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Articles

"CASES ON BOTH SIDES": PATTERNS OF ARGUMENT IN LEGAL DISPUTE-NEGOTIATION

ROBERT J. CONDLIN*

I. INTRODUCTION

After their first dispute negotiations¹ law students report that legal argument never convinces anyone. "There are cases on both sides," they say, "which are equally strong, and arguing about them wastes time because it only produces impasse."² As they become "experienced," students try to proceed directly to the trading of offers, but usually without success. They find that they must return to argument, if only to settle novel questions or ones on which there is disagreement about applicable norms, but they do so grudgingly and without much faith in the enterprise's usefulness. Practicing lawyers are not much different. They try to leave substantive law implicit and work out disputes by appeals to shared categories of what cases are worth.³ Like students, they see argument as counter-productive, and use it only as a last resort.

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Several people have commented helpfully on earlier drafts and I am grateful to them. Special thanks are due to Tom White who developed the *Lerch* problem discussed in sections IV and V and Steve Saltzburg, counsel to the real "Lerch", who taught me prison transfer law.

1. These include both simulated negotiations in law school courses and settlement of actual disputes as part of clinical work. "Dispute-negotiation" is the settlement of disputes arising out of past events. The paradigm example is the settlement of a lawsuit. It is to be differentiated from "rulemaking negotiation," which is the establishment of rules to govern future conduct. An example of the latter is the negotiation of a business contract. Both types are to be distinguished from criminal dispute-settlement, or plea bargaining. See Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638 (1976). For another typology, see J. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 1-5 (1983) (dividing the types of negotiation into transactions, civil disputes, labor/management negotiations, and criminal cases). This Article is about argument only in civil dispute-negotiation.

2. There is no more predictable assertion in all of dispute-negotiation. Students express this view in several ways and I have quoted the most common.

3. See generally Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 272-73 (1984) (discussion of bargaining "arenas"); G. Bellow, *Proposed Research* 27-30 (1975) (unpublished manuscript on file with author) (discussion of lawyer categorization of cases into "slots").

These views are surprising. Legal disputes typically consist of disagreements about the nature and extent of legal rights and obligations;⁴ and resolving these differences, or at least discussing what a court would do with them, would seem to be logically prior to reaching a settlement. As the embodiment of the disputants' substantive rights, argument is also the element of negotiation most directly related to the justice of a settlement. In fact, in a basically just legal system, the justice of a negotiated outcome would seem to exist, at a minimum, to the extent the parties' competing legal claims are raised, debated and resolved. While argument is not all of negotiation, therefore, it is an essential part, and it is anomalous that students and lawyers report as they do.⁵

This Article examines that anomaly by analyzing arguments appearing in transcripts of simulated dispute-negotiations. Over a five-year period, approximately one hundred teams of negotiators were asked to settle a hypothetical lawsuit involving the constitutionally questionable transfer of an inmate of the Virginia prison system. Each of these negotiations was videotaped, and from these tapes representative excerpts of negotiation argument have been isolated and transcribed. Three of those transcripts are reproduced here.

In the course of the analysis, several conclusions emerge. Negotiation argument is seen as more simplistic, chaotic, predictable, and illogical than is generally believed to be the case, partaking more of stylized dance or game-playing than of political discourse or analytical investigation. These qualities suggest that it is discounted in negotiation because it ought to be. The analysis also considers the related question of why intelligent lawyers and law students would make ineffectual arguments, and tentative answers

4. A willingness to attempt to convince another through reasoned persuasion is what separates negotiation, definitionally, from mere discussion. See Eisenberg, *supra* note 1, at 674. See also J. WILLIAMS, *supra* note 1, at 79 ("[I]t is axiomatic that opening positions . . . [in] negotiation . . . will be some distance apart . . . [and] some method or procedure is necessary" to close that distance.).

5. Students and lawyers may be wrong, of course, and be influenced by argument when they do not know it. But even wrong perceptions can mature into values and shape future practice. See Condlin, *The Moral Failure of Clinical Legal Education*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 331 n.78 (D. Luban ed. 1983) (description of theories explaining how perceptions mature into values) [hereinafter cited as *THE GOOD LAWYER*]. The perception that argument wastes time is dangerous because it may breed cynicism about the power of law to influence settlement, discourage full preparation of cases on the merits, and encourage approaches to negotiation that are incomplete or ineffective. See *infra* pp. 134-35.

having to do with the structure of face-to-face bargaining and negotiator understanding of the nature of argument, are advanced.

