain sense, of the character of a moral feeling.” *Id.* This does not mean that one should be a “fanatic,” or “insensible to good qualities in an opponent,” but one should “throw [one’s] feelings into [one’s] opinions” since it is “truly difficult to understand how any one, who possesses much of both, [could] fail to do [this].” *Id.* This can be true even when the differences between contending positions are small. See, e.g., BART EHRMAN, *LOST CHRISTIANITIES: THE BATTLES FOR SCRIPTURE AND THE FAITHS WE NEVER KNEW* 160–61, 181–202 (2003) (describing the “vitriolic attacks,” “polemical treatises,” and “personal slurs” used by early Christians in factional arguments over which particular Christian beliefs and practices to affirm). Professor Ehrman’s discussion as a whole shows how the two-thousand-year history of Christianity is, in many respects, a never-ending fight over the nature of orthodoxy.

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ing practice, but it also is tested against it,¹⁷ and it is in this latter regard that communitarian theory frequently falls short. There is room for communitarian maneuvering in legal bargaining, of course. Bargaining is a complex social phenomenon in which the need to trust co-exists with the need to deceive, influence and trade (“create” and “claim” in Lax and Sebenius’ felicitous terms),¹⁸ but an exclusively, relentlessly, or unqualifiedly communitarian approach to bargaining is another name for eleemosynary behavior and lawyers usually want to make deals rather than gifts.

I will illustrate the objections to the communitarian view by analyzing the behavior of a set of lawyers conducting a pre-trial settlement conference in a hypothetical Title VII employment discrimination lawsuit.¹⁹ I have chosen a story about bargaining to illustrate my argument, not because of any strong belief in the efficacy of story-telling as an empirical method,²⁰ but because a story shows most graphically how the communitarian approach does not

¹⁷ Professor Menkel-Meadow seems to agree. See Menkel-Meadow, *supra* note 9, at 347 (“I have long been concerned with how our grand theories operate in the empirical world.”).

¹⁸ DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 29–33 (1986); Leonard Greenhalgh, *Relationships in Negotiations*, 3 *NEGOT. J.* 235, 243 (1987) (“[t]rust is a vitally important factor in real world negotiations.”).

¹⁹ The story of one pre-trial conference, a single data point if you will, ordinarily would be a fairly skimpy basis on which to rest an argument for the inefficacy of any bargaining method. A single set of bargainers might use tactics and strategies not representative of bargainers generally, have its own distinctive interactional dynamic and produce unrepresentative results and effects. But the particular conference I will use here did not have any such idiosyncratic or unusual behavior, and the participants used the full range of moves and maneuvers that the negotiation literature suggests is effective in promoting one’s claims. On the whole, the conference looked like the type of conference one sees regularly in federal and state courts, and that was the impression of the participants as well. A videotape of the conference has been shown to hundreds of lawyers and judges in more than a dozen states and two foreign countries, and while they often disagree about the appropriateness of particular moves and maneuvers, they also agree that the conference as a whole presents a realistic, some even say exemplary, picture of court-supervised pre-trial settlement. The bargaining story told by the conference is a common one, therefore, even if it is not the only story one could tell about pre-trial conferencing in general, and that is enough for purposes of my analysis. But so there is no doubt, I will provide much of the detail of what the participants said to one another during the conference so that readers will be able to judge for themselves what they think about the conference’s representativeness.

²⁰ For my reservations about story-telling as a method, see Robert J. Condlin, *Learning From Colleagues: A Case Study in the Relationship Between “Academic” and “Ecological” Clinical Legal Education*, 3 *CLINICAL L. REV.* 337, 349–50 n.29 (1997) (the use of “stories . . . is always an advocacy move, used as much to make a point as discover one, even if the storyteller does not think so.”); Condlin, *supra* note 7, at 297 & n.407 (describing the difficulties in a “resort to narratology”), and references cited therein. Any type of story-telling can be untrustworthy. See, e.g., EHRMAN, *supra* note 16, at 170

(“[w]hat all the differences [in the Gospel accounts of the death of Jesus] show, great and small, is that each Gospel writer has an agenda – a point of view he wants to get

work in many real life contexts. A story situates one in the bargaining world face to face with the tactical and strategic choices lawyers and clients confront and the consequences attached to making those choices in different ways. From this vantage point it will be apparent that much of the time bargainers are better off pursuing individual rather than common ends and that they are more likely to do this successfully if they are secretive as well as open, argumentative as well as accommodating, suspicious as well as trusting, stubborn as well as flexible and combative as well as cordial. From the perspective of a skillful bargainer, the frequently self-defeating properties of an exclusively communitarian approach will be difficult to miss.

II. COMMUNITARIAN BARGAINING THEORY

Parts of communitarian bargaining theory simply codify consensus cultural norms and, as such, have always been part of the practical wisdom of lawyer bargaining. “Go along to get along” is an ancient, if crude, such norm. But the first systematic attempt in legal scholarship to articulate a communitarian theory of bargaining dates to the late 1970s and the work of Gerald Williams.²¹ Williams argued that “the most effective [legal] negotiators [are] characterized by positive social traits and attitudes and by the use of more open, cooperative and friendly negotiating strategies.”²² He claimed that effective bargainers characteristically avoid insulting, rude, threatening and belligerent behavior, share information freely and unguardedly, value their own and their adversary’s interests and needs equally, assess claims objectively and realistically

across, an understanding of Jesus he wants his readers to share. And he has told his stories in such a way as to convey that agenda.”).

Id. On the other hand, stories can provide insights that more generalized data bases cannot. For an illustration see note 161 *infra*. Story-telling acts on an insight of behavioral economics, that a specific account of a real life event is more likely than generalized argument to overcome the “optimism bias” often present in the analysis of data. See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law* 15 (U. Chicago Law & Economics, Olin Working Paper No. 225, Harvard Law & Economics Discussion Paper No. 495, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=590929 (describing the process of “debiasing through the availability heuristic”).

²¹ GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983) [hereinafter *LEGAL NEGOTIATION*]. The Williams book was published in 1983, but the survey research on which it was based was conducted in the nineteen-seventies and the results were published in articles before the book came out. See Gerald R. Williams et al., *Effectiveness in Legal Negotiation, in PSYCHOLOGY AND THE LAW* 113 (Gordon Bermant et al. eds., 1976) [hereinafter *Effectiveness*].

²² Williams, *Effectiveness*, *supra* note 21, at 127.

and do not seek any special advantage for themselves or their clients.²³ Collectively, these qualities define an approach I once described as “cordial bargaining.”²⁴ It was unfortunate for Williams that his research data did not support a strong link between cordiality and effectiveness. Lawyers responding to his surveys indicated that the most important quality of effective bargaining was not cordiality, but instead, a kind of legal astuteness that enabled lawyers to make convincing arguments to others.²⁵ Bargainers were effective, Williams’ subjects reported, to the extent they were “perceptive, analytical, realistic, convincing, rational, experienced and self-controlled” in the presentation of their claims.²⁶ These responses did not shake Williams’ faith in the importance of cordiality,²⁷ but they did send other defenders of communitarian bargaining back to the drawing board for more refined conceptions

²³ *Id.* Andrea Kupfer Schneider has updated Professor Williams’ research, coming to most of the same conclusions. See Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002). Like Williams, Professor Schneider bases her findings on lawyer opinions expressed in response to survey questions about the effectiveness of different negotiation styles. In justifying the use of survey research, she concludes that “perceptions of effectiveness are an important measure of what actually occurs in negotiation [and] . . . are the closest we can get to objective conclusions about effective negotiation behavior.” *Id.* at 232. Unfortunately, as I will show in this discussion, lawyer eyewitness testimony about bargaining effectiveness has all of the weaknesses of eyewitness testimony generally, so that what lawyers describe as effective negotiation practice is not always the best indication of what actually works in negotiation. Lawyer bargainers, like everyone else, like to think of themselves in flattering terms. They believe that they respond positively only to behavior that is substantively grounded and personally respectful, that they cannot be bullied, intimidated, manipulated, coerced, or pressured in any way, and that they meet such maneuvering head on and in kind. And they report this to people who ask. But much of the time this is just so much espoused theory, and as Chris Argyris and Donald Schön demonstrated many years ago, espoused theory does not always reflect theory in use. See ARGYRIS & SCHÖN, *supra* note 10 (describing the differences between espoused theory and theory in use); CHRIS ARGYRIS, *BEHIND THE FRONT PAGE* (1974) (illustrating the contradictions between what people do and what they say they do, using data from the daily workings of a newspaper editorial department). To discover what actually works in bargaining practice it is necessary to watch lawyers bargain in addition to asking them how it went.

²⁴ Condlin, *supra* note 14, at 16.

²⁵ In William’s words, lawyer bargainers were effective in proportion to:

[T]he quality of the legal work being performed, including the expertise with which an attorney had investigated the facts of his case, studied and understood the legal rules applicable to it, taken a realistic position with respect to the value of the case, and presented his position in ways that other attorneys accepted as being rational, fair and persuasive (convincing).

WILLIAMS, *LEGAL NEGOTIATION*, *supra* note 21, at 40.

²⁶ *Id.* at 28 & 39–40.

²⁷ See Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 46 (1996) (“the negotiation ritual must be performed with understanding and care.”). See also Condlin, *supra* note 14, at 18–19.

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of the communitarian approach. The first such refinement, developed by Roger Fisher, William Ury and their colleagues at the Harvard Negotiation Project (now called the Project on Negotiation), combined the ideas of cordiality and legal astuteness to produce what came to be called the theory of principled bargaining.

Principled bargaining asks lawyers to “separate the people from the problem,” “focus on interests, not positions,” “invent options for mutual gain,” and “[base agreement] on objective criteria.”²⁸ The first three of these directives come as no surprise. They reduce to the common sense suggestion that in bargaining it is useful to “see the situation as the other side sees it,”²⁹ or put another way, to avoid over-interpretation and projection in deducing another bargainer’s motives, meanings and purposes. But the fourth directive, the injunction to base settlement on objective criteria,³⁰ added an important new element to the communitarian conception of bargaining and gave the theory of principled bargaining its jurisprudential bite. Anticipating John Roemer’s criticism of the “informational poverty of bargaining,”³¹ the directive made a start on justifying bargaining’s place in a system of adjudicatory justice by showing how bargained-for results could be legitimate as well as final. Building on William’s idea of legal astuteness, principled bargaining used the concept of objective criteria to transform legal bargaining theory from a theory of strategy and manners to one of morality and politics. For many commentators, however, particularly those who thought individual interest-based bargaining was destined to fail, principled bargaining’s refusal to jettison adjudicatory methods completely and its incorporation of some features of

²⁸ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 11–12 (1981). There is a second edition of the book, with Bruce Patton as a third author. See FISHER, URY & PATTON, *supra* note 7.

²⁹ FISHER, URY & PATTON, *supra* note 7, at 23. See also Janos Nyerges, *Ten Commandments for a Negotiator*, 3 NEGOT. J. 21, 25 (1987) (“[t]he good negotiator feels the necessity to put himself or herself into the situation of the other side.”).

³⁰ FISHER, URY & PATTON *supra* note 7, at 88–89. Objective criteria are standards and procedures that exist independently of each side’s will, are legitimate and practical, and pass the test of reciprocal application, that is, each side would use them even if their bargaining situations were reversed. Examples of fair standards included market value, replacement cost, depreciated book value, competitive prices, scientific judgment, precedent, community practices, traditions, moral norms, and what a court would decide. *Id.* Examples of fair procedures included taking turns, drawing lots, letting someone else decide, and the like. *Id.* One can see how there could be considerable room for argument over what constituted fair standards and fair procedures in particular cases. For a critique of the idea of objective criteria, see Condlin, *supra* note 14, at 25 n.71, 32–34.

³¹ John Roemer, *The Mismatch of Bargaining Theory and Distributive Justice*, 97 ETHICS 88, 90, 97–102 (1986) (arguing that bargaining theory lacks the sophistication necessary to consider questions of distributive justice).

adversary advocacy, prevented it from being the final word. For these commentators, a radically new approach was needed, one that defined bargaining theory in exclusively communal rather than individualistic terms and that did not get sidetracked, however well-intended, in the destructive quest for correct answers to substantive legal questions. This is where the theory of problem-solving bargaining came in.³²

The most comprehensive statement of the problem-solving model, that of Carrie Menkel-Meadow, developed at about the same time as the theories of cordial and principled bargaining. Problem-solving bargainers satisfy the “real,” “underlying,” “basic,” or “actual,” needs that parties bring to negotiation, rather than their legal needs expressed in the proxies of money or goods.³³ They consider multiple proposals for resolving disagreements simultaneously and do not get locked into patterns of argumentation and concession over single demands.³⁴ They articulate “reasons why a particular solution is acceptable or unacceptable rather than simply reject an offer or make a concession.”³⁵ While they sometimes discuss the legal merits of particular arguments, one of the “primary advantages” of the problem-solving method “is that no judgment need be made about whose [legal] argument is right [and whose is] . . . wrong.”³⁶ Problem solvers seek out shared interests, explore value differences, look to third parties for contributions, aggregate and disaggregate resources, seek substitute goods and exploit the long and short term values of the parties,³⁷

³² Problem-solving bargaining has both a warm and fuzzy version grounded in the literature of humanistic psychology, CARL R. ROGERS, *ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY* (1961), and a hard and scientific version grounded in the literature of economics and game theory, ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1985). There are major differences between the two versions though each believes it is better to coordinate than fight, but for different reasons.

³³ Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 794 n.155, 795 (1984). Professor Menkel-Meadow has written quite a bit more about the problem-solving model since this early piece, but to the extent that anything has changed it has been in the direction of making her model less distinctive. Compare *id.* at 826 (not necessary to argue the substantive merits of the parties' claims to settle a dispute) with Menkel-Meadow, *supra* note 9, at 600 (arguing substantive merits of the parties' claims can advance settlement).

³⁴ *Id.* at 822.

³⁵ *Id.* at 825.

³⁶ *Id.* at 826. Not all individual variants of the method share this agnosticism about the role of argument on the merits in bargaining. See, e.g., John S. Murray, *Understanding Competing Theories of Negotiation*, 2 *NEGOT. J.* 179, 182–85 (1986) (“the problem-solving negotiator . . . us[es] the merits as a central negotiating focus”).

³⁷ *Id.* at 813.

until they reach agreements that satisfy everyone. They distribute bargained-for material fully among the parties rather than waste it on competitive wrangling or leave it on the table because of an inability to agree, and reconfigure agreements until it is no longer possible to make them more efficient.³⁸ Collectively, they focus attention on “solving the problem . . . rather than winning the argument.”³⁹

At first glance, the problem-solving method might seem to be a slightly dressed up version of principled and cordial bargaining and to a large extent it is. All three approaches share the common premise that adversarial position-taking is the major cause of bargaining breakdowns,⁴⁰ assume that the underlying interests of adverse parties are invariably compatible and trust that bargainers who are sufficiently skillful and flexible always can find common ground. But the theories also are different in several important respects and the key to the differences lies in the contrasting adjectives each uses to identify the essential character of bargaining.⁴¹ Principled bargaining is grounded in the belief that legal, moral and social principles are always available to dictate the solution to any dispute and that these principles can be found in the set of background norms, both explicit and tacit, that lawyers and clients accept as authoritative. Problem-solving bargaining, by contrast, sees the attitude and skill of individual bargainers as the key to success. While background norms can be useful, it is the bargainers’ willingness to treat bargaining as a joint venture, in which the shared interest in reaching an agreement outweighs each bargainer’s individual interest in reaching her or his most favorable agreement that has the biggest influence on settlement.⁴² Cordial bargaining, by contrast, assumes that it is enough to be nice, that this will cause others to reciprocate and that reciprocal niceness

³⁸ *Id.* at 822.

³⁹ *Id.*

⁴⁰ See FISHER, URY & PATTON, *supra* note 7, at 4–5, 12, 82–83, 91, 152, for a description of positional or adversarial bargaining.

⁴¹ One also might see this as a difference among the various metaphors each theory uses to visualize the nature of bargaining interdependence. See Greenhalgh, *supra* note 18, at 236 (“[t]he choice of metaphor can make a big difference in a negotiator’s definition of the relationship [with another negotiator].”).

⁴² Proponents of problem-solving bargaining may have backed away somewhat from this aversion to using substantive principles to settle disputes and, if so, they have effaced the difference between themselves and the proponents of principled bargaining even further. See Menkel-Meadow, *supra* note 11, at 600 (extolling the “‘substantive’ problem-solving possibilities of negotiations that are conducted through analysis, rational thinking, and coordination, rather than power-plays, competition and deception.”).

inevitably leads to non-self-interested, mutual concessions resulting in agreement.⁴³ Think of this as a belief in niceness as its own reward.

This burst of bargaining scholarship in the late 1970s and early 1980s established the general analytical framework for communitarian bargaining theory and Professors Williams, Fisher, Ury, and Menkel-Meadow as the theory's parents, at least legally.⁴⁴ Like all good parents, they have had precocious, dutiful and unruly children but, for the most part, their offspring have not so much changed the original communitarian model as combined it with other bodies of scholarship, or rearranged its various components, to produce hybrid rather than competitor variations. Since the mid-1980s, in fact, there has been such a steady stream of refine-

⁴³ See, e.g., CHARLES E. OSGOOD, AN ALTERNATIVE TO WAR OR SURRENDER (1962) (describing the "graduated reciprocation of tension reduction" method of negotiation, in which bargainers make unilateral concessions as a means of inducing their adversaries to reciprocate); Joseph P. Forgas, *On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies*, 74 J. PERSONALITY AND SOCIAL PSYCHOL. 565, 574 (1988) (describing how negotiators in an experimentally induced good mood have a kind of "emotional contagion" that induces cooperative behavior in others); Leigh Thompson et al., *Some Like it Hot: The Case for the Emotional Negotiator*, in SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE 139, 142 (L. Thompson et al. eds., 1999) (hypothesizing that the trusting attitude implicit in cooperative behavior may stimulate reciprocal behavior in others); Leigh Thompson & Janice Nadler, *Negotiating Via Information Technology: Theory and Application*, 58 J. SOCIAL ISSUES 109 (2002) (describing social contagion as "the spread of affect, attitude, or behavior from Person A ('the initiator') to Person B ('the recipient') where the recipient does not perceive an intentional influence attempt on the part of the initiator;" and describing the form most relevant to the study of legal negotiation as echo contagion, "which occurs when a social actor imitates or reflects spontaneously the affect or behavior of an initiator"); Clark Freshman, Adele Hayes & Greg Feldman, *The Lawyer-Negotiator as Mood Scientist: What We Know and Don't Know About How Mood Relates to Successful Negotiation*, 2002 J. DISP. RESOL. 1, 14-17 (2002) (describing how negotiators in a positive mood get significantly larger joint gains); Chris Guthrie, *Principles of Influence in Negotiation*, 87 MARQ. L. REV. 829, 833-35 (describing the natural urge to reciprocate as the "fourth principle of influence that a lawyer might use" to "induce her counterpart to settle on terms that are advantageous to her [the lawyer's] client").

⁴⁴ For examples of contemporaneous literature in related fields, on which legal scholars drew, see THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT (1960); RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965); ARTHUR LALL, MODERN INTERNATIONAL NEGOTIATION (1966); CHESTER L. KARRASS, THE NEGOTIATING GAME (1970); OMAR J. BARTOS, PROCESS & OUTCOME OF NEGOTIATIONS (1974); JEFFREY Z. RUBIN & BERT R. BROWN, THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION (1975); ORAN R. YOUNG, BARGAINING: FORMAL THEORIES OF NEGOTIATION (1975); DANIEL DRUCKMAN, NEGOTIATIONS: SOCIAL PSYCHOLOGICAL PERSPECTIVES (1977); P.H. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS CULTURAL PERSPECTIVE (1979); DEAN G. PRUITT, NEGOTIATION BEHAVIOR (1981); SAMUEL B. BACHARACH & EDWARD J. LAWLER, BARGAINING: POWER, TACTICS, AND OUTCOMES (1981); I. WILLIAM ZARTMAN & MAUREEN R. BERMAN, THE PRACTICAL NEGOTIATOR (1982); HOWARD L. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1985); and LAX & SEBENIUS, *supra* note 18.

ments to, or modifications of, the communitarian model that the debate over its content now often seems to be the only scholarly bargaining game in town.⁴⁵ Noteworthy among these efforts is

⁴⁵ See Peppet, *supra* note 9, at 484–97 (describing debates among the various communitarian models of bargaining). Perhaps the best evidence of the dominance of the communitarian model in bargaining scholarship is found in the second edition of the Wiggins and Lowry anthology. See WIGGINS & LOWRY, *supra* note 5. Fewer than a dozen (out of 116) article excerpts in the book are critical of the communitarian model, for example, and each of these is usually buried at the end of a chapter in which the other excerpts extol various features of the communitarian approach. In addition, the anthology’s section on bargaining advocacy, the central component of an adversarial or positional method, is the weakest and second shortest in the book. *Id.* at 363–83. It does not include a single excerpt from the vast literature on Rhetoric dating from Aristotle to the present, for example, and it treats the issue of bargaining “fairness” as a purely social psychological phenomenon, leaving the philosophical literature out of the picture altogether. See also ANDREA KUPFER SCHNEIDER & CHRISTOPHER HONEYMAN (eds.) *THE NEGOTIATOR’S FIELDBOOK* (2006) (section on “Is it Moral, is it Fair, is it Right?” has excerpts from only social psychology articles and nothing from philosophy or political theory). For philosophy and political theory based discussions of bargaining fairness, see, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L. J.* 2619 (1995); David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 *PHIL. & PUB. AFF.* 397 (1985); Roemer, *supra* note 31. One of its article excerpts even limits discussion to perceptions of fairness, seemingly on the belief that it is no longer possible to get the real thing. See Welsh, *supra* note 3, at 1 (“[p]eople often disagree . . . whether an outcome is fair . . . The definition of distributive fairness is, therefore, inevitably subjective.”), and another confuses perceptions of fairness with fairness *simpliciter*. See Leigh Thompson & Janice Nadler, *Judgmental Biases in Conflict Resolution and How to Overcome Them*, in *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE* 213, 224–25 (Morton Deutsch & Peter T. Coleman eds., 2000). Drawing, among other things, on the increasingly popular literature of behavioral economics, the book depicts bargainers as programmed agents at the mercy of their tacit heuristics, biases and urges and easily manipulated by framing tricks, salience concerns, and other social-psychological forces and maneuvers. For descriptions of the development of behavioral economics and its relationship to law, see generally *BEHAVIORAL LAW AND ECONOMICS* (Cass Sunstein ed. 2000); Russell Korobkin & Thomas Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 *CAL. L. REV.* 1051 (2000); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471 (1998). For a general-audience description, see Craig Lambert, *The Marketplace of Perceptions*, 108 *HARV. MAG.* 50, at 1 (2006) (describing behavioral economics as “the study of how real people actually make choices”). There are few self-consciously evaluating and deciding agents in the bargaining universe described by Wiggins and Lowry, and seemingly no one who has any kind of critical perspective on Prospect Theory or has read Kahneman and Tversky. This might be explained, in part, by the fact that much of the literature on which Wiggins and Lowry draw is based on experiments using law and business school students as subjects, and students are less fully socialized bargainers than are seasoned practitioners. See, e.g., Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 *SO. CAL. L. REV.* 113, 127–28 (1996) (describing the influence of “framing effects” on Cornell law students’ decisions of whether to accept settlements in a hypothetical bargaining exercise). It is sad that the work of Kahneman and Tversky has suffered this fate. In the hands of legal bargaining scholars, the useful concepts of “heuristics and biases” have become another “paradigm,” an inventive and productive concept ground into near unintelligibility by indiscriminate overuse. All of that said, however, the Wiggins and Lowry anthology is still the most important anthology on legal bargaining both because it is the only one and because, in areas where it is expert, it is quite good. Negotiation text books generally evidence the same

Professor Riskin's pairing of communitarian bargaining with mindfulness meditation ("a method of non-judgmental, moment-to-moment attention developed some 2500 years ago by the Buddha"), to create a bargaining method that permits the "thoughtful negotiator" to escape the "egocentric cravings" that dominate the lawyer's "Standard Philosophical Map."⁴⁶ Professors Korobkin and Guthrie, among others, have mined the rich social-psychological literature on "prospect theory" produced by Daniel Kahnemann, Amos Tversky and their colleagues, to flesh out the communitarian conception in sophisticated and subtle ways, as well as provide a more substantial defense of the claim for the theory's comparative effectiveness.⁴⁷ Scott Peppet has constructed a contrarian version of the

tactic communitarian bias. Of all the books in the field, for example, few show any real sympathy for the adversarial model and those that do qualify that sympathy in numerous ways. *See, e.g.*, CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (5th ed. 2005); JAY FOLBERG, DWIGHT GOLANN, LISA KLOPPENBERG & THOMAS STIPANOWICH, *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 43–53, 69–70 (2005). Among the commentators, Charles Craver, Donald Gifford, David Lax, James Sebenius, Gerald Wetlaufer, James White and Scott Peppet are particularly good at blending communitarian and adversarial methods in an intelligent and sophisticated manner. *See, e.g.*, LAX & SEBENIUS, *supra* note 18, at 29–33 (describing the iner-relationship between creating and claiming value); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 82–88 (1985) (describing how competitive and cooperative bargaining strategies are used in combination depending upon context); Gerald B. Wetlaufer, *The Rhetorics of Negotiations* (July 23, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=770545; White, *Machiavelli*, *supra* note 15; Peppet, *supra* note 9, at 535 ("collaboration does not mean revealing all of one's information, preferences, interests, and litigation strategies."). Not all legal bargaining scholarship is social-psychologically based. There is an older body of literature grounded in economics, rational choice theory, and game theory, which remains influential though it focuses more on devising optimum incentive and constraint structures, within which bargaining can operate, than on analyzing the nature of effective bargaining practice. *See, e.g.*, Samuel R. Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991).