The results of this analysis have implications for the study of argument in law school, as well as the further development of the most prominent theory of the dispute-negotiation process, and raise normative questions about the role of negotiation argument in producing just settlements. These theoretical and normative issues are discussed in preliminary form and questions needing further work are identified. The Article is principally about argument in negotiation, and not either argument or negotiation generally, or the extent to which argument, in proportion to other persuasion strategies, influences negotiation outcome, and it is exploratory in every respect.

The discussion is divided into seven sections. Section II defines argument and describes its various forms in dispute-negotiation. Section III identifies the essential elements of good argument that the Article presupposes. Section IV describes the hypothetical dispute-negotiation problem used to produce the Article's data base, and the legal issues raised by that problem. Section V contains the data and its analysis. Section VI speculates about causes of the patterns appearing in the argument data, and describes the implications generated by the analysis. Section VII concludes with suggestions for further study.

II. ARGUMENT AND NEGOTIATION

Negotiation is a complex phenomenon consisting of several overlapping and interdependent processes. Each process takes multiple forms and performs multiple functions, which in turn may be performed by other processes. Argument is an important but small part of this overall picture, a subprocess of a subprocess, and understanding its role is helped by a description of this context.

A. Negotiation

Negotiation consists of assessment, persuasion, and exchange. Combined, these processes account for most of the actions a negotiator takes and most of the stages through which a negotiation proceeds.⁶ In assessment a negotiator identifies the principal meaning

6. Many have articulated more elaborate conceptualizations, but most are reducible to assessment, persuasion and exchange. For examples, see generally S. BACHARACH & E. LAWLER, *BARGAINING: POWER, TACTICS, AND OUTCOME* 41-79, 204-13 (1981); O. BARTOS, *PROCESS AND OUTCOME OF NEGOTIATIONS* 3-48, 75-100, 169-99, 273-97 (1974); G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: NEGOTIATION* 11-35 (1981); P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS* 36-208 (1979); D. PRUITT, *NEGOTIATION BEHAV-*

of an adversary's communication, determines whether it accurately predicts what the adversary will do, and measures the importance the adversary attaches to the predicted behavior.⁷ Call these the questions of meaning, trustworthiness, and valuation. Because these questions are about topics that have strategic importance, answers must be discovered indirectly, on the basis of circumstantial evidence, and usually as an interpretive by-product of a discussion about the substance of the dispute.⁸

Exchange is the process of offer, concession, and, usually agreement. These maneuvers occur in sequence, and collectively are referred to as the concession pattern. Exchange takes place within a bargaining range, a set of points located on a spectrum of overlap between the smallest amount one side will accept and the largest amount the other side will give before refusing to settle. Exchange is sometimes continuous throughout negotiation and sometimes restricted to certain periods, but all facets of negotiation are directed

IOR 1-17, 46-51 (1981); H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 44-65 (1982); H.L. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 136-49 (1970); T. SCHELLING, *THE STRATEGY OF CONFLICT* 21-52 (1960); R. WALTON & R. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* 1-10 (1965); J. WILLIAMS, *supra* note 1, at 7-10, 42-44, 70-85; O. YOUNG, *BARGAINING: FORMAL THEORIES OF NEGOTIATION* 3-19, 25-37, 131-44, 245-52, 303-18 (1975); I. ZARTMAN & M. BERMAN, *THE PRACTICAL NEGOTIATOR* 42-199 (1982); Cross, *Negotiation as a Learning Process*, 21 J. CONFLICT RESOLUTION 581 (1977); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 966-73 (1979); Shea, *The Study of Bargaining and Conflict Behavior: Broadening the Conceptual Arena*, 24 J. CONFLICT RESOLUTION 706, 709-32 (1980); G. Bellow, *supra* note 3, at 26-30.

There is now "no theory of negotiation that can encompass and explain the entire process, [only] a number of well-developed theoretical approaches that both open the way for and require much more testing and debate." I. ZARTMAN & M. BERMAN, *supra*, at 6. See also P.H. GULLIVER, *supra*, at 179-80 (quoting Zartman & Berman and noting that a determinate theory is not probable in the near future); O. YOUNG, *supra*, at 252 (conceding the lack of a "unified theory of bargaining"). Cf. O. BARTOS, *supra*, at 302-05 (discussing problems with models of negotiation); P.H. GULLIVER, *supra*, at xvi-xvii (possibilities of negotiation theory). For a list of the necessary elements of a general theory of negotiation, see J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION*, 299-300 (1975); Druckman, *Social Psychological Approaches to the Study of Negotiation*, in *NEGOTIATIONS: SOCIAL PSYCHOLOGICAL PERSPECTIVES* 15-42 (D. Druckman ed. 1977) [hereinafter cited as *NEGOTIATIONS*].