⁴⁶ RISKIN, *supra* note 5, at 13–17. *See also* Freshman et al., *supra* note 43, at 75–78 (describing how cognitive-behavioral techniques based on mindfulness meditation have been shown to promote long term mood management). These various approaches to bargaining can be seen as vectors of the so-called "comprehensive law movement," the principal subdivisions of which are therapeutic jurisprudence, preventive law, creative problem-solving, holistic law, alternative dispute resolution, and collaborative law. Each of these views shares a common concern for client personal needs and emotional well being in addition to legal rights. *See* SUSAN S. DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 169–202 (2004).

⁴⁷ RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 156–71 (2002); Russell Korobkin, *supra* note 3; Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43 (1999). For the original work, see Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 *ECONOMETRICA* 263 (1979); Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representations of Uncertainty*, 5 *J. RISK & UNCERTAINTY* 297 (1992).

theory that encourages lawyers to bargain explicitly over the nature of their bargaining in addition to the particulars of their disputes.⁴⁸ Robert Cochran has grounded a similar view in religious belief,⁴⁹ and Donald Gifford has combined adversarial and communitarian methods into a single, context-dependent hybrid.⁵⁰

Clever and thoughtful as these (and other such) variations are, like the original communitarian model, they remain untested against the reality of actual bargaining practice and this is a cause for concern. The appeal of any bargaining theory ultimately depends not just on the elegance of its design but on its ability to explain and inform bargaining practice. If it's "not in the rocks," as geologists say, it cannot be in the theory. Most attempts to determine whether communitarian bargaining theory is "in the [legal] rocks" have been based on facsimile or opinion evidence (i.e., simulated student bargaining exercises or responses to lawyer surveys), rather than direct data of lawyers bargaining. Students do not bargain in the same way as lawyers,⁵¹ however, and lawyer-bargainers have strong incentives to tell stories that are better than the reality they purport to describe. To learn whether communitarian methods actually work it is necessary to analyze them in their natural habitat of actual lawyer bargaining and to do that we turn to the Drillco case.

III. PAINE V. DRILLCO: A STORY OF A NEGOTIATION

A. The Case

Phillip Paine (Paine), a former employee of the Drill Corporation (Drillco), a United States based oil company with refineries throughout the world, sued Drillco for wrongful termination of his employment contract. Paine had worked for Drillco for twelve years at the time the dispute arose and held the position of Electrician.

⁴⁸ See Peppet, *supra* note 9.

⁴⁹ Robert Cochran, *Legal Representation and the Next Steps Toward Client Control: Attorney Malpractice for Failure to Allow the Client to Control Negotiation and Pursue Alternatives to Litigation*, 47 WASH. & LEE L. REV. 819 (1990).

⁵⁰ Gifford, *supra* note 45. Perhaps the best work has been done outside the legal academy. See LAX & SEBENIUS, *supra* note 18.

⁵¹ Robert J. Condlin, "Every Day and in Every Way We Are All Becoming Meta and Meta," or *How Communitarian Bargaining Theory Conquered the Universe (of Bargaining Theory)*, 23 OHIO ST. J. DISP. RESOL. 231 (2008) (describing the differences between student and practitioner bargaining behavior).

cal Supervisor (his duties consisted of doing “general electrical work”), in the company’s Sampson Refinery in Charlottesville, Virginia. Paine was offered an opportunity to take a one-year overseas assignment to work for Drillco Services Venezuela (Drillco Venezuela), a wholly owned subsidiary, on a refinery upgrade project in Amuay, Venezuela. He and six other Drillco employees were given the details of the assignment at an orientation meeting at the Sampson Refinery two months before the assignment was to begin. They were told that they would receive a thirty-five percent increase in salary while in Venezuela, twenty-five percent of which would be a bonus for working overseas and the other ten percent a hardship supplement. The employees also were told that they could take their families with them to Venezuela and were shown slides of the housing available on the Drillco Venezuela compound. The housing consisted of both fixed foundation brick houses and mobile homes; employees with children were to be given preference for the fixed foundation housing. Paine and two of the other interested employees each had three children. The employees also were told that they could return to the United States during their time in Venezuela for emergencies and that the company would determine what constituted an emergency. Paine accepted the assignment and moved with his family to Venezuela in August of the same year.

Upon arriving in Venezuela, Paine and his family were assigned to mobile home housing. He was the only employee with children not given a fixed foundation house. Paine was African-American and the other employees were Caucasian. Paine complained about the housing assignment to his Venezuelan supervisors, arguing that the mobile home was not what he had been promised and that it was not comparable to the housing given to white employees. The company made a subsequent offer of a fixed foundation house, but it was in the nearby town of Judibana and not on the company compound. Paine concluded that the Judibana house was inferior to the mobile home so he declined the offer.

Three months later, in November, Paine decided to return to the United States to resolve problems associated with his home mortgage and to assist his mother-in-law while she was undergoing surgery. He testified that he asked his Venezuelan supervisors for permission to make this trip and they granted it. He left Venezuela with his family to go to the United States on December sixteenth and returned to Venezuela the following January first. Upon his return, Paine’s Venezuelan supervisors ordered him to return to

the Sampson Refinery, alleging that he had “left Venezuela without permission.” During the course of an investigation by officials at Sampson, Paine claimed that he had been given permission to leave Venezuela, but when the Sampson officials checked with Paine’s Venezuelan supervisors they denied this. The Venezuelan supervisors also said that when they checked with the travel agent Paine used to book his trip, they learned that he had made his reservations in September long before he claimed to have learned about the mortgage problem and his mother-in-law’s surgery. Based on this information, Drillco fired Paine for leaving Venezuela without permission and for lying to the company about the circumstances surrounding his leaving.

Paine filed a complaint in federal district court for the Eastern District of Virginia alleging that his housing assignment and firing were racially motivated in violation of Title VII of the Civil Rights Act of 1964,⁵² and section 1981 of the Civil Rights Act of 1866.⁵³ He asked for a jury trial under the Section 1981 claim. In his prayer for relief he asked for \$42,000 in damages (\$6,000 a month for the seven months of his assignment he had not been allowed to complete), and for attorney’s fees. Subsequently, he found new employment as an electrician with another company but at a greatly reduced salary (\$1,120 a month). He started the new job one year to the day after the commencement of his Venezuelan assignment. Drillco denied that it discriminated against Paine. It said that the Venezuelan housing assignments were made on a random basis and that if any particular employee did better than any other, good fortune rather than malevolence was the cause. It also argued that Paine left Venezuela without permission in December and lied to company officials about being authorized to make the trip. He was fired, according to Drillco, because of this lie and because he breached the company’s travel policy, and not because he was black.

A pre-trial order filed with the District Court identified the contested facts in the dispute as whether “the working conditions at Drillco Refinery Venezuela and the facts surrounding Paine’s request to return to the United States [were] the reasons for Paine’s termination.” The legal issue was described as whether there was any discrimination against Paine on the basis of race.” The pre-trial conference was presided over by an experienced and highly regarded federal magistrate who was soon to become a fed-

⁵² 42 U.S.C. § 2000e *et seq.* (2000).

⁵³ 42 U.S.C. § 1981 (2000).

eral district judge. The defendant was represented by a senior Title VII partner at one of the country's (now world's) largest law firms and the plaintiff was represented by a former staff lawyer for the United Auto Workers and a former Assistant United States Attorney for the Northern District of California, both of whom had extensive Title VII litigation experience. All of the participants were highly successful lawyers and regarded as leading practitioners in their respective areas of concentration. The conference lasted two and one-half hours.⁵⁴ By the time it was over the Paine lawyers

⁵⁴ The conference was videotaped, and the tape was transcribed. The Drillco problem and the case materials to go with it were prepared by Professor Steven Saltzburg for the Virginia Advocacy Institute. The actual case on which the problem was based (a New Jersey federal district court action involving a major American oil company), had been settled, but the participants in the Drillco conference were not involved in that settlement and were not informed of its terms. They had the full set of documents and testimony (i.e., pleadings, motions, rulings, deposition transcripts, correspondence, relevant documents, pictures and physical evidence, as well as legal research and witness profile memoranda), from the original case, all appropriately modified to make the case anonymous. They did not know any of the original parties and witnesses.

There always is a concern that observer-effects will alter the behavior of participants in a videotaped performance, that they will act a little like MTV reality show characters and play to the camera in an effort to call attention to themselves, but there is no evidence that this happened in the Drillco conference. The taping was done unobtrusively, in an ordinary conference room, with only the lawyers and magistrate present. No cameras, microphones, wires, or other such recording equipment were visible, so there was little to remind the participants that they were being watched. Moreover, because the conference lasted for almost three hours there was ample time for any latent awareness of the staged nature of the meeting to pass from consciousness. All of the participants were experienced litigators, accustomed to performing in public, and when the conference was over they described the experience as identical to the real thing, down to the sweaty palms at the end of the last full group meeting when they were worried they would not be able to finalize the deal. No one reported being self-conscious of the taping, even when asked, and all were surprised by some of their behavior on the tape, unaware that they had said and done such things. They also looked and sounded like they did in non-videotaped situations.

The Drillco conference is not representative of legal dispute bargaining generally. It bears little resemblance, for example, to one of the most common forms of legal bargaining, the bureaucratized negotiation of criminal pleas that takes place between prosecutors and defense attorneys in the corridors of court houses while cases are waiting to be called. Plea bargaining is a truncated, to-the-point, and limited process that is based on an elaborately developed and jointly held set of internalized categories and norms designed to dispose of most cases routinely and reserve true bargaining for genuinely new problems. The format and time frame of the Drillco pre-trial conference are luxuries which plea-bargaining rarely enjoys. Such conferences usually are limited to large civil disputes that cost a great deal to try and that involve great risk for both sides (so that settlement is preferable). It is easier to study lawyer bargaining technique in the formal pre-trial conference context, however, because the moves and maneuvers lawyers use are in plain sight and in larger than life proportions for all to see. Tactics and strategies that work in these conferences also work in the lesser included case of bureaucratic bargaining, however, once they are appropriately downsized and "arranged" (in the musical sense). I limit discussion to a single, final-meeting version of the pre-trial conference because I want to discuss the effects of face-to-face bargaining technique, rather than structural or time constraints, on bar-

had modified the magistrate's understanding of the substantive issues in the case and his corollary evaluation of what the case was worth and he, in turn, had imposed that changed view on the Drillco lawyer. One would not have expected such a one-sided result in a negotiation among evenly matched and highly skilled lawyers working with materials that were equally balanced. Understanding how it happened will help illustrate the limits of the communitarian approach to legal bargaining.

1) The Full Group Meeting

The conference began quietly, with the participants sitting around an octagonal table in a sparsely but comfortably furnished room. The magistrate spoke first, explaining the purpose and structure of the conference,⁵⁵ and telling the parties that another judge would try the case should settlement efforts fail.⁵⁶ He introduced himself to the Paine lawyers,⁵⁷ whom he did not know, and asked if there had been "any settlement discussion among counsel."⁵⁸ When both sides answered no,⁵⁹ he summarized their answers as indicating that "there's no demand that's been made or offer on the table."⁶⁰ He concluded by describing the nature of the proceeding⁶¹ and the extent of Paine's claims.⁶² Very few pleasant

gaining outcomes, but I do not mean to minimize the importance of the latter. When one builds extended breaks into the bargaining conversation (in the form of multiple meetings spaced over time), so that bargainers have an opportunity to reflect on how things are going, techniques that work when there is limited time to react often do not work as well, and sometimes they do not work at all.

⁵⁵ "So that we could talk about the prospects of settlement of the case." *Drillco* Pre-Trial Conference Transcript, Oct. 1985 at 10 (transcript on file with Author) [hereinafter *Drillco* Transcript].

⁵⁶ "Judge T will be trying this case." *Id.* Having different judges for settlement and trial has important consequences for how settlement is conducted and the type of information that the parties are willing to share. This topic has been the subject of quite a bit of discussion in the scholarly literature. See, e.g., Harold Baer, Jr., *History, Process, and a Role for Judges in Mediating Their Own Cases*, 58 N.Y.U. ANN. SURV. AM. L. 131 (2001); Daisy Hurst Floyd, *Can the Judge Do That?: The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45 (1994); James A. Wall & Lawrence F. Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27 (1982).

⁵⁷ "Mr. B I know you well of course, and I'm afraid I haven't encountered either of you before." *Drillco* Transcript, *supra* note 55, at 11.

⁵⁸ *Id.* at 10.

⁵⁹ In effect the Paine lawyers said "some modest" discussion, and the Drillco said "nothing of real substance." *Id.*

⁶⁰ *Id.* at 11.

⁶¹ "The entire case will be tried to a jury." *Id.*

⁶² "The two claims are Title VII and 1981" and "pendent state civil rights act claims, wrongful discharge, breach of contract." *Id.*

tries were exchanged, there was almost no small talk, and all of the parties seemed very serious. It was a civil, businesslike, somewhat perfunctory beginning.

The full-group meeting lasted about thirty minutes, progressing through a series of increasingly acrimonious exchanges about most of the major issues in the case⁶³ and ending in an all-out shouting match between the lawyers. At that point, the magistrate ended the meeting and caucused privately with each side. I will reproduce only the shouting match here. There are several interesting patterns in the prior conversations, many of them prophetic of things to come, but each resurfaces in the caucuses and with greater effect, so I will reserve analysis for then. When the magistrate participated in the discussion he usually sided with the Drillco lawyer, both supporting his arguments and challenging those made by the Paine lawyers. It is difficult to be sure how much of a preconceived view he brought to the conference. At times he seemed genuinely curious, asking open-ended questions about evidence, testimony and the parties' respective theories of the case. Yet, at others, he controlled the conversation with leading, short answer questions, unilateral topic shifts and strong statements in favor of one or the other side (invariably Drillco), suggesting that he had made up his mind. The lawyers responded to this pattern in different ways. The Paine lawyers assumed that the magistrate meant what he said only when it helped them and disputed all other points vigorously, while the Drillco lawyer usually agreed with the magistrate's views whether favorable or not and adjusted his approach accordingly. Despite all of the mixed signals, it seems fair to say that by the end of the meeting, all of the lawyers thought that the magistrate was squarely on Drillco's side.

The meeting ended when a magistrate question concerning what "[the company supervisors] say [were] the reasons conveyed to them by [Paine] for wanting vacation time" provoked a sharp disagreement over Paine's motives for going home.⁶⁴ The issue of motives had been discussed earlier, but this was the first time the Drillco lawyer argued his "home for holidays" theory of the case.⁶⁵

⁶³ In order, the parties discussed the following issues: Whether Paine's recovery was limited to economic loss; whether he was assigned substandard housing because he was black; whether he had permission to return to the United States in December; whether Company witnesses would be credible; whether Paine's December trip was prompted by an "emergency" as defined by the Company manual; whether Paine lied to Company investigators about the reason for his trip; and finally, if Paine lied, whether it was the reason he was fired.

⁶⁴ *Id.* at 11.

⁶⁵ *Id.* at 40.

DA: Well, when he talked to [his supervisor] . . . Paine denies that he talked to [his supervisor], but [the supervisor] will testify that Paine did talk to him and indicated he was having trouble with his mortgage and he needed to go up and have something, to try to settle it out. But interestingly enough, that this problem with the mortgage originally came up in mid-October and it was on the nineteenth of October when Paine had his long-distance conversation with the fellow at the bank and it's not until late in November when Paine suddenly decides, gee, I've got to run up there and do something about it. I assume that the phone in the office still worked back to the United States. He had talked to the guy at the bank once and I'd like to know and I'm sure the jury will want to know why the guy didn't go back and pick up the phone and call the bank again and say "Hey, what's happening?"

PI: Mr. [Drillco lawyer], I am certain you can appreciate one's concern. You're in a foreign country, your house may be foreclosed on, there is a substantial investment that could be lost if they are not there physically present to handle the matters to straighten them out.

DA: I appreciate that completely and what I don't understand is when you're there in a foreign country, you're living in a compound with the people that you work with and your link to the outside is a telephone in the office of your superintendent and he has allowed you to use it before and you certainly could assume he would do it again, why you wouldn't walk or drive across the compound and use that telephone to call back to the bank to talk to [the bank officer] again, because you'd had a conversation with him before and [the bank officer] had indicated "I will talk to your real estate broker, I will talk to the other bank and find out what the story is for you." [The bank officer] did that. He wrote a letter on the twenty-third of October telling Paine what the story was. If Paine didn't get the letter, query: why didn't he pick up the phone and call [the bank officer] again and say, "Hey, I haven't heard from you, what's happening." Because it's easier to say, "Gee, I got a problem, Christmas is coming, I want to go home."

P2: You know, this idea that they wanted to go home for Christmas . . .

- DA: [Interrupting] Well, they got there at Christmas time, didn't they?
- P2: They got there a week before Christmas, if I am not mistaken. It's true that they were there during that period. It's also true . . .
- MA: [Interrupting] The first time they've all been away from home, I mean they're homesick . . .
- P2: Well, that's a motive that is as much a figment of defense counsel's imagination as anything I've ever seen.
- DA: Yeah, but the difference is I don't have to . . .
- P2: [Interrupting] There's nothing in the record to suggest that that's real.
- DA: I don't have to prove that that's why he did it. You have to prove that he did it for discrimination. I can offer that as an alternative to the jury as to perhaps . . . it's not discrimination. Maybe the guy is lying to him as to why he wants to come up here. If he's lying about that, he's probably lying about something else.
- P2: Why would somebody want to come home for Christmas when their entire family is down there with them in the first place, assuming . . .
- MA: [Interrupting] His entire family is homesick.
- P2: Assuming. Well I think that's a little iffy . . .
- MA: [Interrupting] Bring the whole crew home with him. Didn't cost him a nickel did it?
- P2: Would one jeopardize one's job in order to do that? If, on the contrary . . .
- MA: [Interrupting] Maybe he felt he had more secure tenure.
- P2: Everyone around him was asking permission to go home and being allowed permission to go, under circumstances involving less emergency than his family situation, coupled with his mortgage situation . . .
- MA: [Interrupting] Well, is that in fact the case. Can you prove that?
- P2: And he's told . . . well that's been his testimony . . . and he's told when he consults with [his Venezuelan supervisor], he's told that it may be a little slow during the last couple of weeks in December, so that he times it at the company's convenience, rather than his personal convenience for the holidays.
- MA: The bottom line is that it's not a situation where he is footing the bill for all of this himself. The company is

paying the bill for him to come home, paying for his vacation and paying to fly the whole crew back.

P2: I'm not sure that's quite accurate, your honor. I think they are paying his airfare, which in and of itself, furthers my point. They would surely not have done that if he had left without permission. But, furthermore . . .

DA: [Interrupting and almost shouting] And they wouldn't have done it if they'd wanted to discriminate against him, either.⁶⁶

The argument continued in this fashion for several more minutes, covering such charged topics as “how in the world [did] the company [pay] the bill for Paine’s trip if Paine had not gotten permission,” and “Paine’s attitude [was] I don’t care whether I’ve got permission or not, I’m going to go.”⁶⁷ By the end, relations among the lawyers were strained. Even in transcript form it is obvious that their comments had become longer, more pointed and more personal than earlier in the meeting and on tape it is apparent that they also had become louder and more sarcastic as well. At times the lawyers literally shouted at one another, interrupting to make speeches rather than responding to each other’s points. The magistrate’s decision to end the meeting was easy to understand.⁶⁸

Figuring out why the conversation became so unproductive is difficult. There was no obvious first cause of the conflict, no single gratuitously insulting or personally offensive comment that drew first blood and set off a series of self-defensive recriminations. None of the lawyers had a fragile ego or weak personality and while their areas of practice overlapped, none was a long-standing competitor of, or had a history or past struggles with, the other. Going into the conference each of the lawyers expressed respect for the others and while all of them thought that discussion was likely to be challenging, they also thought it was likely to be cor-

⁶⁶ *Id.* at 39–42.

⁶⁷ *Id.* at 42–43.

⁶⁸ I'll tell you what, I think we've been through the discussions here pretty thoroughly, unless there's something else we can settle, I would want to meet with you privately for some more discussion. Let's do this. Why don't you [to the Drillco lawyer] come into my office over here, and we'll leave the conference room, and you all [to the Paine lawyers] can just relax for a little while.

Id. at 42 & 45. The lawyers' behavior helps explain the popularity of the private caucusing model of pre-trial settlement. Judges often believe, and reasonably so, that lawyers will posture as long as they are face to face and that they must be separated if any progress is to be made. Private caucusing comes with its own problems, however, as it relegates the parties to a private, sometimes lawless world of shuttle diplomacy in which deception is rampant and strong arm tactics abound.

dial. None of them had qualms about arguing forcefully for points they believed in, but neither did they believe that it was productive to argue for the sake of arguing, or to punish others gratuitously. Each knew that scoring debater's points had the potential to antagonize and that adversarial histrionics did not play well with this particular magistrate. Yet they turned the meeting into a form of stylized combat. Why this happened is hard to understand.

It is possible that the lawyers thought that arguing forcefully was the best way to establish their adversary credentials with the magistrate and thus, the best way to enlist his aid in securing a favorable settlement. The argument for doing so has a crude logic. Settlement judges will apply pressure to concede where they think it will have the most effect. Cases which do not settle must go to trial, so pressure to concede will have the greatest effect on lawyers who are reluctant to go to trial. Lawyers with poor advocacy skills and weak commitment to their cases will fear trial more than lawyers with good skills and strong commitment, or at least that is what judges will think. Thus judges will apply greater pressure to concede on lawyers with poor advocacy skills and weak commitment. Lawyers must prove that they know how to assess evidence, argue law and stick to their positions, therefore, if they are to avoid this pressure. If in so doing they risk polarizing conversation, so be it. No one ever made a good deal by being unwilling to lose it. The argument has weaknesses, of course, but it also has a certain appeal, particularly to practitioners whose threshold for contentious discussion is a good deal higher than citizens (or legal academics) generally.⁶⁹

Whatever the cause, the fact that the lawyers treated the discussion as a kind of orchestrated fight prevented them from using the ensemble meeting to achieve any of the objectives commonly

⁶⁹ In a variation of this explanation, the Drillco conference lawyers may have believed that if they expressed tentativeness of any kind the magistrate would compare this unfavorably with the certainty expressed by the other side and conclude that they were less convinced by their claims. And a lawyer who is less convinced is less convincing. (Why should I believe you if you don't believe what you say yourself, especially when you know things about your case that you're not telling me?) Yet when asked about this, the lawyers voiced no qualms about revealing doubt, tentativeness, or limited conviction to the magistrate. They had sophisticated conceptions of advocacy which saw mixed views as often a sign of strength, and mistrusted the exaggerated expression of certainty as "protesting too much." On the other hand, this very sophistication may have worked against them. Each side made complex arguments that had to be countered. Failing to do so would acknowledge, even if implicitly, that the arguments had merit, and this would give away important points that could change the magistrate's understanding of the case. The lawyers were under simultaneous obligations, therefore, to contest almost every point, but not appear to be reflexively adversarial, and this is very difficult to do.

ascribed to the pre-trial conference.⁷⁰ They did not narrow the issues in dispute to the serious, contested few, for example, invent “win-win”⁷¹ solutions that accommodated their respective interests and needs, identify objective criteria against which to measure the strength of their respective claims, or come to understand and respect the differences between their substantive legal views. They would have had to listen more carefully to what each other was saying to do any of these but listening carefully is difficult to do when one is under attack. Many of their comments seemed designed to avoid unintended, unilateral concessions while buying time to determine how to challenge the other side’s position further. The simplest way to avoid conceding is to dismiss statements peremptorily but dismissing another’s views peremptorily can offend and cause the other to respond in kind. When this happens it is not surprising that a fight would break out.

This is the kind of adversarial bargaining that communitarians decry. Lawyers can hammer out agreements in this way, but even when they do, they leave interactions of this sort in a foul mood and use subsequent negotiations to pay other lawyers back for slights and insults, real and perceived that remain unpunished. It would be better if this process could be more social, not only for the psychic health of individual lawyers but also for the rights of parties caught up in the system and the effectiveness of the dispute settlement process as a whole. One structural mechanism built into adversarial bargaining to neutralize this kind of lawyer posturing and reduce the risk of being sociable is the private caucus.⁷² Meeting privately with the pre-trial judge permits lawyers to share intentions and beliefs candidly and at greater length than would be prudent in the full-group meeting. With the parties’ complete

⁷⁰ See R. LAWRENCE DESSEM, *PRETRIAL LITIGATION: LAW, POLICY & PRACTICE* 503–06 (3rd ed. 2001) (describing purposes of the “Final Pre-Trial Conference”); ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* 684–87 (5th ed. 2001) (same); THOMAS A. MAUET, *PRETRIAL* 325–26 (6th ed. 2005) (same); WAYNE D. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* (1988) (same); WAYNE D. BRAZIL, *SETTLING CIVIL DISPUTES* 44–46 (1985) (describing “what judges have to contribute to settlement”); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 63 U. CHI. L. REV. 337 (1986) (examples of settlement promoting actions by judge).