7. Thus, when one lawyer says to another, on the day before trial, "You've got to understand, this client is an old friend of mine, and when he tells me that they've never had complaints of this kind before, I've got to go with him," the second lawyer must determine whether the statement is a threat to go to trial; whether friendship for the client is feigned or real; if real, whether it trumps other (including economic) considerations; and what minimum action would convince the first lawyer not to carry out his threat.

8. For discussions of assessment, see G. BELLOW & B. MOULTON, *supra* note 6, at 83-93; R. WALTON & R. MCKERSIE, *supra* note 6, at 61-67; Goffman, *Expression Games: An Analysis of Doubts at Play*, in *STRATEGIC INTERACTION* 1-83 (E. Goffman ed. 1969).

toward creating conditions for favorable exchange.⁹

Persuasion is the process of convincing an adversary to view a matter in dispute favorably to oneself.¹⁰ It can take the form of threat, appeal, and argument. Threat is the prediction that one will harm another unless the other performs some specified action within his control.¹¹ Appeal is the request that an adversary make a gratuitous concession and is similar to the practice in animals of going "belly-up" when faced with certain defeat by a more powerful enemy.¹² Argument is the invocation and reasoned elaboration¹³ of authoritative norms—rules, policies, and principles—to support a negotiation position or to rebut an adversary's position.¹⁴

9. For discussions of exchange, see S. BACHARACH & E. LAWLER, *supra* note 6, at 80-103; G. BELLOW & B. MOULTON, *supra* note 6, at 79-154; P.H. GULLIVER, *supra* note 6, at 135-53; H. RAIFFA, *supra* note 6, at 44-65; R. WALTON & R. MCKERSIE, *supra* note 6, at 13-57.

10. For discussions of persuasion see Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69, 84-85, 89 (1982); Walcott, Hopmann & King, *The Role of Debate in Negotiation*, in NEGOTIATIONS, *supra* note 6, at 194.

11. Threat occurs, for example, when a lawyer says that he will conduct expensive discovery unless an adversary agrees to settle at the lawyer's price. The discovery is the predicted behavior, the agreement to settle is the specified action, and the cost of responding is the harm. Because threat is grounded in power rather than in right, it is generally disfavored. A person who threatens, when he could appeal or argue, treats negotiation as a fight or a game rather than as a norm-based system for settling disputes. This is sometimes a strategically useful message to send, but in the ordinary case, it provokes more resistance than it dissolves. Cf. Eisenberg, *supra* note 1, at 675 (noting the cost of using sheer power in rulemaking negotiation). For discussions of threats, see S. BACHARACH & E. LAWLER, *supra* note 6, at 104-56; G. BELLOW & E. MOULTON, *supra* note 6, at 130-32; H.L. ROSS, *supra* note 6, at 155-56; J. RUBIN & B. BROWN, *supra* note 6, at 278-87; T. SCHELLING, *supra* note 6, at 35-43, 123-31; R. WALTON & R. MCKERSIE, *supra* note 6, at 107-11; O. YOUNG, *supra* note 6, at 311-12; Kelly, *Experimental Studies of Threats in Interpersonal Negotiations*, 9 J. CONFLICT RESOLUTION 79, 101-04 (1965); Lowenthal, *supra* note 10, at 85-88; Tedeschi & Bonoma, *Measures of Last Resort: Coercion and Aggression in Bargaining*, in NEGOTIATIONS, *supra* note 6, at 215-36.

12. Typically in an appeal, a lawyer says, "I don't want to go home empty-handed. Could you let me have such-and-such?" and means just that. In addition to asking for a favor, appeal consists of throwing oneself on the mercy of an opponent, in order to use offensively an opponent's hesitancy to exploit vulnerability. See generally S. BACHARACH & E. LAWLER, *supra* note 6, at 175-77 (discussion of "appeals" to "responsibility" norm). For a description of going "belly-up," see K. LORENZ, ON AGGRESSION 122 (1963).