⁷¹ This expression is incoherent if read literally using a consistent definition of “win,” but I use it because it seems to have meaning for so many people. See Condlin, *supra* note 14, at 43 n.120 (win-win reminds one of the Dodo in *Alice in Wonderland* – “Everybody has won and all must have prizes.”).

⁷² Scott Peppet describes several proposals for constructing such structural features. See Peppet, *supra* note 9, at 486–97.

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views on the table the magistrate is in a position to determine if there is the overlap necessary to make settlement possible. This is how private-caucusing is supposed to work in any event, whether it does is something we now investigate.

2) First Caucus with the Drillco Lawyer

In what turned out to be perhaps the most fateful move of the conference, the magistrate decided to meet with the Drillco lawyer first. He had worked extensively with the lawyer in the past, had just met the Paine lawyers for the first time, and thought that starting with a familiar face would make for a smoother beginning. In a sense he was right, though the decision's effect on the settlement agreement itself was less benign. The most important objective of a private caucus is to find out what a party will pay or take to settle. The Drillco lawyer's agreement to caucus first, therefore, was the functional equivalent of agreeing to make the first offer. There is no more fundamental (albeit simpleminded) principle of bargaining than that of not making the first offer. The Drillco lawyer did not have to predict the Paine lawyers' demands with precision to know that he would be taking a substantial risk if he put a reasonable figure on the table first. In fact, had the order of the caucuses been reversed and the Paine lawyers' demand been known at his first meeting with the magistrate, the Drillco lawyer could have bargained more aggressively from the outset. This particular sequence of caucuses was not inevitable. Paine was the plaintiff and the one demanding the change in the status quo, so it was logical that he go first. The Drillco lawyer could have argued this to the magistrate, but he did not and eventually he paid for it.

The caucus started innocuously enough. After exchanging pleasantries the magistrate and the Drillco lawyer discussed, in order, the strength of Paine's substantive claims, the extent of his economic damages and Drillco's offer. The first of these topics might have been avoided altogether. Repeating one of his group meeting points, the magistrate began by stating that the evidence "pretty well [comes] down in Drillco's favor, unless Mr. Paine gets a pretty quirky jury;" then he asked, "What kind of authority do you have in this thing?"⁷³ Perhaps taken by surprise, the Drillco lawyer responded somewhat flippantly, "How much do I need?"⁷⁴ Seemingly irked by the fact that the lawyer was not willing to

⁷³ "Obviously you've got some settlement authority. What kind of authority do you have in this thing?" Drillco Transcript, *supra* note 55, at 45.

⁷⁴ *Id.* at 45.

“evaluate the case [for himself],”⁷⁵ the magistrate spent the next four minutes, or half of the caucus, making five separate arguments against Drillco’s position.⁷⁶ While not vehement or overwhelming, the arguments were more than perfunctory, and collectively they expressed doubts about the magistrate’s earlier statements supporting Drillco. The Drillco lawyer realized almost immediately that he had made a mistake in not responding directly to the magistrate’s question and tried to interrupt to start the sequence over again,⁷⁷ but it was too late; he had to defend himself against each of the magistrate’s arguments. Not until he returned to his “Paine lied” theory of the case did the magistrate let him off the hook, probably because the magistrate did not believe Paine either.⁷⁸

After brief asides on the “cost . . . to try this thing,” and the concern that “Mr. Paine will want to amend the pre-trial order,”⁷⁹ discussion moved to the subject of Paine’s damages. The magistrate took the lead. Arguing that Paine “[hadn’t] had very good earnings since he left [the] company,” the magistrate calculated lost back pay [from the lost opportunity to work in Venezuela], as “maybe one hundred and fifty, one hundred thousand dollars,”⁸⁰

⁷⁵ “Well that says it all. I mean . . . I don’t know . . . you’re going to have to evaluate the case yourself.” *Id.*

⁷⁶ The arguments were: 1) “It’s going to cost you a lot of money to prove it . . .”; 2) “I’m sure Mr. Paine makes a good appearance. . . .”; 3) “They never had any problems with him before . . . and I think that certainly is a circumstantial indication that this may be the result of some kind of discrimination.”; 4) “If . . . [the supervisor] turns out to be some kind of racist character, or comes across to the jury like that, you’re sunk.”; and 5) “They really came down on him pretty hard to fire him, isn’t it [sic].” *Id.* at 46–47.

⁷⁷ “Exactly, but . . .” The magistrate interrupted at that point to say:

It’s going to cost you money to prove it, that’s one thing, and furthermore, it’s the only black fellow that’s worked for the company, and he’s worked his way up, and I’m sure he makes a good appearance, and I think that’s something that’s going to be taken into account. I mean they never had any problem with him before until he winds up down there in South America, and I think that certainly is a circumstantial indication that this may be the result of some kind of discrimination. Certainly they’ll argue that to the jury.

Id. at 46. The Drillco lawyer responded: “Well, sure they will, but Judge, I think that cuts both ways, because a company that’s going to discriminate against somebody is not – they would have done it long ago.” And the discussion went off for a couple of minutes on the topic of whether the company discriminated. *Id.*

⁷⁸ “He is a little squirmy on the deposition, I will grant you that.” *Id.* at 47.

⁷⁹ The concern that the Paine lawyers might try to amend the pre-trial order to include a claim for non-economic damages traces back to off-hand comments by the Paine lawyers’ in the full group meeting. While amendment was never a serious possibility, the risk of it had a major influence on the conference’s outcome.

⁸⁰ The Drillco lawyer will hear this is as a \$100,000 offer. The magistrate made the common mistake of framing the offer in terms of two choices, one wishful and the other insistent, and another bargainer always will hear the latter.

just in the economics”⁸¹ These figures were larger than they should have been by a factor of almost six,⁸² principally because the magistrate counted hardship and overseas bonuses as salary and failed to take into account that the Venezuelan assignment was for only one year. The Drillco lawyer saw the mistaken assumptions immediately and in a careful and respectful manner, over a period of a couple of minutes, explained them to the magistrate.⁸³ Both parties then agreed that “even so, Paine is about eighteen hundred a month under what he was stateside,” and this “nets out to somewhere around twenty-seven thousand” in total lost back pay.⁸⁴ The problem of front pay was mentioned twice but not discussed because of the difficulty of determining “how long Mr. Paine will be underemployed.”⁸⁵ This was a mistake, given the way events were to develop.

After agreeing on the amount of damages, the magistrate and lawyer turned their attention to the question of what Drillco would “feel comfortable recommending to close this thing.”⁸⁶ This was an important moment in the caucus. Because it was invited by the magistrate the offer had to be serious, anything less would be insulting, and this made it difficult for the lawyer to suggest a figure that was aggressively, or even plausibly, high.⁸⁷ The lawyer began

⁸¹ *Id.* at 48.

⁸² This is true for only the \$150,000 figure. The factor is four if one uses the \$100,000 figure.

⁸³

DA: You can't take those numbers at face value, and the reason is this. He got his base pay, which was . . . let's talk about it in terms of months, three thousand dollars a month was his base pay going down there. He got a hardship bonus and an overseas bonus totaling thirty-five percent of that. The rest, the difference between what that figure is — and that comes out to four thousand and fifty dollars a month — the difference between that and the six thousand was the bonus for being in the other country, the difference in exchange rates, the higher prices, and that sort of thing . . .

MA: You mean that's a wash?

DA: Which he doesn't get if he's not there.

MA: But he might have stayed there indefinitely if he hadn't been canned. How long was the assignment? One year?

DA: One year.

MA: Just one year?

DA: A one year assignment.

MA: All right.

Id. at 49.

⁸⁴ *Id.* at 49–50.

⁸⁵ *Id.* at 48.

⁸⁶ *Id.* at 50.

⁸⁷ A plausibly high first offer is the best (from the perspective of the offeror) offer an adverse bargainer will accept the smallest reasonable percentage of the time. As long as there is

to calculate out loud explaining that “it’s going to cost us at least ten thousand to try it,” and the magistrate agreed,⁸⁸ but before he could continue the magistrate interrupted to describe Drillco’s “exposure [as] probably in the, maybe the top range, seventy-five thousand or so, maybe a hundred, . . . if the judge lets them amend the pre-trial order”⁸⁹ Surprised and perhaps a little confused, the Drillco lawyer acknowledged that “while I think we’ve got definitely the upper hand on the case, we’ve got to allow for the fact that there is always a risk factor. So I, you know . . . if we can go fifteen thousand, or something.”⁹⁰ The magistrate accepted this figure instantly stating in language he would soon repudiate, “Yeah, that’s what I was thinking. I was thinking in the fifteen to twenty thousand range . . . would probably be a pretty reasonable settlement.”⁹¹ After a brief aside on the question of whether Paine “might be thinking about cash register numbers,” the magistrate ended the caucus by saying “Well I’ve got some idea of what your range is. Let me bring them in here and talk with them a little bit.”⁹²

\$15,000 was a surprising first offer for the Drillco lawyer to make. He had said prior to the conference that fifteen thousand was about as much as he thought Paine could recover at trial, but once he began the bargaining at that figure there was no possibility he would end there.⁹³ He might have changed his mind about expected outcome, of course, but since almost everything had gone his way in the conference up until then it is not clear why he would. The reasons he gave for making a \$15,000 offer also were curious.⁹⁴

some possibility, however small, that the offer will be taken, a lawyer can defend it sincerely and in good faith, in the hope that the present case is that situation. See Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOTIATION L. REV. 1, 41 (1999) (describing the ideal first offer as one that is as “extreme . . . as can be gotten away with, but not so extreme that the offeror appears to be negotiating in bad faith”).

⁸⁸ *Id.*

⁸⁹ Drillco Transcript, *supra* note 55, at 50. This suggests that the magistrate’s earlier concern about the Paine lawyers increasing Drillco’s exposure by amending the pre-trial order was having an effect.

⁹⁰ *Id.* at 51.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Expecting to have a first offer accepted is a form of “take-it-or-leave-it” bargaining – a refusal to bargain, in other words – and that is why it rarely works. It also is an unfair labor practice. See *NLRB v. Gen. Elec. Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). Bargaining anticipates that there will be at least one concession by each side. Without the possibility of counteroffers there can be no bargaining.

⁹⁴ For an explanation of the need to justify offers in terms of some substantive or practical principle, see SCHELLING, *supra* note 44, at 24–27 (describing the process of demonstrating com-

He explained the offer as a combination of the \$10,000 saved if the case was not tried and \$5,000 to compensate Paine for his expected chance of success at trial.⁹⁵ But why he would offer Paine both the results of a successful trial and the savings realized from not having to go to trial, is not clear. Paine would save his own costs in avoiding trial and without the same inducement it is not clear why Drillco would want to settle. If the Drillco lawyer's prediction about trial outcome was wrong and there was a risk Drillco would have to pay Paine more than \$5,000 the company still had no reason to offer Paine the \$10,000 saved by avoiding trial. There was no necessary correlation between an increased risk of losing at trial and the cost of trying the case. Such a risk might justify an offer of more than \$5,000 but if so, the size of the offer would depend upon the percentage increase in the risk of losing, not the cost of trial. In effect, the Drillco lawyer bid against himself here by making two offers instead of one and both his second offer (the savings realized by avoiding trial), and the combination of the two, were unduly generous.

Perhaps the combination of Paine wanting "cash register numbers," the magistrate's mistaken estimate of Drillco's exposure (as \$75–100,000), and the Paine lawyers' possible threat to amend the pretrial order to ask for non-economic damages,⁹⁶ spooked the Drillco lawyer and pushed him to his bottom line prematurely. The \$15,000 offer was made quickly, without much explanation and in response to the magistrate's first serious application of pressure. But if the Drillco lawyer panicked this would be surprising. He was an experienced bargainer (and litigator), and not likely to make an impulsive, ill-considered offer. Instead, he may have interpreted the magistrate's request for a offer as a directive to get right to the point and not waste time bargaining. He knew the magistrate well, had worked with him extensively in the past and trusted him not to take advantage. Perhaps these factors caused him to speak more candidly about the case than he would have

mitment to offers); GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS* 555–61 (1978) (same); KOROBKIN, *supra* note 47, at 156–71 (same).

⁹⁵ \$5,000 was approximately one-fifth of Paine's out of pocket damages (as calculated by the magistrate and the Drillco lawyer), and the Drillco lawyer had said before the conference that he thought his client had a twenty-five percent chance of losing on the merits. He was giving himself a little room to add to the \$15,000 figure, therefore, if that turned out to be necessary. See Drillco Transcript, *supra* note 55.

⁹⁶ While the magistrate generated most of the force of this threat on his own, it is fair to call it the Paine lawyers' threat since it can be traced to an off-hand comment by the lawyers in the full group meeting. *Id.*

otherwise. The \$15,000 offer may have been a truthful (and communitarian) response to the question of how much authority he had and not a bargaining move.

Being candid with the magistrate made sense, however, only if the Paine lawyers could be counted on to be candid in return and this was a questionable assumption to make. The Paine lawyers had disclosed little if any private information unilaterally in the full group meeting, for example, had argued both large and small issues aggressively and had made exaggerated demands, often causing the magistrate to appear to have second thoughts about his initial Drillco-favoring views. The lesson of the full group meeting,⁹⁷ as far as the Drillco lawyer was concerned, should have been that the Paine lawyers were aggressive, maximizing bargainers and that there was considerable risk in exposing his true bottom line to them unilaterally (even if through the magistrate).⁹⁸ Admittedly, this risk would have been easier to appreciate had the order of the caucuses been reversed and the Paine lawyers' demand already been on the table. But given what we now know about the Paine lawyers' strategy waiting in the wings, the negotiation was almost over after the first Drillco caucus. On the surface, however, things looked just the opposite and the Drillco lawyer had every reason to be optimistic. But for the fact that he had to re-argue part of his case on the merits, the meeting had gone very well. The magistrate had agreed that the evidence "came down in Drillco's favor," and had evaluated the case for settlement in a dollar amount nearly identical to Drillco's.⁹⁹ While he might have to come up with another \$5,000 or so,¹⁰⁰ the Drillco lawyer could expect that he would be able to settle on satisfactory terms. All that remained was to bring the Paine lawyers on board and with the magistrate as his ally that ought to be easy to do.

⁹⁷ Paine's lawyers were new to the community and from another region of the country. As a result, the Drillco lawyer had no past experience with them, or local, reputational information about how they would bargain. His observations from the full group meeting were all he had to go on.

⁹⁸ It does not matter whether the Paine lawyers' aggressiveness was a defensive reaction to the Drillco lawyer or a default style. If they bargained aggressively with the magistrate the Drillco lawyer had to counter in kind, if only to neutralize the effects of their approach.

⁹⁹ *Id.* at 45.

¹⁰⁰ The fact that the magistrate qualified his reaction to the offer and summarized it as in "the fifteen to twenty thousand dollar range," signaled to the Drillco lawyer that he (the lawyer) probably would have to pay slightly more to reach a final agreement. *Id.* But the magistrate also was telling the lawyer he was in the right range and that his offer was reasonable. Given the speed with which he agreed, the magistrate also was probably telling the lawyer that he had offered too much. See Bazerman, *supra* note 11, at 224 (describing "The Winner's Curse").

3) First Caucus with Paine's Lawyers

In their first caucus the Paine lawyers changed the magistrate's view of the case and laid the groundwork for a settlement that went well beyond what the Drillco lawyer and magistrate had agreed was "pretty reasonable."¹⁰¹ The caucus illustrates how bargaining skill can combine with fortuity to confound even settled expectations and beliefs. The caucus lasted nearly twice as long as the Drillco lawyer's and was an equal mix of advocacy and trading.¹⁰² Offers were requested, made, attacked, defended and refined and the substantive issues in contention, including those already discussed in the full group meeting, were debated at length. The discussion was fast paced and intense, but also respectful, substantively sophisticated and logically ordered. It is a good illustration of how robust argument can advance understanding and produce agreement.

The magistrate began by asking the Paine lawyers "what kind of authority" they had to settle but, as he explained, he meant "are you all pretty well in the driver's seat or is the client calling the shots?"¹⁰³ Put in this way, the question asked whether Paine was greedy and out of control rather than how counsel evaluated the case for settlement and as such, probably reflected the magistrate's continuing concern about Paine wanting "cash register numbers."¹⁰⁴ The lawyers' answer, that they "were fairly well in the driver's seat, with some parameters," seemed to invite the follow up question of what they wanted to settle, but the magistrate did

¹⁰¹ Drillco Transcript, *supra* note 55, at 51.

¹⁰² See Condlin, *supra* note 14, at 89 (describing relationship of advocacy to trading in bargaining).

¹⁰³ Drillco Transcript, *supra* note 55, at 52.

¹⁰⁴ *Id.* at 51. While this literal concern may have been overblown – the threat to amend was made off-handedly by the Paine lawyers at the beginning of the conference, with no serious intention of carrying it out – the magistrate's propensity to raise it at various points in the discussion provided clues as to his view of the potential outer limits of Paine's recovery. For example, in discussing whether the trial judge would allow an amendment to the pre-trial order, he described the Drillco lawyer's evaluation of the case as one "that maxes out at forty or fifty thousand bucks, max." *Id.* at 54. This amount was considerably higher than the lawyer's stated value of the case but the Paine lawyers did not pick up on the amount and discuss it. Later, when describing the binding effect of the pre-trial order, the magistrate continued, "[S]till, the point is you don't have any surprises there. And if you start talking about a couple of hundred thousands of dollars to assuage his mental suffering, I don't think you're going to be allowed to do that." *Id.* at 55. The Paine lawyers planned to make a \$200,000 demand under the right circumstances but didn't expect it to be taken seriously. The magistrate's willingness to mention such a number, and then to say only that he did not "think" it was attainable, encouraged them to proceed with their plan.

not ask that question for some time to come.¹⁰⁵ Instead, also repeating an earlier point, he challenged Paine's claim on the merits, arguing at length and in several different ways, that he was "going to have a hard time" proving discrimination.¹⁰⁶ These arguments were important, not so much for what they said, they contained little that was new,¹⁰⁷ but for the overall impression they conveyed of the magistrate being solidly on Drillco's side. These opening comments seemed to give the Paine lawyers little reason to be hopeful.

About four minutes into the caucus the magistrate asked the second version of the question with which he had begun: "Well, how do you evaluate the case for settlement purposes? What kind of number have you come up with?"¹⁰⁸ While not as flippant,¹⁰⁹ the Paine lawyers were as hesitant as the Drillco lawyer to put a specific dollar figure on the table. Building up to an offer, they pointed out that Paine's monetary demands depended upon "whether he got make-whole, Title VII relief, including reinstatement, or whether all he [got was] money."¹¹⁰ The magistrate interrupted, ostensibly to identify "another problem"¹¹¹ with Paine's

¹⁰⁵ *Id.* at 52.

¹⁰⁶ *Id.*

¹⁰⁷ The arguments were: 1) success in proving intentional discrimination by circumstantial evidence is directly proportional to the non-minority composition of the witnesses for the defense, and the defense witnesses are "going to look black to the jury," to which plaintiff's counsel replied, "Well, I'm not so sure they're going to look black. . . . The dominant impression. . . is going to be that these are foreigners;" 2) "The one independent witness . . . who has no axe to grind . . . comes down pretty much against your client," to which the Paine lawyers replied, "[T]here's a lot more ambiguity here than we might be lead to believe;" 3) "You've got an uphill row . . . with Title VII cases . . . The track record in this Circuit . . . does not favor plaintiffs," to which the lawyers made no reply; 4) the jury will be all or almost all white and not be sympathetic to a race discrimination claim by a black plaintiff, to which the lawyers made no reply; and 5) the judge trying the case will not allow amendment of the pre-trial order and as written, that order freezes Mr. Paine "on the low end of the damage scale," to which the lawyers replied, "[we] have a very different view of the rules about pre-trial orders." *Id.* at 52-54. Of these arguments, only the pre-trial order discussion consisted of more than two statements by either party.

¹⁰⁸ *Id.* at 55.

¹⁰⁹ See discussion *supra* Part III.2.

¹¹⁰ Drillco Transcript, *supra* note 55, at 56. This was the first mention of reinstatement in the conference. It had not been discussed in the full group meeting and was not mentioned in the pre-trial order.

¹¹¹ "Here's another problem that I see . . . on all the . . . claims [other than Title VII] that you've got milling around here . . . I don't know how many of them will survive a directed verdict frankly," and on those that do, the Court "may not ask the jury to find damages at all, is that clear?" *Id.* Throughout the conference the magistrate tended to interrupt whenever the lawyers volunteered new information about their demands or new arguments to support their positions, seemingly to control the flow of new information and consider it at his own speed.

case, but probably to give himself time to digest this new demand for reinstatement. Following a brief, pro forma discussion of the “other problem,” he returned to the reinstatement issue by saying, “anyway, go ahead on to . . . you talked about the ways you have evaluated the case . . . go ahead, I interrupted you.”¹¹²

Here, the Paine lawyers developed their first formal offer. It was probably the most important moment in the caucus.

P2: I was just going to suggest that we thought a suitable settlement . . . on the one hand, if the employer is willing to reinstate Mr. Paine and if they are, we think it’s in both Mr. Paine’s interest and the employer’s interest . . .

MA: [Interrupting] Well, does he want it?

P2: Yes sir.

MA: He does want it?

P2: Yes sir. If you look at what he has lost in earnings, in future job status and earning potential, by leaving this situation where he was a long-seniority supervisor with a high earning potential and high status . . .

MA: [Interrupting] Well then, as a bottom line, how much money are you talking about if they reinstate him?

P2: We’re talking about one hundred thousand dollars, plus reinstatement, plus clearing his record.

MA: No way. No way. There’s no way. It’s just not possible. I wouldn’t evaluate it with reinstatement at one hundred thousand dollars, even without, frankly. I don’t think they’ll reinstate him because they are convinced he lied and I think that practically is not practical.

P2: Do you think they are really convinced he lied, or that they’re just backing up [the company supervisor] as a matter of face saving?

MA: Who? . . . Didn’t [Drillco’s house counsel] do the investigation as an independent . . .

P2: [Another company officer] did the investigation. [This officer] is the one person Mr. Paine had bad blood with. It’s very peculiar that he was picked to do the investigation under those circumstances.

P1: Yes.

MA: Didn’t they send somebody else down there to investigate

¹¹² *Id.* at 57.

P1: The statement indicates that under [the company officer with whom Paine had bad blood], that when Mr. Paine was returned to the United States he conducted an investigation into Venezuela events. I'm attributing that to [the officer]. He had been Mr. Paine's supervisor. Now, "conducted" sounds like he actually did it. Whether he undertook to see that the investigation was made . . .¹¹³

This brief exchange changed the negotiation radically. To begin with, it introduced the new remedy of reinstatement. Paine's pleadings did not request reinstatement, there was no mention of it in the pretrial order and it had not been discussed in the full group meeting. Yet, reinstatement is a preferred remedy in Title VII cases and it had a number of advantages in Paine's situation. Drillco was a large company with facilities throughout the United States and while Paine's former job had been filled, equivalent positions were open at many of the company's other refineries. As a practical matter, this made reinstatement a workable option. But more importantly, if successful, it would eliminate the need to speculate about Paine's lost front-pay because there would be none and this would remove the thorniest damage issue from the case. Properly understood, reinstatement provided a possible "win-win"¹¹⁴ response to what otherwise had the potential to be a zero-sum problem and allowed the magistrate to avoid the unpleasant task of having to choose between either-or (front pay/no front pay) options.

But reinstatement also had its downside. It was a new and complicated item, with unknown strategic implications and it was introduced at a time when there was already a lot of water over the dam. Adding it to the settlement package would require re-negotiating the preliminary agreement with the Drillco lawyer and he might balk at such a move, viewing it as low-balling,¹¹⁵ conclude that he could not trust the magistrate, rescind his original offer or break-off negotiations altogether. Reinstatement also might conflict with the provisions of Drillco's collective bargaining agreement with its union, or cause morale problems with other Drillco employees over whom Paine was promoted. If the magistrate thought these or other such risks were substantial it is understanda-

¹¹³ *Id.* at 57–58.

¹¹⁴ See *supra* note 71.