13. "Reasoned 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.'" Eisenberg, *supra* note 1, at 669 (quoting L. Fuller, *The Forms and Limits of Adjudication* 269 (1959) (unpublished paper available in Harvard Law School Library)). In dispute-negotiation, reasoned elaboration takes "as its starting point norms of general applicability derived from sources outside the immediate dispute," or for present concerns, derived from the positive law. *Id.*

14. See generally S. BACHARACH & E. LAWLER, *supra* note 6, at 157 ("Arguments are the justifications . . . that parties give for the positions they take in bargaining."); Heymann, *The Problems of Coordination: Bargaining and Rules*, 86 HARV. L. REV. 797, 859-70 (1973)

Each of these distinctions is often problematic. For example, explicit argument usually contains implicit threat (e.g., if the argument is lost, prohibitive costs will be imposed); explicit threat usually contains implicit argument (e.g., that the threat will be carried out); and explicit appeal usually contains both (e.g., that one ought not to exploit vulnerability, and if one does, one will pay for it in the future). Similarly, assessment, persuasion and exchange intertwine in each action that a negotiator takes. A threat to take a case to trial is also a prod to produce data for assessment, a tactic to camouflage the fact that assessment is taking place, an argument that the listener ought to be economically rational, a principled corroboration of the party's commitment to an offer then on the table, and so on. The processes are also intercontingent. Assessment tells a negotiator which persuasion and exchange techniques work, persuasion creates doubts that make it easier to provoke concessions, and exchange puts concessions in binding form so that continued assessment and argument are unnecessary.¹⁵

(argument as a method of achieving coordination); Lowenthal, *supra* note 10, at 84-85, 89 (discussing role of argument in negotiation). While common among novice negotiators, explicit argument is less prominent in negotiations between experienced lawyers who bargain with one another regularly (e.g., personal injury plaintiffs' lawyers and insurance company counsel, prosecutors and criminal defense lawyers). Perhaps this is because personal familiarity and common experiences give lawyers shared views about what law is settled and what evidence counts as persuasive, and enable them to play out arguments privately in their heads so that they need discuss only novel or controversial points openly. See, e.g., H.L. Ross, *supra* note 6, at 153-54 (negotiation between lawyer and insurance adjuster). Bellow found that such tacit bargaining produced "collusive" and "highly routinized, patterned and predictable" settlements that were "determined to a significant degree by the values, attitudes and needs of the lawyers rather than the clients." G. Bellow, *supra* note 3, at 33-35. Power in negotiation is found in more than just arguments, threats, and appeals. See generally S. BACHARACH & E. LAWLER, *supra* note 6, at 41-79 (discussion of sources of power); see also P.H. GULLIVER, *supra* note 6, at xviii-xix ("[P]ower . . . reside[s] in material resources and normative claims . . ."); *id.* at 186-90 ("In sum, there appears to be considerable ambiguity and great operational difficulty in using the concept of power to explain . . . convergence on an agreed outcome."); *id.* at 200-07 ("negotiating power: an operational scheme"); T. SCHELLING, *supra* note 6, at 22-28 (discussion of power in negotiation as "power to bind oneself"); R. WALTON & R. MCKERSIE, *supra* note 6, at 185-209 (discussion of power and the dimensions of the labor negotiating relationship).

15. Though argument may be manifest in any negotiation process, including assessment and exchange, and may be used to accomplish such non-persuasion objectives as filling time, catharsis or posturing for a client, this Article will be concerned with the explicit use of argument to convince an adversary of the strength of one's position based upon either correct understandings of substantive law or correct predictions of what a court will do. The analysis will be limited to assessing an argument's verbal content. Tone, pace, attitude, demeanor and a full range of complex nonverbal signals add significantly to the content of what an argument communicates, but those qualities are difficult to capture on paper, and the reader is rarely in a good enough position to

B. Argument

Argument may be expressed in a moral, rule, or strategic form.¹⁶ In its moral form, it says that something should be done because it is right to do it, judged by consensus standards of what is good, fair, and just. The argument that one should not misrepresent the quality of merchandise to an illiterate consumer because misrepresentation does not respect the consumer's autonomy as a person, is an example of an argument in moral form. The rule form of the same argument is the utilitarian claim that valid laws (e.g., those against misrepresentation) should be obeyed or horrible consequences will result (e.g., everyone will ignore the law when it suits his purpose). The strategic form makes the prediction that a court will find the misrepresentation legally culpable, and will impose a penalty on its maker. These forms of argument often combine in practice and the choice of one is usually a choice of emphasis rather than kind.

Argument's purpose, as has been said, is to convince an adversary to see the issues in dispute in terms favorable to oneself. But "convincing" someone in the highly stylized, rapid-fire, and often dance-like conversation of negotiation has special meaning. Negotiators do not usually reach public agreement, either about what the law requires in an objective sense, or about how a court will apply it. Explicit concession of even minor substantive points rarely occurs. Privately, however, the parties are more tentative in their respective commitments, and when an adversary raises an unanticipated argument, with an unexpected facility or conviction, new doubts arise about pre-negotiation beliefs. Usually this happens tacitly. A negotiator does not say to himself, "I feel my resolve weakening;" it simply occurs. In fact, there is little rational alternative. A belief in what law requires is always tentative, in the sense that it must be reworked each time a new piece of data relevant to forming the belief is discovered. Doubt is not the same as loss of conviction and new points ultimately may be rejected as insubstantial, or assimilated as compatible with one's position, but until this happens, new

determine if the analysis is correct. While a significant amount of meaning may be lost by focusing on words, that still seems the appropriate place to begin.