¹¹⁵ CHESTER L. KARRASS, *GIVE & TAKE* 105–07 (1974) (describing "lowballing: The attractive offer that turns out not so attractive").

ble that he would be unsympathetic to the request for reinstatement. Given this backdrop, the Paine lawyers had to be encouraged by the magistrate's somewhat tepid response.¹¹⁶

The reinstatement demand also was noteworthy for the different understanding of the pre-trial conference and the different approach to bargaining, that it reflected. The Drillco lawyer's offer of \$15,000 was a genuine bottom-line figure that left little room for further negotiation. It was what he hoped to pay to settle the lawsuit and was designed to end the bargaining process not start it. It did not contemplate much in the way of further concessions. The Paine lawyers' request for reinstatement plus \$100,000, on the other hand, was the proverbial inflated, opening demand.¹¹⁷ It asked for more than Paine reasonably could have hoped to win even if completely successful at trial and left plenty of room for future concessions. It pushed one end of the bargaining range¹¹⁸ out as far as possible, in an attempt to define the range in terms that were imbalanced in Paine's favor.¹¹⁹ In old fashioned terminology, the Paine lawyers were "maximizers," and the Drillco lawyer was a "fair and reasonable" bargainer. In a one-time

¹¹⁶ While the magistrate might have said there was "no way" Paine could be reinstated (it is not clear whether "no way" refers to the demand for \$100,000 or the demand for reinstatement), he also asked if Paine "want[ed] it (i.e., reinstatement)," and "how much money" he wanted "if" reinstatement was granted. Drillco Transcript, *supra* note 55, at 57. These questions were unnecessary if there was truly "no way" reinstatement could be granted. He also qualified the "no way" assertion itself four sentences later when he said "I *don't think* they'll reinstate him because they are convinced he lied." *Id.* Finally, while "no way" is strong and unequivocal, the tone with which it was said was not. The magistrate raised his voice and increased his pace only slightly, and sounded more surprised than angry. He seemed to be saying, "I don't want to hear this," rather than, "I have already thought about what you say and have rejected it." *Id.*

¹¹⁷ Orr & Guthrie, *supra* note 45, at 624–25 (describing how "negotiators . . . generally fare better if they open with high demands . . . with the most self-serving position they can reasonably justify . . . [and] even with positions they cannot possibly justify.").

¹¹⁸ Condlin, *supra* note 14, at 68 (describing concept of bargaining range). *See also* Korobkin, *supra* note 3, at 1790 (describing the concept of "bargaining zone").

¹¹⁹ Parties typically split a bargaining range somewhat evenly once it has been identified. Winning and losing is obvious otherwise and this always will be unacceptable to one of the parties. Thus, it is easier (though not easy) to construct an imbalanced range in the first instance than it is to bargain for a disproportionate share of a balanced range once constructed and maximizing bargainers try to do this. *See id.* at 1792–94 (describing the process of constructing the bargaining range as "zone definition"); RAIFFA, *supra* note 44, at 47–50 (illustrating the relationship between concession pattern and bargaining range). It is not enough just to make up inflated demands; however, one also must successfully challenge an adversary's efforts to do the same thing in response and successfully defend one's own demands. A demand becomes a serious offer only when arguments in support of it convince an adversary that there is some possibility one will refuse to settle unless the demand is met. In this way, successful trading is always a corollary of successful advocacy.

relationship, maximizers usually beat fair and reasonable bargainers and they would again here.

The defense of a demand and not its size, is what gives it force, however, and the Paine lawyers' defense was skillful. They expressed the demand calmly and matter-of-factly, not arguing for it before it was challenged and when challenged, not filibustering with long soliloquies that delayed or prevented the magistrate from responding. Such tactics would have signaled defensiveness and undercut the lawyers' attempt to be convincing.¹²⁰ When the magistrate said "no way," and seemed to reject the demand out of hand, the Paine lawyers ignored the statement and responded instead to the easier-to-rebut claim that Paine had lied.¹²¹ There was no look of panic on their faces, no nervousness in their tone. Their voices did not rise and their pace did not speed up. They acted as if nothing particularly significant had happened and stood ready to discuss the demand, as if they expected the magistrate to agree with it once he came to understand it. In short, they looked like people who believed in what they had asked for and who thought the magistrate would come to believe in it also. In the discussion that followed, not particularly noteworthy in its own right, one could see the intensity of the magistrate's resistance begin to ebb.¹²²

Once the discussion reached an impasse the magistrate shifted gears and asked, "On the basis that they are not willing to reinstate him, what . . . how do you evaluate it?"¹²³ Paine's lawyers replied, "We double the monetary figure."¹²⁴ This startled the magistrate, as he asked, incredulously, "And that's for settlement, or maximum award?"¹²⁵ The liveliest discussion of the caucus followed. More agitated than at any other time in the conference, the magis-

¹²⁰ Arguing for a point before it has been challenged evidences a defensiveness that can undercut credibility. A listener might wonder, privately of course, why he/she should believe the point if the speaker feels the need to defend it before it is clear that anyone disagrees. Solid arguments are expected to hold up under scrutiny and persons making them do not try to preempt attempts to challenge them. They realize that listeners are more easily convinced by the give and take that follows a challenge than by a lecture.

¹²¹ Drillco Transcript, *supra* note 55, at 57.

¹²² The fact that the magistrate once thought Paine's back-pay damages were in the vicinity of \$100,000 and that such an award was still possible if Paine was allowed to amend the pre-trial order, might have made the offer seem less shocking than it should have. *See* discussion *supra* Part III.2.

¹²³ Drillco Transcript, *supra* note 55, at 58.

¹²⁴ *Id.*

¹²⁵ *Id.*

trate attacked this escalation move¹²⁶ in several ways. At first, he asked the lawyers how they justified doubling their demand.

- P2: That's for settlement. Let me . . .
- MA: [Interrupting] Two hundred thousand?
- P2: It seems to me, your honor, we're talking about a differential per month of eighteen hundred dollars right now and we ignore inflation and all of those things . . .
- MA: [Interrupting] What's to say that tomorrow he won't get . . .
- P2: . . . and this is a gentleman in his thirties . . . he's got another thirty years of working life.
- MA: He doesn't have another thirty years of working at a low salary job. You can't base this on speculation.
- P2: Well, you certainly can't base it on the speculation that in this job market he's going to find a comparable . . .
- MA: [Interrupting] He's also got a duty to mitigate.
- P2: Well, he is mitigating. That's why it's only two thousand a month, not three thousand a month.
- MA: Well, what authority have you got . . .
- P2: [Interrupting] That doesn't even include fringe benefits. We threw that by the wayside as part of our settlement offer.
- MA: That's awful nice of you.¹²⁷ What kind of authority . . . what do you have that says that the front pay in these Title VII situations, or under nineteen eighty-one, goes on for the rest of his working life?
- P2: Well, your honor, there are not a lot of Title VII . . .
- MA: [Interrupting] It's not a personal injury kind of thing.
- P2: No.
- MA: [Interrupting] Where you've got diminished earning capacity.

¹²⁶ Literally, the magistrate challenged the \$200,000 demand and not the fact that the lawyers made an escalation move. See KARRASS, *supra* note 115, at 60–62 (describing “escalation tactics”). But see Bazerman, *supra* note 11, at 218–22 (describing “The Nonrational Escalation of Conflict”).

¹²⁷ Ironically, this sarcasm was a positive sign. The magistrate's ability to joke about the situation indicated that he had not been pushed beyond his limits. He was not really angry, in other words, though he was irked, so Paine's lawyers could continue to press him. Cf. Keith G. Allred, John S. Mallozzi, Fusako Matsui & Christopher P. Raia, *The Influence of Anger and Compassion on Negotiation Performance*, 70 *ORG. BEH. & HUMAN DEC. PROC.* 175–87 (1997) (describing the nature of genuine anger in negotiation); Michael W. Morris & Dacher Keltner, *How Emotions Work: An Analysis of the Social Functions of Emotional Expression in Negotiations*, 22 *RESEARCH IN ORG. BEHAVIOUR* 1–50 (2000) (describing rapport-building communication methods of problem-solving negotiation)

- P2: Well, your honor, there are not a lot of Title VII cases where indeed the ordinary, usual customary and generally mandatory remedy of reinstatement is denied, or . . .
- MA: [Interrupting] Oh, there are zillions of them . . .
- P2: [Interrupting] No actually, there . . .
- MA: . . . where they don't want to be reinstated.
- P2: There are relatively few and there's a great body of case law that says that the make-whole, ordinary, preferred remedy is reinstatement.
- MA: That's right.
- P2: In the unusual cases, there is always the question of the jobs that they have found. A great many of them find jobs during the pendency of the case that eliminates the problem of the likelihood that they will be permanently in a lower tier position. The cases I am most familiar with where that is not true are not Title VII cases, but age discrimination cases, which is, after all . . .¹²⁸

Using an age discrimination analogy as justification for the inflated demand seemed to surprise the magistrate. The Paine lawyers had not made such an argument at any time in the conference up until then and there was no reason for the magistrate to have read age discrimination cases in preparing for the conference. After a one-line response, that age discrimination cases were different "because nobody get younger,"¹²⁹ the magistrate abandoned the

¹²⁸ Drillco Transcript, *supra* note 55, at 58–59.

¹²⁹ *Id.* at 60. In fairness to the magistrate, there was a brief discussion of the analogy, but "nobody gets younger" seemed to be his only substantive point. The discussion is set out in its entirety below.

- P2: Yes, but age discrimination act cases are brought under a statute modeled under Title VII, whose prohibitory language is identical to Title VII, and the situation arises more commonly there because when they get reduced out in force their chances of getting employed elsewhere are often demonstrably very slim. And the usual . . .
- MA: [Interrupting] Well, that's true, but the whole idea is they're being fired because they're too old to work, according to the employer. The reason they are being fired is because they are too old to fit the employer's needs, and Congress has said that's unlawful, but if that's the case, their employability is diminished. And I don't see anything in this case that says that Mr. Paine can't go out next month get a job that pays what he had.
- P2: Actually, your honor, I hesitate to correct your last statement, but they're fired because the employer thinks they are too old.
- MA: That's what I said.
- P2: They don't necessarily . . . but they don't necessarily think that they are too old.
- MA: Right. I understand that.
- P2: They may very well not be too old to perform.
- MA: I understand.

topic by agreeing that “it [the age discrimination analogy] is worth a little bit in terms of the front pay kind of remedy,” as long as Drillco does not have “to foot the bill . . . for the rest of [Mr. Paine’s] life.”¹³⁰ The Paine lawyers accepted this half-way concession and dropped the argument. In retrospect, they might have pushed the point a little further, but going into the conference they did not think the age discrimination analogy was strong and had planned to abandon it in the face of any substantial resistance. At the time, they were more than happy to accept the concession of it being worth “a little bit” in return for not pressing the argument.

The Paine lawyers then turned the discussion to another “body of precedent” that they argued also authorized front pay damages, consisting of the “great many cases where reinstatement . . . isn’t possible immediately and may not be possible for two years, or five years, or ten years.”¹³¹ In such cases, they argued, “the typical make-whole . . . order” requires a defendant to “reinstate as soon as possible and in between now and then pay the differential [in salary], whatever that differential may be.”¹³² Paine’s situation was not different in any significant respect from the delayed full employment case, the lawyers argued, and thus the same kind of order could be entered here. At this point, the magistrate may have blinked slightly. Perhaps concerned about the growing number of “bodies of precedent” the Paine lawyers were able to muster and that he was not prepared to discuss, he acknowledged, albeit indirectly, that reinstatement might be a possibility.¹³³ Compared with its increasingly unattractive alternatives, it no longer looked so bad.

The Paine lawyers then reversed roles on the magistrate, asking, “Well, your honor, how do you see this thing in terms of set-

P2: And the reason that their employability prospects are diminished is that there is rampant age discrimination elsewhere in this society rather than that there is any real impairment in terms of their capability.

Id. at 60.

¹³⁰ *Id.* at 60–61.

¹³¹ *Id.* at 61.

¹³² *Id.*

¹³³ This time he made no attempt to respond substantively to the Paine lawyers’ argument. His actual words were,

Well, let me make this clear. I haven’t broached the reinstatement idea by [sic] [the Drillco lawyer] and maybe he’d be more receptive to that than I judge he would be. I don’t know. It seems to me they’re a little bit vituperative here in terms of they don’t want anything to do with Mr. Paine. They don’t like him because they think he lied.

Id.

ting?”¹³⁴ The move was timely. In a long, sometimes rambling and often disjointed response, the magistrate expressed a set of contradictory commitments and beliefs that revealed a person beginning to have doubts about his evaluation of the case and perhaps beginning to change his mind.

MA: Well, I don't know. I think it probably has a . . . I've got some idea what [the Drillco lawyer' s] line of authority is. I think he probably is coming in telling me a little low. The company realizes that it' s going to be out-of-pocket a certain amount to try the case to begin with, so that' s already in the loss column and they think that there' s some prospect that you could recover if you get a sympathetic jury, sympathetic to your client and convince them that everybody else is lying. This is an uphill struggle. You know that. A plaintiff's always got that problem. I think, and I've got to tell you, I think the facts come down more on the company's side than on your side in this case. I don't see any smoking gun. I don't see any real hard evidence. It's entirely circumstantial, proof of intent. And the independent witness . . . does not really corroborate your guy. The thing about the mother-in-law and varicose veins, if that's an emergency, I don't know. Can you bring some doctor in here who will testify as to the life-threatening nature of varicose-veins? I think you'll have a hard time finding one.¹³⁵

The Drillco lawyer would have been surprised to learn that the magistrate thought he “[was] coming in . . . a little low.”¹³⁶ In the first caucus, he had described the lawyer's \$15,000 offer, which took both the “amount to try the case” and the “prospect . . . [of recovery from] a sympathetic jury” into account, as “pretty reasonable.”¹³⁷ In fact, it was the dollar value the magistrate had in mind himself. Yet, now he was beginning to have second thoughts. While he had not yet changed his mind completely and still be-

¹³⁴ *Id.* at 62.

¹³⁵ *Id.* at 62–63.

¹³⁶ *Id.* at 62. If “little” is read to mean \$5,000, then nothing has changed. In the first caucus, the magistrate characterized the Drillco lawyer's \$15,000 offer as a \$15–20,000 offer and thus signaled that it might have to be increased by \$5,000. *See* discussion *supra* note 91, and accompanying text. But here the magistrate seemed to be saying that the Drillco lawyer should re-evaluate the case in its entirety, that if Paine gets a sympathetic jury the lawyer's understanding of what the case was worth is fundamentally mistaken.

¹³⁷ *Id.* at 51–52.

lieved that “the facts come down more on the company’s side than on Paine’s,”¹³⁸ the magistrate’s conviction had begun to weaken.

A moderately long but only semi-serious discussion of “the life-threatening nature of [Paine’s mother’s] varicose vein” surgery followed,¹³⁹ at the end of which the magistrate made another interesting comment.

MA: In any event, you’ve got a tough time convincing the jury of this. Not to say that your advocacy won’t do the trick,¹⁴⁰ but I see this as more likely than not a defendant’s verdict and that diminishes the settlement value the case I think, if I push [the Drillco lawyer], this is above the line of authority he has given me, I think maybe he can come up with thirty thousand dollars, maybe somewhere in that ballpark, but I don’t think you’re going to get anything higher than that. And I’d have to push him to come up with that. This, after your fee is deducted, would give . . .¹⁴¹

This was the second time in the caucus that the magistrate acknowledged, albeit indirectly, that Paine might win at trial, this time because of the Paine lawyers’ advocacy skills. Ordinarily, a comment praising lawyer advocacy skills would be seen as just being sociable, but here it also might have reflected the magistrate’s true belief. When he began the conference he had not worked with the Paine lawyers and was not familiar with their reputations, so a comment praising their advocacy skills had to be based on what he had seen in the conference itself. Viewed in this light, the comment seemed to signal a weakening of the magistrate’s resolve and act as an encouragement to the Paine lawyers to press for more. More significantly, the magistrate also put a number on his chang-

¹³⁸ See discussion *supra* Part III.2.

¹³⁹ Drillco Transcript, *supra* note 55, at 63. Recall that one of the reasons Paine gave for returning to the United States was to assist his mother-in-law during the period of her varicose vein surgery. The legal question was whether the surgery was an “emergency” within the terms of the Drillco employee handbook and thus an authorized reason to leave.

¹⁴⁰ This comment about advocacy skills made explicit what had been apparent for some time in the conference. The Paine lawyers consistently made clever arguments the magistrate did not anticipate, told him about case law he was not aware of and argued at a level of sophistication slightly beyond his in discussing individual legal points. Their arguments were one frame of reference ahead of the magistrate much of the time. This was not surprising given the differences in role between advocate and magistrate but it also could not help but cause a bright person such as the magistrate to develop a respect, even if grudging, for the lawyers’ skill.

¹⁴¹ Drillco Transcript, *supra* note 55, at 64.

ing evaluation of the case by offering the lawyers \$30,000¹⁴² to settle. This was less than they had asked for to be sure, but twice as much as what he had told the Drillco lawyer he thought was reasonable. The magistrate had started to trade proposals with the Paine lawyers and as with all trading, the relevant question was where he would stop. The ensuing discussion provided more clues.

PI: This is without reinstatement?

MA: Oh, yeah, without reinstatement . . .

P2: [Interrupting] Let me add another item I should add a couple . . .

MA: . . . it would give Mr. Paine some money in his pocket. That may be enough to assuage his feelings. I assume you're taking a quarter or a third, so he would wind up with maybe twenty thousand or so, or maybe a little more than that on a contingent basis . . .

P2: [Interrupting] Your honor, I should have said a couple of other things . . .

MA: . . . but if you're talking in the big ticket, if you're talking about, if you're stuck at one hundred thousand dollars, or even anything above fifty, I think you might as well forget it. There's no way . . .

P2: [Interrupting] Let me mention a couple . . .

MA: . . . I'll stand and fight.¹⁴³

While ostensibly still opposed to reinstatement (“Oh yeah, without reinstatement”), the magistrate’s objections now had begun to ring increasingly hollow. He was protesting too much. He discussed reinstatement at length, hinted that the Drillco lawyer might accept it and did not explain why it would not work. All of this indicated that he took the option seriously, his comments to the contrary notwithstanding. His objections may have been sincere but they were not plausible and the Paine lawyers were right to ignore them. The lawyers responded with a variation of their escalation strategy.¹⁴⁴ Each time the magistrate resisted their demands they added, or threatened to add, another item or argument to the bargaining agenda (“Let me add another item I should add a couple of . . . ;” “Your honor, I should have said a couple of other things . . . ,” “Let me mention a couple of . . .”). The message, that new issues would keep appearing until he saw things

¹⁴² Literally, he offered only to try to convince the Drillco lawyer to make an offer of \$30,000, but both the magistrate and the Paine Lawyers assumed that the Drillco lawyer would go along.

¹⁴³ Drillco Transcript, *supra* note 55, at 64–65.

¹⁴⁴ See discussion *supra* Part III.3.

their way, could not have been one the magistrate wanted to hear.¹⁴⁵ His only choices were to flee (concede) or fight (argue), and since his arguments until then had not been all that effective, fleeing was beginning to look like the better choice. Fleeing meant buying his way out of the discussion in the same manner he bought his way out of the similarly unsuccessful earlier discussions, by making a more generous counter-proposal.

The foregoing exchange also contains an important clue as to the magistrate's private monetary evaluation of the case. While he told the Drillco lawyer he thought the case was worth \$15–20,000 and the Paine lawyers that he thought he could get them thirty thousand, here he indicated that a “big ticket” demand would be “anything above fifty thousand dollars.”¹⁴⁶ Given his fear that the pre-trial order would be amended and the issues in the case expanded, \$50,000 was not out of line as a value to place on the case. The Paine lawyers did not pick up on this clue, however, and the magistrate did not mention the \$50,000 figure again. The lawyers' failure to get a commitment to \$50,000 would have repercussions in the next caucus when the magistrate presented Paine's counter proposal to the Drillco lawyer. It was the Paine lawyers' only serious error in the caucus.

Conversation then shifted to the attorney's fees issue mentioned by the magistrate earlier in the caucus and the Paine lawyers' argument that it was not proper to negotiate for fees “in conjunction with settlement.”¹⁴⁷ The magistrate objected, arguing that “[the Drillco lawyer] has got to know . . . the bottom line cost,” otherwise he “is not going to settle.”¹⁴⁸ A moderately long discussion of this issue ended only when the Paine lawyers pointed out that they “were really talking about a relatively modest amount [for attorneys' fee of] . . . five thousand all in.”¹⁴⁹ This discussion lacked the fast-paced and confrontational qualities of the caucus until then, as each side seemed to be catching its breath and gearing up for the finish. Though the participants could not have known it at the time, this topic was to be to the caucus what a turnaround point is to an out-and-back road race. As the last new substantive issue to be discussed, it completed the list of obstacles

¹⁴⁵ That he kept interrupting the lawyers to cut them off before they could make the arguments is the best evidence of this.

¹⁴⁶ Drillco Transcript, *supra* note 55, at 65.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 65–66.

¹⁴⁹ *Id.* at 67.

to be overcome in reaching an agreement. All of the contested issues now were on the table and it remained only for the parties to figure out how to compromise among them and converge on an agreement. At first, both the magistrate and the Paine lawyers dug in their respective heels, sometimes arguing, sometimes inviting an offer and sometimes making one, as if in an elaborate game of chicken.¹⁵⁰ Each seemed to be testing the other's will and stamina, professing unwavering support for its own positions while scrutinizing the other's for signs of tentativeness or doubt. Yet, slowly, as the discussion wound on, each side also began to express flexibility and a willingness to compromise. These contradictory signals made the conversation complicated and subtle and an interesting study in endgame bargaining.

The following exchange illustrates this endgame bargaining, blending features of advocacy, concession and convergence into a seamless whole. The magistrate spoke first.

MA: Alright. Well, that [i.e., attorneys fees] might be something that can be worked out with him [the Drillco lawyer]. But in terms of the money going to your client, where do you think the settlement value is in the big number range?

P2: We're willing to talk about these numbers, but I'm telling you what we . . .

MA: [Interrupting] Well, I'm telling you I think that given the way this thing lines up, now obviously I haven't seen Mr. Paine, or [his company supervisor] or anybody else, so I don't have an idea about really how they're going to come across in terms of credibility and demeanor, but on the other hand, you all haven't seen anybody except your client and [the bank officer]. So you're going to be shooting in the dark.

P2: Often, plaintiff's counsel finds themselves in that position.

MA: Well, that happens sometimes, that's right, but I mean that's something that obviously is a weakness that doesn't add to the strength of your negotiating position. Well, suppose you realistically, suppose the ceiling on recovery going to Mr. Paine himself is about twenty-five

¹⁵⁰ See WILLIAM POUNDSTONE, *PRISONER'S DILEMMA* 197–201 (1992) (describing bargaining game of chicken).

thousand.¹⁵¹ That would leave enough room to pay you attorneys fees and still keep it within what the company can stomach. How do you feel about that?

P2: Hardly pay us to settle.

MA: Why?

P2: Unless we're talking about reinstating Mr. Paine. Obviously his injury here, I mean he lost forty thousand off the top just in being sent back and not being able to complete that term in Venezuela, never mind his future prospects.

MA: Now wait a minute! I don't know about that. Now wait just a minute. There's a cost-of-living type thing in there, you're talking about gross numbers. His net out of that is much less. Isn't it?

P2: No, I don't think so. I think we can play with the numbers in various ways . . .

MA: [Interrupting] His net is probably in the twenties somewhere.

P2: Well, there's a lot of numbers . . .

MA: But then at settlement, you're not, I mean, you guys are talking the top of the maximum recovery and settlement has got to take into account the very real possibility that he'll get zip . . .

P2: [Interrupting] Of course. Agreed, your Honor. On the other hand, we're talking also about compensatory damages, about lost fringe benefits . . .

MA: . . . and if he gets zip I don't know what you get. I'll bet if he gets zip you don't get anything out of the civil rights act.

P2: Well, but on the other hand, bear in mind what our losses are. They are maxed out at what our gains are in attorneys' fees and costs if we prevail. Our investment may very well be not so great that it doesn't make sense for us to throw in another thirty hours and try the case.

MA: Certainly, everything is a cost benefit kind of thing, but I mean, you know, the point is, that you've got to realize and you can't realistically, I know you're advocates, but in terms of the settlement process, you've got to realistically look at the case and realistically, you've got an uphill battle of proving intent by way of circumstantial

¹⁵¹ This seems to be a restatement of the magistrate's \$30,000 offer. The Paine lawyers had said earlier in the caucus that their fee would be \$5,000.

evidence, where at least two of the people you claim are lying are, let's say, non-American, Caucasian racial group, which is a real hassle for you in this case.¹⁵²

Unlike earlier discussions where argument predominated, here offer making and argument were mixed in nearly equal proportions. The argument was fairly perfunctory, consisting for the most part of the magistrate saying “take seriously the possibility that you might not win,” and Paine’s lawyers countering with “what more do we have to lose.” These were not new points and at times each side looked as if it was giving directions to a non-native speaker, “saying it again, louder.” But the statements also contained an important subliminal message. When the Paine lawyers said “we’re willing to talk about these numbers,” it would “hardly pay us to settle . . . unless we’re talking about reinstate[ment],” we could “. . . play with the numbers in various ways,” and we “agree” that Paine could “get zip,” they communicated an open-mindedness about the magistrate’s proposals, a realistic understanding of the situation and a willingness to compromise.¹⁵³ While the literal content of their comments was mixed, the underlying point was clear. They wanted to settle.

The magistrate did not pick up on the subliminal message right away, or if he did, he was not quick to acknowledge it. He responded to the lawyers’ comments as if they reflected intransigence rather than flexibility and four times within a single sentence appealed to them to be “realistic.” Appeal is the least effective of the negotiation advocacy strategies,¹⁵⁴ and it is rare to see an experienced bargainer use it at all.¹⁵⁵ But here it may have been just the right move. After a brief aside on whether the Venezuelan super-

¹⁵² Drillco Transcript, *supra* note 55 at 67–69.

¹⁵³ *Id.* at 67.

¹⁵⁴ Bargaining advocacy takes the form of argument, threat and appeal and the three strategies are preferred in that order. See Condlin, *supra* note 14, at 69–70 (describing advocacy strategies in bargaining). By asking for a favor, an appeal tacitly concedes the point under discussion and asks for mercy from the adversary (like an animal in nature confronted by a more powerful enemy, the person goes “belly up”). Resorting to appeal is a situation most bargainers try to avoid.

¹⁵⁵ An appeal is not necessarily a strategy of helplessness when used by a magistrate. A magistrate is not an adversary in the traditional sense and when he asks a lawyer to be “realistic” he does so from a public officer rather than interested party point of view. More importantly, if a lawyer does not respond, a magistrate will have the opportunity to pay him back, so to speak, from a position of power many times over during the course of the case (and a career). There is a tacit threat in a magistrate’s request for a favor, therefore, that is not present when another lawyer does the asking.

visors would be believed,¹⁵⁶ and whether “the company [was] prepared to . . . pay Paine some money to go away,” the impasse broke.¹⁵⁷ The Paine lawyers asked if Drillco was “prepared to help [Paine] in his efforts to mitigate his damages and obtain comparable employment . . . [by] clear[ing] his record . . . [and] giv[ing] him an affirmative recommendation?”¹⁵⁸ This was a new request, but the strategy was familiar. At moments of impasse, the Paine lawyers would escalate their demands by introducing a new item into the bargaining conversation, hoping either that it would be the final straw that caused the magistrate to give up, or that it would provide a new perspective on the problem suggesting a mutually acceptable resolution. This time the strategy seemed to work, though for which reason is not clear.

¹⁵⁶ Like all topics raised at this stage of the caucus, this issue had been discussed earlier and nothing new was added this time around.

P2: I don't think it's that hard to get the jury to believe . . .

MA: [Interrupting] It's not like the typical big corporation where a whole . . .

P2: . . . that two poor Venezuelans who managed to luck into a job with a big American company are very fearful of being shipped back into . . .

MA: Suppose both have MSEE degrees.

P2: Is there anything in the record that says that?

MA: You haven't deposed them. Suppose they are Ph.D.'s. You don't know.

P2: Well, but we do know. They wouldn't be operating at the level of Mr. Paine's immediate supervisors if that's what their credentials were.

MA: You never know. Maybe they're management trainees or something.

P2: They're at the level Mr. Paine was supposed to be at if he hadn't been effectively demoted when he was officially assigned on his arrival in Venezuela.

MA: That's another problem. But in terms of the settlement thing, I've got to tell you I think a jury around here, I think that the probability, the litigative probabilities, come out below fifty percent on Mr. Paine's side. In view of that, I think that it might be penny wise and pound foolish if you say you're going to go ahead to the wall for this unless we get a tremendous offer. I don't think it's going to be coming.

Drillco Transcript, *supra* note 55, at 69–70.

This last issue, of whether Paine's job assignment in Venezuela was an effective demotion in rank, bothered the magistrate throughout the conference, and was one of the issues he saw being raised if the pre-trial order was amended.

One might think of this argument as “filler” used to pass time while thinking of what to do next, or to create space between statements one does not want to be seen as related. Such argument usually is about issues already considered and resolved, and since it is not intended for its own sake, it need not be responded to. Perfunctory substantive argument between concessions in a negotiation end game and disjointed rambling at the point of a major substantive topic shift, are two of the most common examples. Such argument allows parties to catch up with and follow changes in the settlement conversation and to make concession-making look less arbitrary than it probably is. These perceptions, in turn, increase participant confidence in the rationality of the negotiation enterprise and make settlements more stable. *See* Condlin, *supra* note 14, at 101–02, for additional illustrations.

¹⁵⁷ Drillco Transcript, *supra* note 55, at 70.

¹⁵⁸ *Id.*

The magistrate replied to the question about an affirmative recommendation in the following way.

MA: Well, let me do this. I'll tell you what. Let's hold off a minute before we get into . . . cause I realize that emotionally . . . I think Mr. Paine is interested in clearing his reputation

P2: Absolutely.

MA: . . . and that is a non-monetary dynamic really, that I did not explore with [the Drillco lawyer] because I discussed money. But I can tell you right now, in terms of the money, there's just not a whole lot there. I don't think there's going to be. I think in terms of the money going right to your client, I would think again, although I don't have the authority from [the Drillco lawyer] to give you this, I would think I might be able to squeeze twenty-five or thirty thousand out of him, with the idea that there's going to be another few thousand for your fee, in terms of the hours that you've put in.¹⁵⁹ But, I haven't gone into these other inducements to settlement and I'll see what he says about them. That's certainly a thing to explore. I had just been looking at it as a money case because the pre-trial order didn't ask anything about the reinstatement. I assumed he was happy where he was. Did you have something to add? [The Paine lawyers were conversing privately.]

PI: No. I was just saying, obviously thirty thousand, without reinstatement, isn't what you think [the Drillco lawyer] is quoting.

MA: No. In fact, he has told me that . . . he hasn't told me what finite limits on it are, but he has given me his evaluation of the case, which is below that figure. But that's not to say I can't goose him up a little bit. That's why we have the conference.¹⁶⁰

Tentatively and equivocally, the magistrate told the Paine lawyers that they had a deal if they wanted it. His equivocation was understandable. The lawyers had bargained aggressively until then and if their latest representations about non-monetary compensation were not trustworthy he wanted to be free to back away from

¹⁵⁹ This is a \$40,000 offer, in effect, \$30,000 for Paine and one-third on top of that for attorneys' fees. The magistrate and lawyers had established earlier that the lawyers would take one-third of the recovery for their fee. The Paine lawyers did not hear this offer.

¹⁶⁰ *Id.* at 70–71.

his offer without seeming to contradict himself. But if the representations were trustworthy and Paine genuinely valued future employment more than money, there was an obvious middle-ground solution to the case.¹⁶¹ Each side would concede in the currency it valued least. Paine would take less money and Drillco would reinstate him, or help him find future employment (or perhaps both). By agreeing to explore non-monetary options with the Drillco lawyer, or as the magistrate put it, “goose him up a little,”¹⁶² the magistrate, in effect, indicated to the Paine lawyers that their strategy of expanding the bargaining pie¹⁶³ to include reinstatement had worked.

The lawyers’ success here seems attributable mostly to the fact that they outlasted the magistrate.¹⁶⁴ He had rejected reinstatement several times earlier in the caucus and appeared to be sincere in doing so. Yet, the principal basis for his rejection, that reinstatement was not included within the pre-trial order, was unconvincing; it did not explain why the remedy was a bad idea in and of itself, or why it would not work here. He probably rejected the demand because he was surprised by it, did not know what to think about it, or because he did not want to complicate the bargaining process by

¹⁶¹ Only someone with a well developed sense of irony would describe this as a “problem-solving” solution. Discussion of the reinstatement option resembled a head-butting contest more than a joint venture, and the final agreement to accept it was based on an even split of a strategically distorted bargaining range more than the discovery of a natural middle ground between complementary interests. The agreement does show that even adversarial bargainers can create value, just not necessarily from a perspective of “both parties’ underlying interests and preferences.” See Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RES. 235 (1993). The reinstatement scenario also illustrates an advantage of bargaining stories as data. The added detail of a story permits one to distinguish between the outward form of a bargaining move and its inner nature. In much of the bargaining literature the Drillco reinstatement discussion would have been categorized as problem-solving because it expanded the bargaining range and permitted the parties to reach an agreement that gave something to each side. And yet, in reality, the discussion was designed to help one side recover almost one hundred percent of what he had lost at the expense of the other side. When data is presented in non-context specific terms, behavior can seem communitarian when it is that way in appearance only. See, e.g., Dwight Golann, *Is Legal Mediation a Process of Repair – or Separation? An Empirical Study, and Its Implications*, 7 HARV. NEGOT. L. REV. 301, 310–15 (2003) (describing relationships that continue to be dysfunctional and antagonistic as “reconstructed” after mediation, and showing how “integrative results” do not necessarily entail communitarian attitudes or relationships). If the Drillco reinstatement move is problem-solving bargaining there is no other kind of bargaining.

¹⁶² Drillco Transcript, *supra* note 55, at 71.

¹⁶³ Or pot. The choice of metaphor may depend upon whether one prefers the main course or dessert.

¹⁶⁴ Russell Korobkin, *Aspiration and Settlement*, 88 CORNELL L. REV. 1, 10–11 (2002) (noting that “the party with the most patience should win the lion’s share of the cooperative surplus”).

introducing a major, new item this late in the game. Whatever his true motives, however, the Paine lawyers' refusal to bargain against themselves by giving in to the magistrate's non-substantive objections was the correct response. By pressing the argument for reinstatement in the face of the magistrate's resistance, even to the point of stubbornness, they risked antagonizing him to be sure, but they also gave themselves the chance to learn that he was bluffing and that eventually he would concede the point.¹⁶⁵ The latter is precisely what happened.¹⁶⁶

The Paine lawyers recognized the importance of the magistrate's agreement to explore reinstatement and reinforced it almost immediately, both in a familiar and not so familiar way. First, they pointed out that they had "some flexibility," which the magistrate interpreted as a signal that they could accept his offer.¹⁶⁷ He began to speak as if the deal had been made.

MA: If we put together a package that you and I and [the Drillco lawyer] all agree is pretty reasonable, I certainly would be willing to talk to Mr. Paine. I do this frequently to indicate that gee, here's something that the lawyers and especially in Title VII cases, because there's a lot of emotion involved and here's something that the lawyers feel is reasonably objective and you've got to take into account: a) that the plaintiffs who get big verdicts are really as rare as hen's teeth unless they are walked into the courtroom on a stretcher and b) that

¹⁶⁵ Looked at in another way, the Paine lawyers won a contest of will with the magistrate over the issue of whether to add reinstatement to the conference agenda. Some commentators advise against getting into tests of will with other bargainers, suggesting that it looks stubborn, polarizes relationships and increases the risk of deadlock. See Menkel-Meadow, *supra* note 33, at 793–94 (describing how adversarial bargaining can lead to "stalemate"); FISHER & URY, *supra* note 28 (describing how arguing over positions stalls settlement and increase the risk that no agreement will be reached). But see White, *Machiavelli*, *supra* note 15 (describing how contests of will are inevitable in bargaining), Nyerges, *supra* note 29, at 26 (noting that, "negotiation is . . . a contest of will."). Yet, if the Paine lawyers had followed this advice they would have come out of the conference measurably poorer. Their success suggests that it is not whether one gets into contests of will, all advocacy is such a contest to some extent, but how one does it, that is critical. Arguing points of disagreement does not polarize as long as the focus is kept on the reasons for the disagreement and not the disagreement itself. Since bargainers sometimes bluff, and at other times are slow to understand, calling bluffs and repeating arguments are necessary parts of good advocacy practice. One must be courteous in doing this, of course, but the Paine lawyers show that it can be done.

¹⁶⁶ It is hard to tell from the tape whether the magistrate gave in (i.e., was finally convinced by the lawyers' argument), or gave out (i.e., stopped objecting out of exhaustion). After the conference he said it was a little bit of each.

¹⁶⁷ Drillco Transcript, *supra* note 55, at 71.

you've got the chance that you may get zip for your efforts.¹⁶⁸

Ostensibly for the purpose of helping Drillco implement reinstatement, the Paine lawyers made one more escalation move, whether intended or not, suggesting that an additional item be added to the agreement.

P1: Also, your Honor, Drillco is a fairly large company and I think they can be somewhat accommodating in terms of . . . our client is willing to relocate and . . .¹⁶⁹

Smiling, the magistrate recognized the problem immediately.

MA: [Interrupting] Is that right?

PI: Oh yes. And to be placed in a different . . .

MA: [Interrupting] Well, who's going to pay for shipping?

PI: The company, obviously.

MA: There goes another five thousand bucks.¹⁷⁰

Co-counsel intervened to soften the point.

P2: If they have another division, it might be feasible for him to have a new start, even under the same company's auspices for example.¹⁷¹

This led to that rarest of all negotiation events, one bargainer stating the punch line to another bargainer's argument, as if it was an insight of his own.

MA: Well, what did his work record . . . was his work record was alright?

P2: His work record was superb until this incident. There's nothing whatsoever in the records to indicate a single blemish in all of those years.

P1: We're not talking about a one or two year tenure . . .

MA: So you're . . . the company would have to be willing to say, well this was *all a big misunderstanding*.¹⁷²

With a straight face and more words than probably were necessary, counsel agreed.

P2: I think that's a fair construction indeed to put on facts. If one accepts Mr. Paine's statement that he indeed con-

¹⁶⁸ *Id.* at 71–72.

¹⁶⁹ *Id.* at 72.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* (emphasis added).

sulted with [his Venezuelan supervisor] and gained permission, it seems altogether possible to me that what we have here is a lot of mutual misunderstanding, compounded by hostile attitudes by [the company supervisor] towards Mr. Paine based on his race. And on that construction, it would be fairly easy to restore the status quo ante by putting him in a somewhat different setting, where his prior record would not come back to haunt him.¹⁷³

The caucus then came to a close.

MA: Alright. Let me get [the Drillco lawyer] in here and explore the possibility of reinstatement, because I think, you know, very frankly, I just don't think there's big bucks there, from the defendant in terms of money. I don't want to spend a lot . . . on the other hand, if Mr. Paine was a decent employee they might be willing to give him another chance and I told [the Drillco lawyer] that I think frankly, sacking him was sort of steep . . .

P2: [Interrupting] It's outrageous.

MA: . . . over something like this and that fact is something that the jury may think was, if not discriminatory in terms of race, maybe enough to give him at least some sort of compromise verdict, which the company certainly doesn't want. It doesn't help their image. All right. Let me get him in here and we'll explore these other sort of non-monetary things.¹⁷⁴

The conference itself was not over. The Drillco lawyer still had to approve the agreement before it could become final and there was much in it that would surprise and perhaps shock him. But the magistrate was committed to convincing him to sign off on it. To see how he did this we must go to the next caucus.

4) Second Caucus with the Drillco Lawyer

There was no tentativeness, equivocation, or sense of mixed purposes in the magistrate's approach to the second caucus with the Drillco lawyer. Using numerous and varied strategies, some even borrowed from the Paine lawyers, he worked single-mindedly to convince the lawyer to accept the "thirty-thousand dollar plus reinstatement" package. Unlike the first caucus, where he de-

¹⁷³ *Id.* at 72–73.

¹⁷⁴ *Id.* at 73.

ferred to the Drillco lawyer, the magistrate took control of the conversation and argued directly for his new view of the case's value. His revised assessment of the evidence (in some instances opposite of what he had said earlier), predictions of what the trial judge would permit, and interpretation of Title VII, all combined to make Drillco's prospects look bleak. When the Drillco lawyer resisted, the magistrate asserted the authority of his position, almost instructing the lawyer to settle. His arguments were long, didactic, and forceful, and when the lawyer appeared ready to respond in kind the magistrate interrupted to prevent him from doing so. The magistrate emphasized selected points, sometimes returning to them five or six times, until the lawyer acquiesced. It was an about face from twenty minutes earlier. While the substance of the magistrate's comments was fairly aggressive, his manner was not. He spoke in a soft tone of voice, smiled frequently, and was never belligerent or rude. By controlling the content and structure of the conversation, he relegated the lawyer's arguments to brief asides, interspersed throughout his own protracted sermons on why the settlement proposal ought to be accepted. He suffocated the Drillco lawyer rather than pummelled him, outlasted him rather than beat him up. His performance was an object lesson in the power of quiet, low-key, even cordial methods for controlling conversation. He demonstrated the power of earnestly talking an issue to death, if you will, rather than beating it into submission.

The caucus took a little over ten minutes and focused principally on the topics of reinstatement and money, with reinstatement receiving the lion's share of the attention. The opening exchange reflects the caucus in a microcosm.

MA: I think I've given them a realistic assessment of the money involved in the case. I don't think they liked it, but I've given it to them anyway. It's up to them now. What I told them, as I frequently do if all of us come to some agreement as to where the case ought to settle, is that I'd be willing to talk with their client. Sometimes it takes that push from the objective viewpoint to say, "Gee, everybody, including me, who has no ax to grind, thinks that this is a reasonable place to come down." But, I'll tell you very frankly . . . I think in order to settle the case there's going to have to be something within a dollar range that's reasonable and here I'm taking a little liberty, because I think what's reasonable may be a little bit higher than what you've come up with, or what

you've indicated, but not much. I think you could probably go with that. But I think in order for him to take that, perhaps the company . . . has the company considered reinstating him in another division or another capacity, cause apparently there's nothing wrong with his work? Has that been considered?

DA: [Extended pause] I've got to tell you this. I find reinstatement to be monumentally unsuccessful. As a matter of fact, the only time I ever recommend reinstatement to a client is if when the matter first comes up it seems pretty obvious that somebody has made a mistake and the company recognizes that . . .

MA: [Interrupting] Well, now look. Now, wait just a minute. As you know, under Title VII that's a preferred remedy and [the judge] may make you do it here anyway.

DA: Oh, I understand that. I understand that.

MA: You know that, so you'd have to swallow him unprepared and against your will. The other thing is, very frankly in this case, I don't know how you came down on it, but I thought that even if the guy didn't follow the proper steps to get authorization, it is not like he went absolutely flat AWOL, and sacking him for this could come across to [the judge], who is going to be administering the equitable remedy no matter what the jury does . . . and you know under Rule 39(c) as I see it, the jury's findings are advisory only on Title VII in any case. And there's no way he can make the jurors' findings absolutely binding on everybody, including himself, under Circuit case law.

DA: I would be surprised if he did not follow them.

MA: Well, I would too. But there may be a different standard of review in connection with it when it gets to the Circuit. But that's another whole kettle of fish. Our job is to keep it from getting to the Circuit. But, he may decide that gee, look, this guy . . . , really, canning him was so far beyond the pale of what his punishment, what his sin called for, if in fact he sort of embellished it a little bit. They could have deducted the airfare from his salary, they could have demoted him in rank, reassigned him, done a million other things. Why was he canned

for this thing? You've got to admit that was awfully harsh.¹⁷⁵

The Drillco lawyer knew he had reason to worry when the magistrate began the conversation with self-serving comments about how hard he had been on the Paine lawyers. He had forced them to be realistic about money (it is interesting that he restricted this assertion to money), and to look at the case from an objective point of view. He did not say that the lawyers had accepted Drillco's \$15,000 offer, however, as the Drillco lawyer might have expected given the magistrate's earlier approval of it as "reasonable." The magistrate's definition of reasonable seemed to have changed. Now, reasonable "may be a little bit higher than what you [the Drillco lawyer] have come up with."¹⁷⁶ More money was not the only surprise, however, as the magistrate also indicated that Drillco should reinstate Paine. Before the conference the Drillco lawyer had said that he thought reinstatement might become an issue,¹⁷⁷ but he was surprised to hear it raised for the first time this late in the game, after a tentative agreement had already been reached (or so he thought). A demand for reinstatement had not been pleaded and the issue was not listed in the pre-trial order, so either the magistrate had been holding back waiting to spring it on Drillco, or Paine's lawyers had changed the magistrate's view of the case. Either way, it was clear that the Drillco lawyer now had to scramble to save his deal, and quickly, before the magistrate became hardened in his views.

The lawyer's first response gave a clue as to how his efforts would fail. He challenged the proposal for reinstatement in the abstract, objecting to generic reinstatement, and not the reinstatement of Paine in this particular case. This made his objection more academic and less personal than was needed to make it credible and, as a result, also easier to dismiss. The Drillco lawyer's response also was notable for what it did not say. If reinstatement was truly out of the question one would have expected a reaction that was more immediate and unambiguous. He should not have had to think about it for even a short period of time because there would have been nothing to think about. He would have known instantly that he could not agree. But there was nothing spontaneous, reflexive, unequivocal, or even lively about the lawyer's rejection of reinstatement. His manner was lifeless, his voice flat and

¹⁷⁵ *Id.* at 73–75.

¹⁷⁶ *Id.* at 74.

¹⁷⁷ He expressed this concern in an interview before the conference.

unanimated, and his tone lacking in conviction. It was as if he was *describing* an objection to reinstatement rather than actually *objecting* to it, as if he truly did not care one way or the other whether Paine was reinstated. Given the situational forces pressing for reinstatement (that it was a preferred remedy under Title VII, that it made the calculation of Paine's damages easier, and that it was a middle-ground alternative between two zero-sum solutions), the absence of a strong objection particularized to Paine told the magistrate that the lawyer would accept reinstatement if pressed to do so, and the magistrate already had decided to press him.

The Drillco lawyer's reason for rejecting reinstatement, that it works only "when . . . it seems pretty obvious that somebody has made a mistake," played into the magistrate's hands.¹⁷⁸ It undercut the lawyer's stated objection to reinstatement since it made clear that he sometimes recommended it, and it transformed the central issue in the case into one of whether a mistake had been made in discharging Paine. Since the magistrate already had determined that the dispute grew out of "a big misunderstanding," he was eager to discuss the case in these terms.¹⁷⁹ In this sense, the lawyer's objection was just what the magistrate wanted to hear. Throughout this segment of the caucus the Drillco lawyer's equivocation, lack of enthusiasm, and failure to respond as if his ox had been gored, combined to make his efforts unconvincing. He seemed to want to argue, but either did not know what to say, or was not willing to express his true feelings. Given his skill and experience, the latter explanation seems to make more sense.¹⁸⁰

The rest of the discussion had a familiar ring to it. The Drillco lawyer parried the magistrate's "harshness" argument with his "plaintiff lied" rebuttal, but this time the magistrate was not so quick to accept the claim.¹⁸¹ The argument, he said, was grounded on the testimony of a single Drillco employee who, in conducting an internal investigation of Paine's discrimination complaint, con-

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 72.

¹⁸⁰ The decision by the Paine lawyers to save reinstatement for their caucus with the magistrate contributed to the Drillco lawyer's predicament. If the topic had been broached in the full group meeting the Drillco lawyer would have been able to respond to it and probably would have done a better job than the magistrate in pointing out its weaknesses. The magistrate did not have all of the data needed to show the difficulties with reinstatement and also did not have the necessary predisposition to challenge the idea aggressively. When the Drillco lawyer first heard about reinstatement the magistrate was already committed to the idea, it was no longer an open question, and the lawyer had to make his objections with the deck stacked against him.

¹⁸¹ "Maybe the guy wasn't lying." *Id.* at 76.

cluded that Paine had lied about being authorized to make his Christmas trip back to the United States. But the magistrate now thought that bad blood between Paine and that employee might have caused the employee to reach that conclusion.¹⁸² Interspersing offers with argument, he suggested that Paine be separated from the employee by being relocated to another facility.¹⁸³ The Drillco lawyer tacitly supported the suggestion by acknowledging that “there was no complaint about [Paine’s] work.”¹⁸⁴ The parties repeated the “harshness/liar” cycle one more time, as the Drillco lawyer’s lukewarm responses seemed to encourage the magistrate to persevere.

DA: They are not . . . they do not want reinstatement.

MA: Is that . . . that’s adamant?

DA: Well, . . . as adamant as they can be. I suppose if I told them you’ve got to do this, they certainly would listen. I would expect them to. For what they’re paying me, they better listen, but . . .¹⁸⁵

The Drillco lawyer’s demise was now in full swing. The magistrate continued to press for reinstatement (sometimes tying it to money damages), the lawyer resisted on the ground that “[Paine was] dishonest with the company during the investigation,” and the magistrate countered by expressing doubt that Paine had lied.¹⁸⁶

MA: Well, I mean, you know, I think, I get the feeling that if you were to come up with a payment of maybe twenty-five thousand, thirty thousand, something like that and reinstate Mr. Paine, you could settle the case. Now, I don’t know that that’s outside the ballpark in connection with what’s reasonable. I don’t see a dollar, you know in terms of the dollar value of a verdict I don’t see this as a high dollar value case for settlement purposes. It’s essentially your cost, plus something to get him to settle. But I do see, if the verdict goes against you, I see a judicially mandated reinstatement as a real possibility here, given the fact that his prior work record was . . . , as you know it’s an equitable remedy, but I think the

¹⁸² “I mean, you know, that’s your man’s assessment of Mr. Paine’s credibility.” *Id.* at 75.

¹⁸³ “Well . . . have you . . . listen, have you talked to management about the chance of reinstating him somewhere else?” *Id.*

¹⁸⁴ *Id.* at 76.

¹⁸⁵ *Id.* at 76–77.

¹⁸⁶ “I’m not sure . . . that your position is really that terribly strong that he outright lied.” *Id.* at 77.