16. For other typologies making similar distinctions, see S. BACHARACH & E. LAWLER, *supra* note 6, at 168-78; G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 852-53, 883-84 (1978); G. BELLOW & B. MOULTON, *supra* note 6, at 142-46; J. RUBIN & B. BROWN, *supra* note 6, at 261-62. Compare the discussion of "argumentative structures" in C. PERELMAN & L. OBRICHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 9, 194 (1969); with that in Bobbit, *Constitutional Fate*, 58 TEX. L. REV. 695, 698-750 (1980).

points give one reason to pause and doubt.¹⁷

Some argument is successful because it is undeniably true, but most produces doubt that is not removable within the time frame of the negotiation. A negotiator may not agree with an argument, may even believe that it is wrong, but unless he can explain how the argument fails, he will feel compelled to defer to it in some significant way. A losing negotiator is rarely convinced that he was wrong; more often his beliefs and level of conviction are weakened at the margin, and as a result, he concedes a little more than he had planned.¹⁸

C. Cooperation and Competition

Like approaches to negotiation generally, argument may be categorized as cooperative or competitive.¹⁹ Cooperative argument consists of non-coercive, rational analysis, in which the objective is to teach another about the truth of one's substantive claims. This effort stops when the listener understands, or when the claims have

17. This is more of a logical than empirical claim. The assumptions are that doubt under conditions of new data is an inescapable element of rational behavior, and that negotiation behavior is rational. See P.H. GULLIVER, *supra* note 6, at 191. This is a cognitive-dissonance based view. For a discussion of the theory of cognitive dissonance, see L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 1-4 (1976).

18. This process can be substantive as well as strategic. Doubts can develop either from the negotiator's incomplete or mistaken understanding or from his being too easily impressed or intimidated. After the fact, a negotiator rarely recognizes what has happened. He explains unplanned concessions by saying that he had no alternative, that he got all that was possible, that his pre-negotiation estimate was overly optimistic; and he attributes a less favorable outcome to facts beyond his control: the other side's case was stronger than he anticipated, or, it would have cost him too much to move the adversary from his irrationally intransigent position. No doubt such analyses are sometimes true, but the fact that they are automatically made, and obviously self-serving, gives one reason to pause. See P.H. GULLIVER, *supra* note 6, at 168.

This is not the only way that argument takes effect in negotiation. In fact there is no "model of persuasive communication that provides a general explanation for . . . successes and failures . . . in changing attitudes and behaviors." K. REARDON, *PERSUASION: THEORY AND CONTEXT* 61 (1981). For a description of ten competing theoretical formulations, see *id.* at 62-111. No more is claimed than that the "rational-doubt" phenomenon is common, and happens even to intelligent negotiators. In fact, it is an experience to which intelligent negotiators may be disproportionately prone.

19. For a synopsis of the literature on cooperative and competitive approaches to negotiation, see Lowenthal, *supra* note 10, at 72-75. The cooperative-competitive dichotomy is fundamental to most social science research about negotiation. For additional approaches using this dichotomy, see S. BACHARACH & E. LAWLER, *supra* note 6, at 162-64; O. BARTOS, *supra* note 6, at 171-99; D. PRUITT, *supra* note 6, 71-136; J. RUBIN & B. BROWN, *supra* note 6, at 158-94, 198-213; R. WALTON & R. MCKERSIE, *supra* note 6, at 11-183 (using synonyms of "distributive" and "integrative"); J. WILLIAMS, *supra* note 1, at 20-40, 47-54; Druckman, *supra* note 6, at 26-28; Schlenker & Goldman, *Cooperators and Competitors in Conflict: A Test of the Triangle Model*, 22 J. CONFLICT RESOLUTION 393 (1978).

been shown to be false. Cooperative argument raises all relevant issues, takes favorable and unfavorable evidence into account, and is expressed at a pace and manner that make digesting and rebutting easy. It does not rely for its force on factors such as power, stamina, tolerance for conflict, delay, ignorance, status, and the like. In cooperative argument, the image of the adversary is that of an autonomous, rational actor, willing to learn.²⁰