Supreme Court has said it's pretty well inescapable. But even if it were escapable, a) you've got a great big corporation, it's not like reinstatement in a ma-and-pa grocery store, with world-wide operations and nationwide operations in this country. You've got a guy who didn't do anything wrong until he hit Venezuela and ran up against this crew down there. And a guy who worked his way up through the ranks of the company and perhaps ought to be given another opportunity. I think the judge would feel, as I feel frankly, that firing him on account of this was pretty doggone harsh. I don't think they have looked at it in terms of disparate discipline here either. Now it may very well be – I don't want to give them any ideas – but maybe one of the things they should have done is to see what's happened to other employees, namely white employees, who got caught doing something similar to this. Now, if they do that you're in big trouble too. If they convene the court . . . if they could find anything.¹⁸⁷

The magistrate was now out of patience. This was his most forceful attempt to convince the Drillco lawyer that his client might lose, and it represented a complete reversal from his earlier view that the evidence favored Drillco.¹⁸⁸ But more than a prediction of loss at trial, the magistrate's statement also was a tacit threat. While professing not to "want to give them any ideas," in fact, he was saying that if the present offer was not taken he would suggest to the Paine lawyers that they consider amending their complaint to add a disparate impact claim and this, in turn, would increase Drillco's exposure exponentially.¹⁸⁹ In his own quiet, low-key way, the magistrate had begun to be somewhat heavy-handed, at least in what he said.

Seizing the moment, the magistrate asked for the fourth time in five minutes:

Can you explore with your personnel people the possibility of reinstating Paine in another division . . . and if you are concerned about it, it may be that he would agree to a reinstatement-

¹⁸⁷ *Id.* at 79–80.

¹⁸⁸ *See supra* Part III.3.

¹⁸⁹ "I don't think that they have looked at it in terms of disparate discipline here either . . . Now, if they do that you're in big trouble too." Drillco Transcript, *supra* note 55, at 80. The magistrate was being a little disingenuous here. He had raised the disparate impact point with the Paine lawyers in their caucus and they had indicated that they did not intend to pursue it.

ment on a one or two year probationary kind of thing and you could work out an arbitration.¹⁹⁰

Whether convinced, intimidated, exhausted, or whatever, at this point the Drillco lawyer expressed an interest in reinstatement for the first time and began to ask about how it would be done.¹⁹¹ The magistrate jumped at the chance to discuss specifics, even to the extent of advancing proposals he had not raised yet with the Paine lawyers.¹⁹² Relocation, in particular, posed difficult issues under Drillco's collective bargaining agreement with its union, and a discussion of those difficulties would prove to be the Drillco lawyer's last stand.

MA: Well, I think he'd be looking for reinstatement at something close to his supervisory level that he was at here in the States. But not with the Venezuelan salary. Work that he's capable of doing and that he did three years before he went down to Venezuela.

DA: Yeah, this can create problems for us because, as you know, we're union shop . . .

MA: No, I didn't know that. I'm sorry. Even the supervisors?

DA: No. Once you leave the . . . once you go into the supervisory ranks you're out of the unit. . .

MA: So, he's white collar now?

DA: He was when he left.

MA: He was when he left.

DA: And we draw our supervisors by folks up from the ranks and under our bargaining agreement if we try to bring a supervisor in from the outside without . . . outside the shop . . .

MA: You mean from outside the shop.

DA: . . . from outside the shop, we've got a problem. And there's no keeping it a secret as to why he's there.

MA: It's not a company wide CBA?

DA: Yes No . . . well, it's both. It's a company wide agreement and then there are local agreements. But there's no way to hide why this guy is being brought in as a supervisor because we're going to have to make some explanation.

¹⁹⁰ *Id.*

¹⁹¹ "What kind of . . . at what level job is he looking for reinstatement?" *Id.* at 81.

¹⁹² "Well, I think he'd be looking for reinstatement at something close to his supervisory level that he was at here in the States, but not with the Venezuelan salary." *Id.*

- MA: Don't you ever have transfer of supervisors?
- DA: Sure, but you have to explain why somebody's being transferred into a particular shop. We don't have that much of it.
- MA: Well, how . . . you have to explain it to the local union. Can't you just say that it's simply a personnel decision to . . . does the CBA expressly cover this? I don't think it does, does it?
- DA: It covers it as far as people having the opportunity to bid on supervisory jobs. We have to have a bid posting. Now, we don't have to choose somebody from the bargaining unit, but as a practical matter, when you don't choose somebody from the bargaining unit you really have to make some explanations. And that's . . . you know, I suppose theoretically, you could shove it down to the union's throat, but you don't do that.
- MA: Well, I think . . . that's . . . these are practical problems that I don't think are insurmountable. I think the important thing is to . . . why don't we do this, I'll bring plaintiff's counsel in here and talk to them about it in a minute. Can you explore with management the possibility of reinstatement in some other supervisory position, plus a relatively modest cash payment?¹⁹³

Unable to deny or disprove an argument based on a collective bargaining agreement he had not seen, the magistrate pushed the argument aside. Dismissing the lawyer's concerns as "practical problems that I don't think are insurmountable," he asked for a fifth time, "Can you explore with management the possibility of reinstatement in some other supervisory position, plus a relatively modest cash payment?"¹⁹⁴ Two minutes of rambling, disjointed and off-topic conversation followed,¹⁹⁵ which the magistrate ended by asking for the sixth and final time, "Can you see your way to recommending something like this?"¹⁹⁶ For whatever reason, the logjam broke and the Drillco lawyer accepted the offer in a burst of euphemistic virtuosity.

- DA: I can recommend something like . . . let me put it this way. I can *explore something like this in a positive tone* with my client, because frankly, it needs a lot of expla-

¹⁹³ *Id.* at 81–82.

¹⁹⁴ *Id.* at 82.

¹⁹⁵ This was more "filler" argument. *See supra* note 156.

¹⁹⁶ Drillco Transcript, *supra* note 55, at 83.

nation. There are a lot of tentacles hanging out there, but if it can be done, I would certainly make an effort to make it happen, provided the money comes down right. Now, if it's going to cost us that and a ton of money too, it's not worth it.¹⁹⁷

Like the magistrate, the Drillco lawyer at first fought the reinstatement demand reflexively, probably because he was surprised by it and not sure what implications it had for the case as a whole, but he was not quite able to make his objections convincing. His arguments were too predictable and too few, were presented with too little enthusiasm and were undercut by his recurring admission (tacit and explicit), that he had recommended reinstatement in the past and if pressed hard enough could do it again.¹⁹⁸ With no force to his assertions and an air of resignation about his demeanor, it seemed only a matter of time before he would accede to the magistrate's demands. For his part, the magistrate seemed to recognize this and did what he could to hasten the inevitable, ignoring the lawyer's half-hearted efforts to resist. In the end, both sides accepted reinstatement, not necessarily because it was the wisest course, but because it had more to be said for it than against it in the parties' limited discussion of the issue.

A big inning is not a ball game, however, and there still were other issues to discuss. The parties had not discussed money, for example, and the Drillco lawyer might have been able to salvage the deal by demanding that Paine accept less than the \$15,000 previously offered. This would have been a reasonable demand given that the \$15,000 offer included money for lost front pay and reinstatement would eliminate that loss. When he qualified his acceptance of reinstatement with the condition that "the money comes down right," the Drillco lawyer seemed to understand this point but, unfortunately, he did not act on it.¹⁹⁹ The discussion of money was shorter than the discussion of reinstatement and considerably more one-sided. The magistrate began by restating his monetary offer.

MA: Well, I don't think it would cost you a ton of money. Let's say you could get him for like that and maybe thirty all-in, which would be cash to him plus . . . they've

¹⁹⁷ *Id.* at 83–84.

¹⁹⁸ In fact, he seemed to invite the magistrate to help him do so by saying, "Now, if a federal judge shoves somebody down your throat, that's another matter . . . that's easier for somebody to swallow." *Id.* at 76.

¹⁹⁹ *Id.* at 84.

got about thirty-five hours in it and if you figure . . . they're talking about one hundred and twenty-five an hour. They're not . . . they're loathe, as I can understand, ethically, to negotiate the whole thing as a package. But you've got to look at it as a bottom line.²⁰⁰

Not only had the money not “come down right,” it had gone up. At the end of the first caucus the magistrate seemingly had agreed that Paine’s case was worth \$15–20,000, without reinstatement. Now that reinstatement had eliminated part of Paine’s damages it seemed only reasonable to expect that he would be satisfied with less money; but thirty thousand was twice fifteen, not less than it. The Drillco lawyer could have been shocked, perhaps even angry, at this chain of events; at a minimum, he should have been curious about whether he had heard the magistrate correctly. But instead, he reacted calmly, in the same low-key, non-agitated manner as when first told about reinstatement.²⁰¹ His first expressed concern, in fact, was about whether attorneys’ fees could be negotiated together with the merits, not whether \$30,000 was a reasonable figure. When he got around to discussing the \$30,000 his objections were surprisingly restrained.

DA: But when you’re talking . . . you get up to thirty thousand, you’ve now doubled where I thought we were reasonable before and that’s getting awful rich, including reinstatement, that’s getting awful rich.

MA: Yet, but if you’re . . . I mean, you used a mathematical analogy before: double two is four; double twenty thousand is forty thousand. We’re not anywhere near that.

DA: No. But we were talking fifteen thousand.

MA: Well fifteen to twenty.

DA: Well, I was talking fifteen, you were talking twenty.

MA: Well, that’s right, fifteen to twenty, as you said. It may be thirty all-in, which would include attorney’s fees.

DA: Well, I always deal all-in. When I talk money, I talk all-in.

MA: But they’re real antsy. Now, I heard . . . now I didn’t know this. They said that there’s some case that the Supreme Court has got about whether it is ethical or not for plaintiffs attorneys to negotiate in a case like this

²⁰⁰ *Id.*

²⁰¹ He leaned back in his chair, pulled it several feet away from the table, folded his hands behind his head, stared at the ceiling and had a completely blank expression on his face. He appeared to be at a loss as to what to do.

where they've got a statutory fee. Do you know anything about this?

DA: There has been some discussion about that and . . .

MA: It's always worried me and contingent fees in general, tort cases and whatever . . .

DA: Well, I think the crux of the problem is that the defendant can't say I will pay three dollars to the plaintiff and one dollar to the plaintiff's . . .

MA: Right, right.

DA: . . . but the defendant can say I'll pay five dollars . . .

MA: All-in. You figure it out.

DA: . . . and I don't care how you folks split it up but that's all I'm paying.

MA: But I can understand the hesitance to negotiate . . . well let's say, just for the sake of argument, if we would get this thing settled for cash of thirty all-in, plus some reinstatement package.

DA: Too much.

MA: Too much. Twenty-five. I don't think they'd go a penny below twenty-five. Twenty-five. That's twenty to him and maybe five to them, which is a reasonable contingency. Because you know, if they go three weeks and win this thing, by god, in addition to a lot of money and reinstating the guy, you're going to have to pay their bill. That's going to stick in management's craw even more than anything else.

DA: Even more than paying mine.

MA: That's right. They know they're going to pay yours anyway. You hate to pay for your own drawing and quartering.²⁰²

DA: All right. Well, let me put it this way. I will recommend and I assume my client would go along with the twenty-five and I will explore this possibility of reinstatement.²⁰³

For all of their frequency, the Drillco lawyer's objections reduced to the simple proposition that he did not want to pay \$30,000. He said this twice ("that's getting awful rich,"²⁰⁴ "too much"²⁰⁵), but in neither instance did he give reasons for his objections and when he finally agreed to recommend twenty-five thou-

²⁰² This statement was gruesomely prophetic.

²⁰³ *Id.* at 85–86.

²⁰⁴ *Id.* at 85.

²⁰⁵ *Id.* at 86.

sand he did not give a reason for agreeing to that figure either. In bargaining theory parlance, he shifted his approach at this point from “reasoned elaboration”²⁰⁶ to “positional bargaining.”²⁰⁷ Unlike the stereotype of the positional bargainer, however, he was not rude or belligerent and he did not present his position in take-it or leave-it terms. Instead, he seemed to say, in code he was confident the magistrate would understand, that he had already gone far enough and that it was the magistrate’s responsibility to force the Paine lawyers to take the final step. In a sense, he was appealing to the magistrate to do him a favor, but the turn to appeal, as we have seen, is never a good sign.²⁰⁸ Here it would save only nickels and dimes, the last \$5,000 of a settlement that already was too generous. Whether he won this point or lost it did not matter much. He had lost the war.

After a brief aside on whether to include attorney’s fees in the final package, the magistrate accepted the \$25,000 counter-offer and agreed to present it to Paine’s lawyers.

MA: That’s it. All-in, I know. It’s going to be a take-it or leave-it thing. And what we’d have to work out . . . again if it can’t be worked out amicably, which I think it can be because they’re decent people, I don’t think they’re sandbagging . . . that there would be a settlement with a reinstatement along with it on some reasonable basis. Alright, let me get them back in here.²⁰⁹

It is somewhat surprising that the Drillco lawyer agreed to this proposal. He believed that Paine had only a twenty-five percent chance of winning his claim on the merits and yet he agreed to pay all of Paine’s attorney’s fees, seventy-five percent of his lost Venezuelan income and all of his future income (by reinstating him). Paine would have had a difficult time improving on these terms at trial. Talented as the Drillco lawyer was, this was not an exemplary performance and his failure took several forms. Rather than exploit, or perhaps even recognize, the magistrate’s lack of conviction

²⁰⁶ See Melvin Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 669 (1976) (“[r]easoned elaboration is that ‘area of rational discourse . . . where men seek to trace out and articulate the implications of shared purposes . . . [that] serve as ‘premises’ or starting points.’” (quoting LON FULLER, *THE FORMS AND LIMITS OF ADJUDICATION* 381 (1959))).

²⁰⁷ See FISHER, URY & PATTON, *supra* note 7, at 4–5, 12, 82–83 & 91 (describing “positional bargaining”); Menkel-Meadow, *supra* note 33, at 768–76 (describing the “structure of adversarial negotiation” as “linear concessions on the road to compromise”).

²⁰⁸ See *supra* note 154 and accompanying text.

²⁰⁹ Drillco Transcript, *supra* note 55, at 87.

in asking for both reinstatement and money, he played out his pre-negotiation plan of paying up to \$25,000, even after the premises on which that plan was based had been discredited. He allowed the bargaining process to be compressed into an offer-offer-agreement format that did not provide time for numerous, small, asymmetrical and grudging concessions. He edited his expectations of possible recovery downward during the course of the bargaining conversation rather than break off discussion to think, under less pressured circumstances, about whether such an adjustment was warranted.

If there was a single, strategic move that dictated the outcome of the conference, however, it was the Paine lawyers' introduction of the reinstatement demand. The Drillco lawyer seemed truly surprised by this demand, and even though he had anticipated it would be made, he was unable to generate objections quickly enough to fight it off, or shift gears quickly enough to recoup his losses when the discussion turned to money. Reinstatement put him permanently on the defensive, one step behind the magistrate for the remainder of their discussion and the magistrate, in turn, was one step behind the Paine lawyers. The Drillco lawyer never seemed to see how the case divided naturally into two parts, one of which (reinstatement) was Paine's payoff and the other of which (money) was Drillco's. Nor did he seem to realize that he needed to alter his low-key, candid, among-friends, bargaining approach once he realized that the Paine lawyers were not playing by the same rules. His approach might have worked in a situation with different participants, but a more animated and aggressive strategy was called for here. The conference was not over yet, however, since the Paine lawyers still had to agree to the reconfigured proposal and while it was similar to the proposal they already had approved, the chance to think about it might have given them second thoughts. It was with that concern that the magistrate met with the Paine lawyers for the second and final time.

5) Second Caucus with the Paine Lawyers

The second caucus with the Paine lawyers should have been the shortest and most agreeable of all of the magistrate's meetings since the offer he brought back included almost everything the lawyers had asked for. Paine would be reinstated and thus would have no front-pay damages and he would be given almost all of his lost back pay, subject only to a deduction for attorneys' fees. Yet, the meeting took twenty minutes and the discussion was among the

most contentious of any in the conference as a whole. The magistrate opened the discussion with a long, rambling statement describing the several obstacles he reputedly had overcome to obtain the Drillco lawyer's assent (e.g., fitting the agreement within the terms of the company's collective bargaining agreement, finding an acceptable location for Paine to be reinstated and devising a probationary reinstatement period). It was not until the end of the statement that he revealed the Drillco lawyer's counter offer. Upon hearing the offer, the Paine lawyers took a short break, and upon returning to the caucus they went on the offensive.

The lawyers started in a somewhat half-hearted manner, making numerous points but not dwelling on any of them. Their first serious objection was directed at the offer to pay Paine \$25,000 for his past economic harm. They wanted at least \$30,000 and said they couldn't, "in good conscience," recommend anything less.²¹⁰ But they were boxed in by their own past omission. They had authorized a \$30,000 offer, in effect, by failing, in the first caucus, to challenge the magistrate's calculation of back pay damages and letting him go back to the Drillco lawyer thinking that \$30,000 was acceptable. When he returned with a counter-offer of twenty-five, the difference between the two numbers was not large enough to make an objection believable. No one in that situation would risk the loss of reinstatement and most of Paine's back pay for the chance to add another \$5,000 to the pot, no matter what they said they would do. The lawyers tried to convince the magistrate (and perhaps themselves) that they needed \$30,000,²¹¹ but it was a half-hearted effort and the magistrate refused to believe them. In fact, he said as much.

MA: I don't think the thirty is there. But I mean if you're just talking about twenty-five thousand dollars, the difference is five thousand dollars, cause he's adamant that is it; and it's just not worth it, it seems to me, to derail this thing for five thousand dollars.²¹²

The lawyers' persistence might have been more successful had they picked up on the magistrate's suggestion in their first caucus that Paine's past damages were worth more than \$30,000. The

²¹⁰ "I cannot, we cannot, in good conscience, see our way clear to recommend anything less than \$30,000 to our client. We are ready to go back and recommend that." *Id.* at 90.

²¹¹ In addition to the "good conscience" argument, they also argued that "We're not talking attorneys' fees in this package. We've taken that off the table," and "I'm very loath to go back to my client and tell him that the turmoil and difficult times he has had" *Id.* at 92-93.

²¹² *Id.* at 90.

magistrate had indicated at one point that he thought \$50,000 was an upper limit, but the lawyers did not pin him down to that higher figure and it dropped out of the conversation. When the magistrate went back to the Drillco lawyer for the second time he presented the \$30,000 because he thought it would be easiest amount for the lawyer to accept. In bargaining parlance, the Paine lawyers failed to expand the bargaining range to provide room for more than one round of concessions. If \$50,000 was still a possibility when they met with the magistrate for the second time, the objection to thirty thousand would have been more credible. \$20,000 would have been worth fighting over. But \$5,000 was not. Recognizing that their position was untenable, the Paine lawyers continued to argue for it anyway, probably to make their ultimate acceptance of the Drillco counter offer appear grudging. If the magistrate thought he had to force the agreement on the lawyers he would be less likely to have second thoughts about whether it was fair, or be concerned that he had been out-bargained.²¹³ After several rounds of somewhat perfunctory and stylized argument, therefore, the Paine lawyers agreed to recommend reinstatement and \$25,000 “with some caveats.”²¹⁴

The parties reconvened as a group for a somewhat contentious memorialization of the agreement. Each side hedged its bets by expressing the view that if the remaining logistical issues (e.g., the length of Paine’s probationary period, the location of his new assignment and the like), could not be worked out then the deal was off. While each of the lawyers was disappointed with the outcome, the Drillco lawyer perhaps described the agreement best when, in responding to a Paine lawyer’s complaint, he commented: “I’ve given you the ranch. I mean, what do you want?”²¹⁵ The magistrate offered to mediate any lingering disagreements, expressed pleasure at having had the chance to work with each of the lawyers and the conference ended.

* * * * *

²¹³ There is substantial research data to suggest that bargainers want the outcome of their negotiations to be fair. *See e.g.*, Korobkin, *supra* note 164, at 17 (describing empirical findings based on plays of the “ultimatum game” and “equity theory”). The Paine lawyers appeared to be of different minds at the end stage of this caucus, with one bemoaning the difficulty of convincing the client to accept the offer and the other eager to “discuss the offer with the client.” At one point, the more aggressive of the two lawyers placed her hand on the hands of the more conciliatory one as if to ask the latter not to speak. Drillco Transcript, *supra* note 55, at 91.

²¹⁴ *Id.* at 93.

²¹⁵ *Id.* at 94.

What then may be said about the Drillco negotiation in the aggregate and what lessons may be learned from it about bargaining behavior in general? To begin with, the parties' final agreement was pretty one-sided. By almost any standard Paine did much better than Drillco. He got his job back and almost all of his back pay and while his future with the company might not have been that bright, he had time and (the company's) money with which to look around for something better. It is hard to see how he could have improved upon this outcome by going to trial. That said, it is a little surprising that such highly skilled and evenly matched lawyers, working with case law and evidence that also was evenly balanced, would reach an agreement so obviously one-sided. It is not difficult to describe how it happened. The magistrate and the Drillco lawyer went into the conference thinking that the case was worth somewhere between \$15,000 and \$25,000. Ironically, the Paine lawyers thought almost the same thing, though they also believed they could convince the magistrate that it was worth several times that amount. Direct discussion among the lawyers quickly became heated and reached an impasse. The magistrate tried to break the impasse by caucusing privately with each side, in a kind of shuttle diplomacy, but when he decided to meet with the Drillco lawyer first he virtually guaranteed that Drillco would make the first serious offer and this tipped the balance of the negotiation in favor of Paine. When asked what he would pay to settle, the Drillco lawyer made a reasonable offer. He did not dissemble, exaggerate, or posture (at least not very much), because he was a friend of the magistrate and did not want to antagonize or insult him. He understood that the Paine lawyers might not reciprocate his reasonableness and that he was vulnerable to a maximizing offer in return, but he thought the magistrate would protect him from that risk.

Unfortunately for the Drillco lawyer, the Paine lawyers redefined the bargaining range for the magistrate by introducing an unexpected non-monetary demand (reinstatement) with substantial monetary consequences, asking for "cash register" compensatory damages and (unknowingly) exploiting the magistrate's private fear that the pre-trial order would be amended to add new claims. The lawyers' arguments may have convinced the magistrate that these demands were serious and the risks real, though it is more likely that they simply surprised him with their novelty and force and he was unable to recover in time to put the arguments in proper perspective. As a consequence, he deferred to the argu-

ments more than was warranted. The arguments were more numerous, more elaborately developed, more fully grounded in the evidence and more emphatically made than his own and he simply may have decided to avoid them rather than fight. It would not be unusual for a person trained in law to defer to what appeared to be a superior case even when that appearance was misleading. The Paine lawyers' age discrimination argument, for example, which seemed to stymie the magistrate's efforts to challenge the front pay demand for \$200,000, was not self-evidently correct and the lawyers did not provide any knock-down reasons to support it. And even if it was correct, it did not justify a \$200,000 demand. But these problems notwithstanding, the magistrate seemed to accept most of the Paine lawyers' arguments as true²¹⁶ and then made those same arguments (describing them as his own) to the Drillco

²¹⁶ I do not mean to say that the age discrimination argument (and others like it) was wrong – it might have held up under scrutiny (though the Paine lawyers did not think it would), and it might not have – but just that it was never fully tested. The magistrate was not ready for it, avoided it and thus, in effect, conceded it. The argument had the kind of influence traditionally reserved for demonstrably correct arguments even though its correctness had not been demonstrated. This phenomenon of deferring to an argument based on its circumstantial properties is a pervasive feature of negotiation, as well as lawyer conversation generally. One might say that lawyers should never concede to arguments that are not fully examined and tested and no doubt that is correct as a matter of general principle, but it is not always possible to anticipate every argument another bargainer might make in negotiation, hard to admit that an argument comes as a surprise, and bad form to keep taking breaks to do more thinking. Sometimes one must go forward on general knowledge and gut reaction, and unfamiliar arguments can have powerful effects in such circumstances, even when weak. See GARY GOODPASTOR, *NEGOTIATION AND MEDIATION: A GUIDE TO NEGOTIATION AND NEGOTIATED DISPUTE RESOLUTION* 123–35 (1997) (describing the non-rational aspects of negotiator decision-making, drawing on Herbert Simon's conception of "bounded rationality" and Daniel Kahneman and Amos Tversky's work on "heuristics and biases"); Richard Birke & Craig R. Fox, *supra* note 87, at 1–57 (same); Korobkin & Ulen, *supra* note 45, at 1084–1109 (same). The age discrimination analogy was the most important surprise argument in this particular negotiation, but with different parties and a different dynamic it easily could have been something else. Effective argument always exploits surprise to some extent and all negotiators are vulnerable to this move some of the time. Mnookin and his collaborators misunderstand this point, claiming that adversarial bargaining must be based on the assumption that "those negotiate[d] against will be less skillful, intelligent, or sophisticated" than oneself, that such bargaining inevitably involves "fishing for suckers." See ROBERT MNOOKIN, SCOTT PEPPET & ANDREW TELUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 321–22 (2000). The Drillco lawyer was one of the best lawyers in his field, a highly respected and skilled practitioner with over twenty years of experience in Title VII litigation, and yet he was not prepared to respond to some of the Paine lawyers' arguments (nor was the equally experienced and skilled magistrate.) Even the best negotiators are not ready to handle every eventuality a bargaining conversation might produce. For a cute illustration of the opposite phenomenon, a "true" (in the sense of economically rational) argument that did not work because it did not take psychological factors into account, see Steven Lubet, *Notes on the Bedouin Horse Trader or "Why Won't the Market Clear, Daddy?"* 74 *TEX. L. REV.* 1039 (1996).

lawyer. The Drillco lawyer, in turn, seemed equally unprepared or unwilling to contest the arguments, acceded to the magistrate's pressure and gave him (and through him the Paine lawyers) almost everything he asked for. In short, the Paine lawyers changed the magistrate's mind (or at least his position), the magistrate changed the Drillco lawyer's mind (or at least his position), and Paine won big.²¹⁷

While this may describe the sequence of events in the conference, it does not say much about why the Paine lawyers' strategy worked, whether it was an exemplary one, or whether other bargainers should try to emulate it. To answer these questions we first need to know more about whether the settlement was likely to be stable. For example, if the Drillco lawyer later would try to set the agreement aside or negate its effects in some other way,²¹⁸ because he was angry at being manipulated, deceived, or surprised, the strategy was not effective, the agreement's favorable terms notwithstanding. When asked if he would have tried to upset the settlement, however, the Drillco lawyer said no, that while he was not happy with it, he did not think the Paine lawyers breached any moral, social or legal limits in making their case. He blamed the client, himself and the magistrate, more than the Paine lawyers for the one-sided outcome. He resolved to bargain more aggressively with the lawyers should they meet again in the future,²¹⁹ but he did

²¹⁷ While skill played a large role in determining outcome, the Paine lawyers also were the beneficiaries of a fair amount of fortuity. The magistrate's decision to meet with the Drillco lawyer first, the Drillco lawyer's reluctance to make an inflated demand because he and the magistrate were friends and the magistrate's ignorance of the age discrimination case law, all were contingent factors in the negotiation. If any one had been missing, the outcome might have been different. Though in all fairness, many factors in negotiation are contingent and bargaining skillfully consists, in part, of being able to identify and exploit them.

²¹⁸ Or he might retaliate against the Paine lawyers in the future, in unrelated negotiations, by being excessively demanding, deceitful, belligerent and the like.

²¹⁹ That they are repeat players in bargaining even when their clients are not, permits lawyers to develop such "reputational" solutions to bargaining problems. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 522-27 (1994). In fact, it is now common in bargaining literature to base arguments for the superiority of the communitarian approach on the "reputational effects" of bargaining style, claiming that the tangible benefits of an adversarial style in particular negotiations invariably are outweighed by the long term costs of being known as an adversarial bargainer. See e.g., Catherine H. Tinsley, Kathleen O'Connor & Brandon A. Sullivan, *Tough Guys Finish Last: The Perils of a Distributive Reputation*, 88 ORG. BEH. & HUMAN DEC. PROC. 621, 642 (2002) ("[h]aving a distributive reputation, whether deserved or not, hurts negotiators"). But see Gilson & Mnookin, *supra* note 219, at 538 ("because litigation is inherently competitive, a reputation for cooperation will be based on the more ephemeral concept of not being too conflictual"). The allure of this argument might be explained by the fact that much of the social scientific study of bargaining is based on experiments using business and law school stu-

not question the legitimacy of their success here. He was an aggressive bargainer himself, as most lawyers are, and at some level he may have had a grudging appreciation of the Paine lawyers' performance. His "given you the ranch" comment at the end of the conference seems to indicate that he knew what had happened.²²⁰

Drillco itself also was likely to be satisfied with the settlement since its assessment would be based principally on information provided by its lawyer and he would describe the agreement as achieving all that was possible.²²¹ He would emphasize how the magistrate took Paine's side in pressing aggressively for reinstatement, how it would cost almost as much to try the case as to pay Paine's damages, how Paine had always been a good employee and would be an even better one now that the unpleasantness of the lawsuit was over, and how Paine's personality clash with the supervisor in Venezuela was probably an isolated incident that would not be likely to recur when Paine rejoined the company stateside. The lawyer would not say much about how the parties arrived at the agreement's particular terms because he himself did not under-

dents as subjects and students have both a lower threshold for being offended and a stronger interest in paying-back than do experienced practitioners. *See, e.g.,* Rachlinksi, *supra* note 45, at 127–28 (describing the influence of "framing effects" on Cornell law students' decisions of whether to accept settlements in a hypothetical bargaining exercise); Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1 (1994) (describing the results of an experiment based on law student bargaining behavior). The argument also fails to consider the extent to which bargainers control the construction of their bargaining reputations and makes the all too common mistake of comparing an exemplar of one approach (communitarian bargaining) with a caricature of another (adversarial bargaining), finding the exemplar preferable. Adversarial bargainers usually are depicted as "stubborn," "headstrong, arrogant, egotistical," "irritating, quarrelsome [and] hostile" persons focused on winning rather than resolving disputes. *See, e.g.,* Schneider, *supra* note 23, at 163–67; Menkel-Meadow, *supra* note 33, at 765–94 (describing the "structure and process of adversarial negotiation"); Murray, *supra* note 36, at 182 (adversarial bargainers choose strategies as if in military maneuvers), and as persons who make take it or leave it demands and refuse to compromise. *See, e.g.,* Murray, *supra* note 36, at 183 ("opponent cannot dislodge or defeat [competitive bargainer's] preparation by any means of persuasion based on the merits"). One ought to be thankful, I suppose, that there is no mention of their drooling, or of polishing their fangs and claws. The Paine lawyers' behavior presents a more realistic picture of adversarial bargaining and shows how being substantively aggressive can be socially acceptable without leaving any of the bad aftertaste communitarians decry. *See* William P. Bottom & Paul W. Paese, *Judgment Accuracy and the Asymmetric Cost of Errors in Distributive Bargaining*, 8 GROUP DECISION & NEGOT. 349, 362 (1999) (no evidence that perceived toughness in bargaining leads to impasse or damages the possibility of long term relationships).

²²⁰ *See* discussion *supra* Part III.4.

²²¹ Appiah's discussion of the malleability of desire (under the rubric of "soul-making") illustrates nicely how shapeless a party's interest in outcome may be and how many different outcomes could be satisfying. *See* APPIAH, *supra* note 11, at 170–81. "[D]esires can be characterized with various degrees of abstraction, with no obvious stopping point." *Id.* at 176.

stand fully how that had happened. He was confused by the magistrate's abrupt shift in allegiance, for example, and was not sure whether he had been misled all along or whether the shift was the Paine lawyers doing. Having agreed to the deal, however, he would sell it to the client²²² to keep the case closed on his docket, the magistrate happy and his reputation intact. Similar to the Paine lawyers' strategy in the conference itself, first he would convince himself and then he would convince the client.²²³

Once Drillco approved the settlement the case would drop off the radar screen of everyone involved. It was not an intrinsically noteworthy case in any conventional sense. The money at stake was not large, the issues were not unique, the time and energy invested were not great and the bargaining conversation itself left no lingering personal grievances or wounds that the Drillco lawyer would feel the need to vindicate down the road.²²⁴ Unless Paine revived the memory of the case by getting into a similar brouhaha in the future, other controversies would come along to replace it on both parties' schedules, both would forget about it and the dispute would be "resolved." There might be lingering questions about whether the agreement was fair, particularly to Drillco, but these

²²² For descriptions of how this is done, see Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990), and JOSEPH S. LOBENTHAL, *POWER AND THE PUT-ON: THE LAW IN AMERICA* (1971). It is now common in the negotiation literature to discuss this process of "cooling out the client" in the language of "frame analysis." See, e.g., Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 SO. CAL. L. REV. 113, 172 (1996) ("[t]he attorney can control the client's frame, thereby influencing settlement decisions in either direction."), though the examples given usually present agent-principal problems more than framing ones. For additional perspectives on the lawyer-client decision-making process in bargaining, see Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 ILL. L. REV. 43 (1999); Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 SO. CAL. INTERDISC. L.J. 375 (1997).

²²³ For an insightful description of ways lawyers (including judges conducting pre-trial conferences), can "spin" mediators to realize their own purposes, see Dwight Golann, *How to Borrow a Mediator's Powers*, 30 LITIG. 41 (2004). The process of conforming desires to options, of aligning what one wants with what is available, has been explained by Jon Elster under the rubric of "adaptive preference formation." See EXPLAINING TECHNICAL CHANGE: A CASE STUDY IN THE PHILOSOPHY OF SCIENCE 86 (Jon Elster & Gudmund Hernes eds., 1983); JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 110 (1983); JON ELSTER, *POLITICAL PSYCHOLOGY* 54 (1993); JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES*; JON ELSTER, *The Market and the Forum: Three Varieties of Political Theory*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 103-32 (Jon Elster et al. eds., 1986). Elster defines "the adjustment of wants to possibilities . . . [as] a causal process taking place 'behind the back' of the individual concerned. The driving force behind such adaptation is the often intolerable tension and frustration ('cognitive dissonance') of having wants that one cannot possibly satisfy." Jon Elster, *Belief, Bias and Ideology*, in RATIONALITY AND RELATIVISM 126-27 (Martin Hollis & Steven Lukes eds., 1982).

²²⁴ Each of these qualities makes the case a run-of-the-mill bargaining problem and representative of lawyer bargaining generally.

questions would be of interest only to someone with a rights-based conception of legal bargaining. Communitarian bargainers would be satisfied that the dispute was over.

We then come to the question of why the Paine lawyers' strategy succeeded. Bargaining competitively can be counter productive, particularly when it crosses over into, or is interpreted as, being belligerent, rude, insensitive and the like; and yet the Paine lawyers' arguments caused the magistrate to change his mind and agree with their position rather than become angry and reject it. The key to their success seemed to lie in the combination of attitudes and maneuvers that made their arguments persuasive even when arguably incorrect and perhaps even a little bit pushy.²²⁵ The lawyers deceived the magistrate as to their true intentions, motives and beliefs, surprised and impressed him with questionable claims he did not anticipate and could not rebut on the spur of the moment, convinced him of their sincerity and intransigence and wore him down.

Consider first the lawyers' ability to keep their true intentions and beliefs secret. Before the conference the Paine lawyers had said they would be willing to settle the case for something in the vicinity of \$25,000, without reinstatement, if that was all that was available. They appraised the case in terms almost identical to those of the Drillco lawyer and magistrate. While they hoped to get more than \$25,000, they thought twenty-five was a fair figure, or at least that it was the most Paine could expect from a court. Unlike the Drillco lawyer, however, they also thought they could persuade the magistrate that the case was worth much more than that and that they could do this by convincing him to treat their inflated demands as serious proposals. Rather than try for a disproportionate share of an evenly balanced bargaining range, difficult to do because winning and losing is obvious, the Paine lawyers planned to create an imbalanced range to begin with and then appear to be fair by dividing it evenly. This strategy required them either to convince the magistrate that their inflated demands were serious and the Drillco lawyer's equivalent counter-offers (if forthcoming) were not, or have the Drillco lawyer make an unreciprocated and generous starting offer. Their own skill produced the former and the magistrate's decision to meet with the Drillco lawyer first produced the latter.

²²⁵ For an excellent discussion of the manner in which these seemingly contradictory qualities can be combined, see Charles B. Craver, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest? How to Be Assertive Without Being Offensive*, 38 SOUTH TEX. L. REV. 713 (1997).

The lawyers were able to fool the magistrate about their level of commitment to their expressed demands, in large measure, because they looked sincere, even earnest (and perhaps were), in stating the demands, even when what they said was implausible and in some instances extremely so.²²⁶ They admitted privately, for example, that they could not defend the demand for \$100,000 for past economic harm and yet made it anyway, unembarrassedly and enthusiastically, discussing it at length as if they expected the magistrate to accept it.²²⁷ Throughout this discussion they spoke in ordinary, well-modulated tones, did not interrupt to repeat points not immediately accepted, did not interrupt to talk over the magistrate to prevent their points from being challenged and were calm and relaxed, as if they expected anyone who thought about the issue ultimately to agree with them.²²⁸ Only their failure to describe the manner in which they calculated Paine's damages gave any indication that they might have been dissembling (apart from the inherent implausibility of the demand).²²⁹

The Drillco lawyer, by contrast, was a good deal more forthcoming, less rigid and easier to read. While he never told the magistrate the most that Drillco would pay to settle, he gave numerous indications that he would increase his offer, and his comments about how he assessed the case were considerably more candid than those of the Paine lawyers. His \$15–20,000 offer, for example, was very close to his true bottom line and he did not try to de-

²²⁶ The \$200,000 demand, for example. See discussion *supra* Part III.3. The magistrate made the common mistake of testing the reliability of the Paine lawyers' statements by trying to determine whether they were sincere rather than plausible. It is possible for bargainers to convince themselves of the most god-awful things and then communicate those beliefs sincerely to others. This does not mean that they will act on the beliefs. For that to be true, the beliefs must be plausible. See Conklin, *supra* note 14, at 6–10 (describing the contextual factors that make interpreting the predictive value of bargainer communication difficult).

²²⁷ The magistrate should have pressed them on this point. Asking an adversary to explain the basis of a demand is an elementary principle of good bargaining. A demand which cannot be grounded on principle is not serious and should not be treated as if it was. Had he asked, the negotiation might have gone down a completely different path, since the Paine lawyers did not have a convincing explanation for how they came up with the \$100,000 figure.

²²⁸ See Welsh, *supra* note 3, at 760 (“[i]f a negotiator perceives that the other negotiator gave her sufficient opportunity to speak, tried to be open-minded in considering what she had to say, and treated her with respect, she is more likely to view the outcome of the negotiation as fair . . .”).

²²⁹ Had they paid more attention to this issue of principled justification they also might have heard the magistrate suggest that the case could be worth as much as \$50,000 and had they heard this they might not have allowed him to go back to the Drillco lawyer with only a \$30,000 demand. This, in turn, would have changed the size of the difference between the parties' last two offers and made the Paine lawyers attempt to hold out for an additional concession (in the final caucus) more credible.

crease it after reinstatement was added to the agenda. He also acknowledged, more than once, implicitly as well as directly, that he could recommend reinstatement even though he had good arguments for not doing so,²³⁰ and reinstatement radically reconfigured the dispute in favor of Paine. His comments, unlike those of the Paine lawyers, could be taken at face value most of the time. In effect, he reciprocated the presumption of candor the magistrate accorded the lawyers, even as the Paine lawyers exploited it.

The Paine lawyers also were a good deal more suspicious than the Drillco lawyer of the magistrate's comments about the case. They believed few, if any, of the magistrate's statements about what Drillco would be willing to pay (or do) to settle, for example, and saw everything he said as an exaggeration at best, a misrepresentation or lie at worst. They also assumed that they could change the magistrate's views whenever they were unfavorable to Paine and, because of this, challenged many of his statements almost reflexively, particularly early in the conference when he routinely sided with Drillco, hoping to have him qualify or reverse his position, as many times he did. The Drillco lawyer, by comparison, took most of the magistrate's assertions at face value, challenged them minimally, never for very long and only on marginal points. He seemed to assume that the magistrate's views were fixed and that they would determine the basic structure of the settlement.²³¹ He acted more like someone intent on finding out what the magistrate believed, rather than someone intent on convincing him of what to believe.²³²

²³⁰ The company's collective bargaining agreement with the union made reinstatement difficult and perhaps impossible. The magistrate would have had to take the lawyer's word for this since he (the magistrate) had not seen the agreement.

²³¹ These qualities of secretiveness (about one's own views) and suspiciousness (about the other sides' views) are paired in the voting, so to speak; in fact, one is the natural corollary of the other. It is understandable that one who is secretive would assume that others are as well and thus be suspicious of what they have to say.

²³² There was little risk that, in retrospect, the magistrate would discover that the Paine lawyers had deceived him and, as a consequence, approach them with greater suspicion in the future. He would have no reason to reflect on the conference, for one thing, it was just one of dozens of conferences like it, all of which would fade quickly into obscurity as others took their place. But even if he wanted to reflect on it, he did not have access to information about the lawyers' true beliefs and intentions that would indicate that he had been deceived. He would know only that the Paine lawyers were inventive and tenacious and that they came well prepared, but that would cause him to make few, if any, adjustments in his approach to them in the future. Only the lawyers' above-ordinary level of enthusiasm and energy was something he could not have predicted and these qualities told him nothing about the extent to which their public representations deviated from their private thoughts. Bargaining aggressively, as long as it does not become personal, rarely offends other lawyers or judges in any lasting sense. They

The Paine lawyers also were able to engage the magistrate in lengthy discussions of individual arguments, even weak ones, in a manner that helped breathe life into the arguments and give them a greater degree of influence than was warranted. The magistrate was partly responsible for this. He was habitually courteous, accorded lawyers a presumption of good faith whether justified or not and deferred to them in the presentation of their cases. He would have given the Paine lawyers a great deal of leeway no matter what they said, but the lawyers helped themselves in this regard by presenting their arguments in ways that made them seem more substantial than they were. They made many more individual arguments than the magistrate and Drillco lawyer, for example, so many more, in fact, that the sheer number at times seemed to overwhelm the magistrate and make it difficult for him to keep up. The lawyers also surprised the magistrate with unexpected arguments based on seemingly irrelevant case law, unusual perspectives on issues raised by the pre-trial order and non-obvious but defensible expansions of issues raised by that order. They seemed to be one argumentative frame of reference ahead of him much of the time.

These arguments were influential for several reasons. Almost invariably, they were based on entitlement claims more than power or leverage (e.g., that Drillco should pay because it had wronged Paine, not because it would be cheaper for it to settle than to litigate),²³³ and thus avoided the antagonism that goes with telling someone he must do what he is told because he will be punished if he does not. The lawyers also were careful not to resort to name-calling, ridicule and other types of *ad hominem* tactics (e.g., describing Drillco's views as silly, ridiculous, or the like) that are popular with lawyers when listeners do not agree. They were unfailingly courteous and respectful, channeling expressions of intensity and commitment into the content of what they said more than

will blame the outcome on the situation, or the weakness of their case, more than on the other lawyer. Belligerent and rude bargaining carries such risks, but belligerent and rude behavior is easily avoided.

²³³ While the Paine lawyers' entitlement claims were suspect, the fact that they were entitlement claims made it more difficult for the magistrate to be offended by them or dismiss them as not worthy of serious consideration. The categories of entitlement and power break down at the margin, of course. Every well-reasoned argument draws on psychological leverage for its force as much as on principles of logic and evidence. A listener who cannot rebut a point often will concede it, for example, not solely because he believes the point to be true but also because he does not want to take the chance of being embarrassed by a discussion that makes his ignorance clear for all to see. See Condlin, *supra* note 14, at 69–79, for a discussion of the different characteristics of different advocacy strategies and the risks in using each type. Threat-based bargaining, on the other hand, is one-dimensional and unambiguously offensive.

their tone and demeanor. They gave the magistrate time to respond to their arguments, listened without interruption when he did,²³⁴ and countered his points with substantive rejoinders, never dismissing them out of hand or ridiculing them as not worthy of a response. They did not use long soliloquies to filibuster points that were difficult for them to rebut as a way of preventing the magistrate from challenging their views, or try to avoid weak points in their arguments altogether by refusing to talk about them (though, in fairness, they also did not dwell on such points and tried to shift discussion away from them as quickly as possible). They exhibited none of the defensiveness typically associated with lawyers who are bluffing or posturing.

Perhaps the lawyers' most powerful attribute, however, was their tenaciousness or ability to persist in the face of the magistrate's seemingly sincere dismissal of their arguments and rejection of their demands.²³⁵ More than once, they refused to take no for an answer when the magistrate seemingly rejected an argument out of hand. Instead, they assumed that the magistrate did not understand and pressed their points again and again, sometimes in as many as five distinct versions, until they either convinced him that the points had merit, weakened his conviction to the contrary, increased his perception of the costs of beating back their claims, or exhausted him.²³⁶ Equally important, they accompanied this argumentative persistence with signals of open-mindedness and willingness to compromise that helped ameliorate any impression that they were just being stubborn. They kept the magistrate dangling on the end of a line, in a sense, just short of the point where it would seem hopeless to continue the discussion, refusing to con-

²³⁴ One of the interesting ironies of interruption as a phenomenon is that it is equally capable of irritating and appealing to lawyers, depending upon who is doing it.

²³⁵ This quality was particularly helpful to the lawyers' novel but weak arguments. When the magistrate dismissed these arguments peremptorily the lawyers continued to assert them in different forms rather than abandon them altogether. When the magistrate did not continue to rebut with the same insistence the arguments began to look stronger, since even weak arguments can appear convincing if unrebutted. Even if the arguments did not convince, the fact that the Paine lawyers continued to assert them made the lawyers' protestations appear to be sincere and this meant that when the lawyers eventually abandoned the argument they would have to be given something in return, since they were giving up something that, for all outward appearances, was significant. On the value of persistence in negotiation, see Bottom & Paese, *supra* note 219, at 351.

²³⁶ The Drillco lawyer also seemed to get tired and made several mistakes because of it. Tiredness is a structural feature of bargaining, however, and something effective bargainers exploit, whether consciously or not. In fact, some bargaining strategies are designed simply to produce tiredness.

cede points until and unless it was absolutely necessary to do so.²³⁷ In short, through a combination of substantive cleverness and a persistent, forceful yet flexible demeanor, they managed to be confident without being arrogant, articulate without being glib and aggressive without being belligerent. They made it seem as though their case did not depend upon rhetorical tricks and as though they were motivated by a commitment to client interests more than a desire to win. While their relentless combativeness would have been annoying to some, it was a substantive combativeness, expressed in what was said rather than in how it was said, and substantive combativeness is hard to fault, at least on reflection, because it is just a form of sticking up for oneself.²³⁸

The Paine lawyers' strategies had some of the outward features of communitarian bargaining but the lawyers themselves were not problem-solvers in any ordinary sense of the term. They were unfailingly polite and respectful, in a manner Williams would have approved, and they argued from principle rather than power in the manner advised by Fisher and Ury, but at the same time they also treated bargaining as an exercise in self-interested maximizing. They were deceptive, competitive, concerned almost exclusively with Paine's interests, and intent on coming away from the conference with as much as they could get rather than finding a mutually beneficial middle-ground solution. They were willing to exploit all of the leverage available to them, including personal qualities of the magistrate unrelated to the substantive issues in the dispute, if that's what it took to produce this result.²³⁹ Beneath their outward appearance of reasoned elaboration lay an unvarnished desire to

²³⁷ The lawyers were so good at this process of adversarial conversation that at times the magistrate even finished their arguments for them, convincing himself of what they had to say. See discussion *supra* note 172 and accompanying text.

²³⁸ As one might expect, the Paine lawyers' behavior often produces strong reactions in those who watch the tape of the conference. Many describe the lawyers' behavior in unflattering terms, but this is the wrong way to view it. The lawyers were not mean-spirited or obnoxious all, or even part, of the time; they were just substantively aggressive. They were not "sharpies" in Scott Peppet's re-deployment of William Simon's quaint term. See Peppet, *supra* note 9, at 481-84. They were hard but fair bargainers, forceful but not overbearing, the kind of bargainers one would hire to protect important interests one didn't want compromised. Theirs was a kind of "on the merits" aggressiveness, not one of personal force, motivated by a sense of integrity and loyalty to the client rather than a sadistic desire to beat someone up or a megalomaniacal need to aggrandize oneself at the expense of another. See Roger Fisher and Wayne H. Davis, *Six Basic Interpersonal Skills for a Negotiator's Repertoire*, 3 NEGOT. J. 117, 119-20 (1987) (describing the skill of "Being Assertive Without Damaging the [Bargaining] Relationship").

²³⁹ The "age discrimination analogy" argument, for example, owed its success as much to the fact that it surprised the magistrate and caused him to back away from discussing it to avoid embarrassment as it did to the fact that it was intrinsically convincing. See Orr & Guthrie, *supra*

win, and this took them outside the camp of communitarian bargaining.

The Paine lawyers' decision to bargain in this way is easy to understand. If it is possible to win more than an adversary, without compromising one's integrity, abusing others, corrupting legal institutions, or making the world a more hostile place – and the Paine lawyers' behavior is evidence that it is – then it is only rational to try to do this, even if the behavior involved is not saintly (i.e., selfless).²⁴⁰ One is usually better off with more rather than less of something valued, everything else being equal; that someone felt otherwise would be the breaking news. Moreover, bargaining in this way permits lawyers to honor promises to clients, perform at a high level of technical proficiency,²⁴¹ advertise themselves, and prosper, all at the same time. These are attractive effects, both in themselves and for the distinctiveness they can confer in the sometimes depressing anonymity of modern professional life.²⁴² Clients

note 45, at 625 (recommending that bargainers take advantage of their adversaries' lack of experience and lack of information about the value of the items in dispute).

²⁴⁰ On the role of saintliness in negotiation, see Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 HARV. NEGOT. L. REV. 83 (2002). Emphasis should be on the “possibility” of winning since in any given case a lawyer is not likely to be as successful as the Paine lawyers were here. Some will, however, and all might, so it is not surprising that individual lawyers regularly would indulge in the assumption that they could win big by playing out a facsimile of the Paine lawyers' strategy, expecting to revert to communitarian methods if a more competitive approach did not work. Some argue that bargainers can never go home again, that relationships once defined as competitive cannot be reformed as cooperative, but that will depend, as do almost all interactional issues, on what form the competitive behavior takes. Compare Morris et al., *supra* note 127, at 45–50 (describing how bargainers commonly turn away from a fully cooperative tone toward more contentious tactics at the endgame stage of negotiation). Bargainers who are mean-spirited and nasty will not be able to revert convincingly to respectful and friendly social styles, but bargainers who are assertive and forceful will be able to revert to cooperative ones. There is a principled inconsistency between the first two approaches that is missing between the second two.