Competitive argument consists of rhetorical and psychological maneuvering designed to coerce an adversary, sometimes subtly and sometimes not, into deferring to one's view when, if fully informed, he would not or should not.²¹ The objective is manipulation, not understanding. Efforts to persuade stop when the adversary agrees to do as one wishes (e.g., sign a settlement document embodying one's terms and not oppose it when presented to the court), even if he does not fully understand what he is doing.²² Competitive argument is based on favorable evidence, and presented in a manner aimed at minimizing critical inspection (e.g.,

20. For a discussion of this process as "fair argument," see Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 MD. L. REV. 223, 237 n.33 (1981). See also Condlin, *supra* note 5, at 326. Compare to cooperative argument the technique of "bilateral focus" suggested by Anatol Rapoport. A. RAPOPORT, *STRATEGY AND CONSCIENCE* 176 (1964). See also G. BELLOW & E. MOULTON, *supra* note 6, at 150-57; R. WALTON & R. MCKERSIE, *supra* note 6, at 145-61; J. WILLIAMS, *supra* note 1, at 53-54.

21. In the language of communication research, competitive argument seeks behavioral modification and realignment, not attitude change. See Miller, *Foreword*, in K. REARDON, *supra* note 18, at 9.

22. For an illustration of how a person could fear being induced to act against himself "purely through the use of argument," see the incident involving Bill Veeck and Branch Rickey described in Eisenberg, *supra* note 1, at 667 n.87. The tale of Brer Rabbit is another such example. See G. BELLOW & E. MOULTON, *supra* note 6, at 9-10. Contract law anticipates the possibility of action against one's interests and provides protection against some such activity. See generally Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982); Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983). For a description of circumstances in which competitive approaches may succeed, see Tedeschi & Bonoma, *supra* note 11, at 213. For further discussions of competitive approaches, see generally S. BACHARACH & E. LAWLER, *supra* note 6, at 167 ("[O]ne focus of . . . argumentation is the cognitive manipulation of each other's bargaining power."); P.H. GULLIVER, *supra* note 6, at 192 ("[I]t is likely that in the process of demonstrating alleged congruence between norms and demand, there will be . . . some manipulation of the norms."); R. WALTON & R. MCKERSIE, *supra* note 6, at 67-82 (discussion of manipulating opponent's perception of his own and adversary's utilities); J. WILLIAMS, *supra* note 1, at 48-52 (discussion of "the competitive strategy"); O. YOUNG, *supra* note 6, at 303-07 ("[I]t is the combination of opportunities for communication with the presence of strategic interaction which paves the way for the manipulative activities that constitute the core of bargaining."); Mnookin & Kornhauser, *supra* note 6, at 972-73 (description of the conditions that create the opportunity for competitive behavior in divorce negotiation).

rapidly, authoritatively) and exploiting fear, insecurity, anger, affection, and the like. Here, the adversary is seen as an obstacle to be removed or circumvented; a type rather than a person, whose motives are antagonistic, and whose actions are purely strategic.²³ Cooperative and competitive qualities can be substantive and manifest in the content of a negotiator's views; or stylistic, and manifest in the demeanor and tone used to express substantive views, and this distinction is often an important one to make.²⁴ The competitive-cooperative categories are ideal types, and particular arguments will have attributes from each.

Cooperative argument is obviously useful in dispute-negotiation, but competitive argument must have more said for it. Several characteristics of dispute-negotiation limit the extent to which full cooperation is possible. For example, in most disputes some issues may be zero-sum,²⁵ in that each party will value the stakes in the same way, and one party's gain will be the other's loss. When such situations occur, what is needed is not clearer understanding of one's interests, but accommodation and compromise. A characteristic response to zero-sum issues is selfishness. For a wide variety of reasons, many legitimate parties often will want as much as they can get,²⁶ and instruct their lawyers to act in this way. When a lawyer

23. These definitions of cooperation and competition are less rigorous than those typically used in the social science or philosophical literature. See, e.g., R. AXELROD, *THE EVOLUTION OF COOPERATION* 6-7 (1984); D. REGAN, *UTILITARIANISM AND CO-OPERATION* 126-34 (1980). This is because I have used the terms to isolate important differences in the two most common pure approaches to legal argument, not to distinguish between competitive and cooperative behavior generally or even between competitive and cooperative bargaining.

24. The distinction is the missing element in Williams' analysis of competitive and cooperative negotiation styles. See generally J. WILLIAMS, *supra* note 1, at 19-40. Several seeming anomalies—e.g., that competitive and cooperative negotiators are often equally successful, but other times, not—could be accounted for in part by this distinction.

25. See, e.g., Morgenstern, *Game Theory*, in 6 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 62, 63 (D. Sills ed. 1968). This characterization usually pertains only to outcomes, and excludes both transaction costs and indirect benefits derived from engaging in negotiation or from conferring a benefit on another. On transaction costs, see generally Demsetz, *The Costs of Transacting*, 82 *Q.J. OF ECON.* 33 (1968).