²⁴¹ Building on the Aristotelian view that “a good life has the inherent value of a skillful performance,” Ronald Dworkin argues that “living a life is itself a performance that demands skill, that it is the most comprehensive and important challenge we face, and that our critical interests consist in the achievements, events, and experiences that mean that we have met the challenge well.” RONALD DWORIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 253 (2000) (emphasis omitted).

²⁴² See THE MARYLAND JUDICIAL TASK FORCE ON PROFESSIONALISM: REPORT AND RECOMMENDATIONS 41 (Hon. Lynne A. Battaglia, Chairperson, & Norman L. Smith, Reporter, Nov. 10, 2003) (describing how “all participants [in the study] expressed [a concern for] the lack of recognition of [their] accomplishment[s]”). The drive to achieve practice skill distinction can be seen as a response to the “quiet desperation” problem. See HENRY DAVID THOREAU, *WALDEN*, at ch. 1-A, ¶ 9 (Everyman's Library 1993) (1854) (“[t]he mass of men lead lives of quiet desperation.”). The development of the communitarian conception of bargaining might even be explained in this way, as an instance of legal academics searching for a theoretically distinctive niche in a world where all of the explicitly adversarial variations are taken.

will go down this path with lawyers because they will believe that doing so increases their chances of getting out-of-the-ordinary compensation for their claims, and only rare clients will think their claims are not worth out-of-the-ordinary compensation.

Bargaining in this manner also benefits the system of informal dispute settlement in the sense that it encourages lawyers to base agreements on the outcomes of arguments about entitlement claims and this in turn makes agreements more substantively legitimate. Legal dispute settlement must be normative as well as instrumental, legitimate as well as final. The legal system promises this and parties caught up in the system are entitled to it. Legal rights should mean the same thing wherever vindicated, however, whether in a boardroom, hallway, office, or courtroom. As I argued several years ago:

[Persons who] use the legal system . . . are entitled to presume that their disputes will be resolved according to law. They may choose to waive this entitlement for non-legal considerations such as fear of publicity, an immediate need for cash, personal feelings for the adversary, intolerance for conflict, moral sensibilities, and the like, and this decision is not troublesome if it represents the free choice of one value over another, when both choices are known. But the selection of a negotiated outcome over an adjudicated one, by itself, should not be seen as a waiver of this entitlement.²⁴³

In a reasonably just legal system, therefore, “the justice of negotiated outcomes exists, at a minimum, to the extent the parties’ competing legal claims are competently raised, debated and resolved.”²⁴⁴

Argument over legal rights of the sort that characterized the Drillco negotiation is one of the principal ways normative factors make their way into informal dispute settlement. Legal argument contributes to the legitimacy of bargained-for agreements by resolving the substantive conflicts at the base of disputes and, if conducted in the manner of the Drillco conference, it does so without rupturing relationships or sending conversations off-track. A failure to resolve such conflicts subordinates the client interest in enforcing legal rights to the lawyer interest in promoting cordial social relations with colleagues, and clients are entitled to object to this rank ordering. Argument can be conflictual and unpleasant, of

²⁴³ Condlin, *supra* note 14, at 81–82; *see also* Wetlaufer, *supra* note 45, at 5–18 (discussing the role of substantive argument in bargaining).

²⁴⁴ Condlin, *supra* note 14, at 83.

course, but conflict and unpleasantness are not circles of hell. They can produce learning and growth as much as antagonism and impasse, and can help parties separate important considerations from unimportant ones in determining what a dispute is all about. The excesses of belligerence, rudeness and mean-spiritedness must be avoided, of course, but arguing over differences, even robustly, is a major part of what principled life is all about.

Communitarian bargaining theory seems to assume that lawyers and clients will put aside these concerns of individual entitlement and systemic legitimacy for what are principally aesthetic reasons,²⁴⁵ but it is not clear why they would do this or what evidence suggests that they ever have. Perhaps in an Hegelian spirit world, or one of Platonic forms, there would be no inclination to prefer one's own projects over others' (though it is not clear why they would then be one's own projects), but bargaining does not operate (in fact, it wouldn't be needed so far as one can tell) in a spirit world. The desire to do as well as possible for oneself is as much a feature of legal bargaining as it is of social life generally and as such, it is a feature that any viable theory of bargaining must recognize and take into account.²⁴⁶

²⁴⁵ Peppet, *supra* note 9, at 516 & 531 (describing the motives behind communitarian bargaining reforms).

²⁴⁶ One might say that communitarian bargaining theorists do not deal adequately with (in a sense, do not acknowledge) the Pogo problem. See WALT KELLY, *WE HAVE MET THE ENEMY AND HE IS US* *passim* (1987). For the history of the expression, see I Go Pogo, http://www.igopogo.com/we_have_met.htm (last visited Nov. 7, 2005); see also WILLIAM SHAKESPEARE, *JULIUS CAESAR* (THE FIRST act, sc. 2, 139–40) (“[t]he fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings.”). They operate on an unsophisticated, if not naïve, psychology that sees self-interested competition over scarce and valuable resources as an optional feature of social and political life. They should read more Madison, THE FEDERALIST No. 51 (James Madison) (“[i]f men were angels, no government would be necessary.”), or De Waal, FRANS DE WAAL, *PEACEMAKING AMONG PRIMATES* 269–71 (1989) (describing how “human societies are structured by the interplay between antagonism and attraction [and how forgiveness and reconciliation] evolved along with aggressive behavior . . . [and] are a shared heritage of the primate order.”); FRANS DE WAAL, *PRIMATES AND PHILOSOPHERS: HOW MORALITY EVOLVED* 14–20 (2006) (defending the view that the roots of morality can be seen in the behavior of monkeys and apes). Richard Nisbett’s insightful book on the “geography of thought” shows how an individualistic and competitive view of bargaining has its greatest explanatory power for American (or Western) bargaining practice. See RICHARD NISBETT, *THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNERS THINK DIFFERENTLY . . . AND WHY* 73–77 (2003). Summarizing decades of social science research, much of which he conducted himself, Nisbett shows how an individualistic focus on particular events in isolation from their context and a belief that one can know the rules governing such events and control the way the events unfold is a characteristic of Western culture. See also Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–48 (1982) (describing this view as the American lawyer’s “standard philosophical map”). He contrasts this way of thinking with a broad, contextual view characteristic of Asian culture that sees events as highly complex and determined by interdependent fac-

The lessons of the Drillco pre-trial conference will not startle practicing lawyers. They understand, for example, that surprising adversaries with unusual, unexpected or clever arguments has strategic value. Lawyers do not like to be told things (particularly in public) they think they should have thought of themselves and they are embarrassed when this happens. This embarrassment can take them temporarily off their game, so to speak, and put them on the defensive. They would like to consider the new information carefully and in private before responding, but often they cannot. Time is pressing, others are waiting for answers, meetings need to be concluded and it is not possible to break off conversation to do more preparation every time something one has missed comes up.²⁴⁷ If lawyers cannot process new arguments in public and in real time, however, often they will defer to them (in the way that the loser of a contest defers to the winner),²⁴⁸ and make concessions based on this deference. This option will be available to some extent in all negotiations since it is possible to surprise all lawyers, even experienced ones, with new arguments some of the time.²⁴⁹

tors requiring joint action. Cultural institutions are not fungible, however, and the fact that bargainers somewhere in the world could negotiate in a communitarian fashion is not evidence that American legal bargainers can as well. See DAVID LUBAN, *LAWYERS AND JUSTICE* 93–103 (1983) (describing the cultural barriers to transferring features of German dispute settlement to the American legal system). It is possible, of course, that Francis Fukuyama is correct (and Samuel Huntington wrong) when he claims that world economic and political systems are converging on the Western democratic and capitalist model. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1993). But see SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1998). (Fukuyama recently seems to have backed away somewhat from this Hegelian vision. See FRANCIS FUKUYAMA, *AMERICA AT THE CROSSROADS: DEMOCRACY, POWER AND THE NEOCONSERVATIVE LEGACY* (2006)). If economic and political systems are converging in this way, then psychological and cultural characteristics of peoples will not be far behind and the adversarial bargaining model will be everyone's preferred approach. It also is possible, however, that this convergence will be on a hybrid set of characteristics taken from both Eastern and Western cultures. See NISBETT, *supra* note 246, at 225–29.

²⁴⁷ In the language of behavioral economics, bargainers assess the accuracy of information and the persuasiveness of argument in terms of the data that can be called to mind and this data is not always complete. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124, 1127–28 (1974) (describing the “availability” heuristic).

²⁴⁸ A mundane instance of this occurs in conversations among law-trained people when it becomes clear to everyone in the group that no one has first hand knowledge of the issue under discussion. At that point, the first person to speak authoritatively on the topic usually is deferred to. It's not that the others necessarily believe what that person has to say but just that her or his comments will be permitted to stand because they cannot be rebutted. If the group had to act on the outcome of the conversation, the views of the person taking the lead might, in large measure, even dictate the nature of the action taken.

²⁴⁹ See Conklin, *supra* note 14, at 83–89 (describing the qualities of effective argument that can produce these surprise effects).

Such arguments need not be indisputably true to work. It is enough that they are too difficult to rebut on short notice and give listeners doubts they did not have coming into the negotiation. Doubt is leverage in negotiation.²⁵⁰ But surprise arguments also can be an instrument of manipulation and deception and, like the Paine lawyers' age discrimination argument, can be used to convince a bargainer to concede a point he or she may not need to. Communitarians disapprove of such arguments for much the same reason practicing lawyers embrace them: they work.

Similarly, lawyers know that it is sometimes possible to take advantage of a bargainer's state of mind or personal psychological characteristics unrelated to the substantive issues in dispute. For example, many law-trained people are not comfortable with conflict. This may seem counterintuitive given the nature of legal work, but disagreement in law is often made stylized or theatrical precisely because lawyers find it too uncomfortable to deal with when real. When they are uncomfortable, however, just as when they are surprised, lawyer-bargainers become careless and make mistakes. They sometimes concede points they don't have to and make more generous concessions than are needed. Often, therefore, there is leverage in creating, exaggerating and dragging out disagreements as long as one's tolerance for conflict exceeds that of the other bargainer. All successful bargainers know and act on this insight to some extent, changing negotiation outcomes at the margin by the one or two terms needed to make a good deal an excellent one. But exploiting bargainer attitudes and personal psychological characteristics unrelated to the substantive issues in dispute also is not a communitarian move.

Finally, lawyers know that adversaries can be unprepared for negotiation, lack experience with the issues or procedures involved in a case, or not like the clients or positions they have agreed to defend. Successful bargainers notice when these attitudes are present and exploit them. The Drillco lawyer, for example, was a highly skilled and experienced Title VII litigator and negotiator but he lacked the Paine lawyers' enthusiasm for the task at hand (as did the magistrate), and the Paine lawyers used this lack of commitment to their advantage. Their success, in part, was an illustration of the familiar sports maxim that whoever "wants it more,"

²⁵⁰ Or, as Steve Goodman sang, "a mind confused is sometimes altered." STEVE GOODMAN, *Roving Cowboy or (Ballad of Dan Moody)*, on *WORDS WE CAN DANCE TO* (Red Pajama Records 1976).

often gets it.²⁵¹ These and other such strategies work as well against problem-solving bargainers as they do against competitive ones, perhaps even better. In using such strategies, bargainers must keep their true purposes hidden, of course, but this usually can be done by supporting demands with reasons and arguments. A bargaining approach is known best by its definition of success (maximize, split the difference, or satisfice²⁵²), not its social style or tactical choices, and the Paine lawyers' behavior is a case study in the process of bargaining competitively without appearing to do so, and without offending.

CONCLUSION

The last half of the twentieth century saw a series of withering and unrelenting criticisms of both the institutions and practices of the American adversary system.²⁵³ Philosophers objected to the system's crude empirical assumptions about finding truth,²⁵⁴ its

²⁵¹ In the legal bargaining literature this idea is usually discussed in terms of the concept of "aspiration," see Korobkin, *supra* note 213, at 26-36 (explaining how high aspirations translate into better outcomes), or "optimism," see S.E. Taylor & J.D. Brown, *Illusion and well-being: A social psychological perspective on mental health*, 103 PSYCHOLOGICAL BULLETIN 193 (1988) (arguing that optimism causes one to persist longer and work harder in overcoming obstacles).

²⁵² To "satisfice" is to settle for an amount that assures a bargainer of a acceptable deal, one he can live with, even if a better deal is possible. The term was coined by Herbert Simon. See Herbert A. Simon, *Rationality as Process and as Product of Thought*, 68 AM. ECON. REV. May 1978, at 1, 10.

²⁵³ The adversary system also had its defenders. See, e.g., STEPHAN LANDSMAN, *THE AMERICAN APPROACH TO ADJUDICATION* (1988); Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER* 123 (David Luban ed., 1983); Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Lon Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30 (Harold J. Berman ed., 1961); Stephen Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 REC. 534 (1975); Stephen Saltzburg, *Lawyers, Clients and the Adversary System*, 37 MERCER L. REV. 647 (1986).

²⁵⁴ ALAN GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 112-16 (1980); Jerold S. Auerbach, *What Has the Teaching of Law to do With Justice?* 53 N.Y.U. L. REV. 457 (1978); Martin Golding, *On the Adversary System and Justice*, in *PHILOSOPHICAL LAW* 105, 106-12 (Richard Bronaugh ed., 1978); David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 93-97 (David Luban ed., 1983). Geoffrey Hazard points out that the claim that the "adversary system of trial yields truth more often than other systems" must remain "an article of faith, because there is no way to conduct a reliable experiment." Geoffrey Hazard, *Rules of Legal Ethics: The Drafting Task*, 36 REC. ASS'N BAR CITY OF N.Y. 93 (1981). For examples of the limited number of experimental and empirical studies of the issue see JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975);

armchair psychologizing about motivating lawyers and preventing decision-maker bias,²⁵⁵ and its propensity to dehumanize lawyer social relations.²⁵⁶ Judges criticized it for its tendency to “beat every plowshare into a sword,”²⁵⁷ legal academics found it inefficient, error-prone and wasteful in comparison with civil law alternatives,²⁵⁸ and cultural critics suggested that it was a retrograde social phenomenon responsible for the decline in American civility and productivity generally.²⁵⁹ With such an across the board con-

Mirjan Damaska, *Presentation of Evidence and Fact-Finding Precision*, 123 U. PA. L. REV. 1083 (1975).

²⁵⁵ Luban, *supra* note 254, at 68–74; LUBAN, *supra* note 246, at 93–97. For an illustration of the Bar’s “armchair psychologizing,” see Lon Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1160 (1958).

Any arbiter who attempts to decide a dispute without the aid of partisan advocacy . . . must undertake not only the role of judge, but also that of representative for both litigants . . . The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.

Id. But see David Luban, *Rediscovering Fuller’s Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801, 822 (1988) (describing how the Fuller-Randall argument “begs the question”).

²⁵⁶ DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000). Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 73 (1980); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 29 WIS. L. REV. 30 (1978); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Human Rights 1 (1975).

²⁵⁷ MARVIN FRANKEL, *PARTISAN JUSTICE* 18 (1980).

²⁵⁸ JOHN LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977); JOHN MERRYMAN, *THE CIVIL LAW TRADITION* 139 (1969); John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

For those who are concerned about the relative justice of the two systems, a statement made by an eminent scholar after long and careful study is instructive: he said that if he were innocent, he would prefer to be tried by a civil law court, but that if he were guilty, he would prefer to be tried by a common law court. This is, in effect, a judgment that criminal proceedings in the civil law world are more likely to distinguish accurately between the guilty and the innocent.

Id. Langbein’s arguments did not pass without objection. See Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988); Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734 (1987). Deborah Rhode has an excellent summary of the criticisms of the adversary system and citations to most of the relevant literature. Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447, 450–59 (2004).

²⁵⁹ MICHAEL ASIMOW & SHANNON MADER, *LAW AND POPULAR CULTURE* (2004); STEPHEN P. CARTER, *CIVILITY* (1999); CAMERON STRACHER, *DOUBLE BILLING: A YOUNG LAWYER’S TALE OF GREED, SEX, LIES, AND THE PURSUIT OF A SWIVEL CHAIR* (1999); CATHERINE CRIER, *THE CASE AGAINST LAWYERS* (2002); MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005); PHILLIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1995); WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA’S RULE OF LAW* (2003); RICHARD K. SHERWIN, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2002); DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* (1999).

sensus that lawyers and legal institutions had become too antagonistic and antagonizing, it was only a matter of time before a more caring and nurturing alternative to the adversarial model would emerge. That alternative, now known most commonly by the acronym of ADR,²⁶⁰ has become a many-headed monster of its own, with manifestations in all aspects of legal and social life, but the area in which it has had perhaps the greatest influence is in the academic scholarship on legal bargaining.²⁶¹

Not surprisingly, ADR bargaining scholarship began as a literature of criticism, concerned more with pointing out the faults of the adversarial model than describing alternatives to it.²⁶² But because evolution is as much a feature of legal bargaining theory as it is of biological life, these early criticisms soon began to be expressed in more positive terms, first as tactics and strategies for making adversarial practices more cordial,²⁶³ and then as a complete theoretical makeover for adversarial bargaining generally.²⁶⁴ Like most intellectual movements that are clearer about what they oppose than what they embrace, however, ADR bargaining scholarship overdid things somewhat, rejecting all types of adversarial maneuvering rather than just its mean-spirited and asocial forms. Rather than tweak adversarial methods to eliminate the gratuitous belligerence, rudeness and nastiness that had crept in, the early ADR literature attempted to eliminate adversarial maneuvering from bargaining practice entirely. Unfortunately, it became trapped in this oppositional stance, unable to avoid defining itself mostly in terms of what it was not – perhaps to make it clear that it was different – or to acknowledge that there was anything good about the approach it sought to replace.²⁶⁵

²⁶⁰ See SIMON ROBERTS & MICHAEL PALMER, *DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING* (2d ed. 2005); *ALTERNATIVE DISPUTE RESOLUTION* (Michael Freeman ed., 1995). At the University of Oregon School of Law the A in ADR stands for “Appropriate” (as in Appropriate Dispute Resolution), though it is not clear whether appropriate modifies dispute, resolution, or both. See University of Oregon School of Law, Appropriate Dispute Resolution Center, <http://www.law.uoregon.edu/org/adr/> (last visited Nov. 7, 2005).

²⁶¹ The Wiggins and Lowry anthology is the best collection of such pieces and the collection is now quite large. See WIGGINS & LOWRY, *supra* note 5.

²⁶² Professor Menkel-Meadow’s UCLA article is a good example. It was one of the first major ADR articles in the legal academic literature and at least two-thirds of it is a critique of adversary practices rather than a description of communitarian alternatives. Menkel-Meadow, *supra* note 33.

²⁶³ WILLIAMS, *LEGAL NEGOTIATION*, *supra* note 21.

²⁶⁴ See FISHER, URY & PATTON, *supra* note 7.

²⁶⁵ Peppet, *supra* note 9, at 517 (“[t]he Problem Solving Critique has been too sweeping in its condemnation of the standard conception of lawyer [bargaining] role.”). Defining values by

It is more than a little ironic that a communitarian perspective on bargaining would come to define the world in mutually exclusive categories. The reflexive tendency to dichotomize was one of communitarian theory's principal objections to adversarial bargaining. Communitarian bargainers were supposed to reject bipolar conceptions of options, see connections where others saw divisions, and synthesize hybrid resolutions out of stand-alone alternatives.²⁶⁶ It was not thought very communitarian, in other words, to see the world in "either-or" (one might even say competitive) terms, but that seems to be what has happened in communitarian theory's attempt to distinguish itself from adversarial bargaining. Obviously, this will not do. To be taken seriously by lawyers and ultimately even by academics, communitarian bargaining theory must make room for and incorporate the sort of adversarial maneuvering the Paine lawyers used so effectively in the Drillco pre-trial conference. It must explain how deception,²⁶⁷ argument and self-inter-

"elaborating on their polar opposites" has many historical antecedents, of course, and communitarian bargaining theorists are not the first to be trapped in that intellectual (and sometimes literal) dead end. The "witchfinders" of seventeenth century England are a particularly tragic case in point. As Keith Thomas explains, "if witches . . . had not existed seventeenth century England might have had to invent them. For, then as now, . . . there could be no God without the devil, no Christ without AntiChrist, . . . and no good neighbors without diabolical witches. Fantasies about evil helped to strengthen commitment to the good. But they also created unjustified fears and suspicions, which in turn led to the cruel persecution of the innocent."

Keith Thomas, *Speak of the Devil*, LIII N. Y. REV. BOOKS 32, 34 (Apr. 27, 2006). While academic "persecutions," particularly modern ones, are usually more metaphorical than literal, more stylized than real, they can make life miserable for the innocent. See Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 538, 640-48 (1990) (describing the reaction of the organized Bar and in-house clinical professors to an early defense of clinical externship instruction).

²⁶⁶ See Menkel-Meadow, *supra* note 9, at 348 (arguing for the superiority of the "new institutions [and] more ad hoc processes" of communitarian theory over the outdated "older conceptions and institutions of dualisms and binary thinking" associated with adversarial bargaining theory).

²⁶⁷ There is an immense body of literature discussing the appropriateness of deception in bargaining, much of it thoughtful and sophisticated and much of it hand-wringing. For one of the best examples of the former, see Gerald R. Wetlaufer, *The Ethics of Lying in Negotiation*, 75 IOWA L. REV. 1219 (1990). I think of the appropriate limits on deception in roughly the same way as does the ABA in its Model Rules of Professional Conduct. Under the Model Rules, for example, lawyers may not make up evidence (i.e., "false statements of material fact"), but they may convey false levels of enthusiasm for particular arguments (i.e., "a party's intentions as to an acceptable settlement"), allow others to draw false inferences about what they will do (e.g., the magistrate's fear that the Paine lawyers would seek to amend the pre-trial order), and make demands they think have only a small chance of being satisfied (e.g., \$100,000 for Paine's past economic harm). For different perspectives on the Model Rules' restrictions on deception in bargaining, see Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties*, 33 SO. CAR. L. REV. 181 (1981); Gary Lowenthal, *Truthful Bargain-*

ested trading fit within a complete theory of bargaining behavior and concern itself more with how to keep such maneuvering in check than with how to eliminate it altogether. All bargaining, even its communitarian form, is a lying game to some extent,²⁶⁸ and one in which adversarial behavior plays an inevitable role. To pretend otherwise is to deny reality, actual and imagined. It is a little like trying to convince a runner not to drink before a road race on the theory that a dehydrated person can run as far as a hydrated one and will be able to do so faster because he will not have to carry all that extra fluid. Advice of this sort always will be a bystander in the world of real life bargaining (and running).

ing by Lawyers, 2 GEO. J. LEGAL ETHICS 411 (1988); Robert Gordon, *Comment: Private Settlement as Alternative Adjudication: A Rationale for Negotiation Ethics*, 18 J. OF L. REFORM 503 (1985); Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387 (1986); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L. J. 1 (1987); Steven Hartwell, *Understanding and Dealing With Deception in Legal Negotiation*, 6 OHIO ST. J. ON DISPUTE RESOL. 171 (1991); James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U.L. REV. 255 (1999). Scott Peppet would permit lawyers and clients to contract out of this system of rules and create their own private ethical norms. See Peppet, *supra* note 9, at 519–29.

²⁶⁸ See White, *Machiavelli*, *supra* note 15, at 928:

On the one hand the negotiator must be fair and truthful: on the other hand he must mislead his opponent. Like the poker player . . . he must facilitate his opponent's inaccurate assessment. The critical difference between . . . successful negotiators and those who are not lies in this capacity both to mislead and not be misled. . . . To conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation.

Id. Steven Lubet, *Lawyers' Poker*, 57 U. MIAMI L. REV. 283, 294–95 (2003) (“you want to read your opponent . . . as accurately as possible and, perhaps more important, you want to make your own . . . behavior inscrutable,” analogizing bargaining to playing poker). *Cf.* Nyerges, *supra* note 29, at 24 (“[n]egotiation is a fight.”). There is no way to prove this claim empirically, of course, short of examining all bargaining interactions for evidence of such behavior, and this would be an impractical if not impossible task. The fact that proponents of communitarian bargaining use a full complement of adversarial tactics and maneuvers (e.g., selective disclosure, overstated beliefs, unsupported assertions, claims based on taste, and the like) to defend their views, however, can be taken as some evidence of the bipartisan appeal of adversarial bargaining methods. For a discussion of this issue, see Robert J. Condlin, “*Every Day and in Every Way We Are All Becoming Meta and Meta:*” or *How Communitarian Bargaining Theory Conquered the World (of Bargaining Theory)*, 23 OHIO ST. J. ON DISP. RESOL. 231 (2008) (describing how the argument for communitarian bargaining theory is based on adversarial argumentative strategies and techniques).

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