26. A party might have the best legal or moral claim to the stakes, or sincerely believe that he does, and be entitled to act that way until shown that he is wrong. Or, his legal and moral rights may depend on what the other party is willing to give, and since the best evidence of what another will give is often what he actually concedes in response to the most pressure that can be put on him, a party would be entitled to press for as much as he can. There is empirical support for the closely related proposition that "[i]n the absence of information about the other's subjective utilities, bargainers are most likely to reach an optimal agreement if they each focus on the clear and honest presentation of their own needs and preferences and avoid trying to 'get inside the head' of the other." J. RUBIN & B. BROWN, *supra* note 6, at 271. See also D. PRUITT, *supra* note 6,

enters a negotiation, therefore, one possible condition is that the adverse negotiator, or his principal, will have a competing conception of the good. It is also possible that he will not, but a lawyer will not know which is the case in advance.

With this possibility as a backdrop, negotiators are likely to approach one another circumspectly, revealing as little as possible until discovering what state of affairs obtains. This is only prudent. One does not expose one's neck until it is clear that the head will not be chopped off. (This is not to suggest that one never takes risks.) As long as the negotiators are strangers, that is, as long as each cannot predict with certainty how the other will resolve the dispute (a condition of almost all negotiation, even between repeat players), cautiousness and circumspection will seem the wisest course for each.

When negotiators talk guardedly, however, they increase their mutual suspicion, because they look as if they do not trust one another, which, of course, to some extent they do not. This suspicion, in turn, encourages each to interpret the other's behavior in competitive terms.²⁷ In the process, a vicious cycle is set up that can be broken only by one of the negotiators making himself disproportionately vulnerable. For understandable reasons, this happens infrequently. Each negotiator thinks of his actions as necessary for self-protection, and only rarely has enough perspective on the process to understand how they contribute to the suspicion and antagonism that develops.²⁸

The truncated time limits within which negotiation occurs make it difficult, even for reasonable and fair-minded negotiators, to overcome this cycle of selfishness, suspicion, and self-fulfilling prediction. Add to this the prevailing definition of lawyer role (principally that of a zealous advocate) which encourages satisfaction of client selfishness,²⁹ a legal rule structure which can be manipulated in

at 191-92 (noting that in "[p]roductive conflicts . . . parties state their preferences and stick to their goals"); H. RAIFFA, *supra* note 6, at 348 (describing results of a "social dilemma game"); cf. Heymann, *supra* note 14, at 821-23 (discussion of "the problem of trust" in coordinating activity).

27. Cf. Condlin, *supra* note 20, at 228-35, 238-42 (description of this interpretive process); Condlin, *supra* note 5, at 328-29.

28. It is not unusual for law trained people to have habits that seal them off from a critical understanding of their own communication practices. See Condlin, *supra* note 20, at 242 n.48. Cf. C. ARGYRIS & D. SCHON, *THEORY IN PRACTICE* 26-27, 76-79 (1974) (discussion of "self-sealing" theories).

29. The obligation to represent a client zealously is found in Canon 7-101 of the American Bar Association's MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979) and in Rules 1.2 & 1.3 of its MODEL RULES OF PROFESSIONAL CONDUCT (1983) (now stated as

multiple ways, a commonly accepted sense of lawyer craft as the skillful manipulation of this rule structure, competitive lawyer habits developed by law school training in "adversarial skills,"³⁰ the implicit obligation to converse continuously, at a fast pace, without the chance to mull over ideas or make costless false starts, and the fact that negotiation takes place in private, outside the purview of any monitoring agent, and one can understand how negotiators often will see competitive argument as the most reasonable means for protecting all of the interests at stake.³¹ If negotiators are not stylis-

"diligently"). The nature and extent of this obligation has always been a matter of debate. See B. Shaw, *A Survey of Legal Ethics in the Nineteenth Century* 24-33 (1980) (unpublished paper submitted in the Seminar on Advanced Professional Responsibility at Harvard Law School, on file with author). Recently, however, the debate has taken on added life. There is still general agreement that a lawyer must be zealous, but there is substantial difference of opinion about whether zealousness requires doing whatever the client requests. For discussion of the issue, see generally A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* (1980); THE GOOD LAWYER, *supra* note 5; Carington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291; Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1030 (1975); Fried, *The Lawyer as Friend: the Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1975); Luban, *The Sources of Legal Ethics: A German-American Comparison*, 48 RABELS ZEITSCHRIFT FUR AUSLANDISCHES UND INTERNATIONALES PRIVATRECHT 245 (1984); Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Wasserstrom, *Lawyers as Professionals: Some Moral Problems*, 5 HUM. RTS. 1 (1975).

30. For a description of these skills and the habits that such training can develop, see Condlin, *supra* note 20, at 273-74; Condlin, *supra* note 5, at 326-32.

31. *But see* R. AXELROD, *supra* note 23. This important recent book suggests that belief in competitive argument may be strategically irrational. Using data collected from a prisoner's dilemma game tournament, Axelrod concludes that when the future casts "a sufficiently large shadow" the perfectly reciprocal cooperative strategy of tit-for-tat is the only strategy that maximizes individual gain and is collectively stable (i.e., is able to resist the challenge of all possible mutant strategies over time). *Id.* at 174. (For a refreshingly clear, if not fully rigorous, discussion of the logic of this conclusion using the theory of metagames, see S. BRAMS, *GAME THEORY AND POLITICS* 34-38 (1975).) Giving practical advice to bargainers based on his conclusions, Axelrod suggests: 1) do not be envious (i.e., ask how well you are doing compared to how well someone else could do in your shoes, not compared to the other bargainer); 2) do not be the first to defect (i.e., always cooperate on your first move: be "nice" in Axelrod's terminology); 3) reciprocate both cooperation and defection (i.e., be provokable but not vengeful); and 4) do not be too clever (i.e., do not make your approach so complicated as to be incomprehensible, and thus arouse suspicion). R. AXELROD, *supra* note 23, at 107-23.

Axelrod's conclusions are carefully drawn, his experiment is clever, his analysis is insightful, and the implications of his work for lawyer bargaining are likely to be considerable. But legal dispute-bargaining is sufficiently different from the pure prisoner's dilemma to caution against too quick and facile an extrapolation. (In fairness, Axelrod does not suggest such an extrapolation, but others are likely to.) Like game theorists, Axelrod assumes that a player can always know when his counterpart has made a competitive or cooperative move, and in the simplified decision matrix of the prisoner's dilemma game this is quite reasonable. But in legal bargaining this judgment is not always

tically rude, belligerent or overbearing in their discussions, they will

so easy to make. For example, if by the use of "power language," I convince you that you should cooperate with me because your interests are the same as mine when they are not, I would have competed successfully against you by appearing to cooperate. (For discussions of "power language," see Erickson, Lind, Johnson & O'Barr, *Speech Style and Impression Formation in a Court Setting: The Effects of "Power" and "Powerless" Speech*, 14 J. OF EXPERIMENTAL SOC. PSYCHOLOGY 266 (1978); Lakoff, *Language and Woman's Place*, 2 LANGUAGE IN SOC'Y 45 (1973).) If my deception is small and my skill at concealing it great, I might be able to maintain this strategy over the lifetime of our relationship, particularly if our interactions are not as continuous as those of a prisoner's dilemma game, and your awareness or memory of my strategy is not vivid each new time we meet. To the extent that the situation I have described is no longer a true prisoner's dilemma, the prisoner's dilemma does not embody important features of lawyer dispute-settlement. See generally S. BRAMS, *supra*, at 30-31 (description of conditions of a prisoner's dilemma).

Likewise, the future does not cast the same length shadow in all kinds of lawyer relationships, and arguments for cooperation in negotiation must take these differences into account. Perhaps I should cooperate with another lawyer I do not expect to bargain with again soon, but Axelrod's analysis does not provide any basis for this claim. It may also be that the general category of cooperation needs further elaboration. Withholding privately held evidentiary data may not produce the same reaction as withholding information about case law and each in turn may not produce the same response as keeping one's bargaining posture private. These differences, if they exist, pose no problem for Axelrod, since specifying the content of the category of cooperative behavior is all that is involved, but they would be of crucial importance to lawyer negotiators who would discover that cooperation in the technical sense did not always equate with ordinary cooperation.

Two additional features of Axelrod's analysis bear comment. First, the work adds fuel to the debate between those who would ground morality in consequentialist considerations on the one hand, and those who would use the nature of the individual, intellectualized ideals, or transcendental doctrines on the other. If a social obligation to cooperate can be fully established on the basis of results from a prisoner's dilemma game and conceptions of self-interest and ordinary rationality, what need is there of more Kantian or perfectionist arguments? Axelrod does not make such a claim, but he gives a big empirical boost to those who do. See, e.g., D. PARFIT, *REASONS & PERSONS* (1984); Regan, *supra* note 23, at 125-42; 207-211; E. ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 41-44 (1977); Gauthier, *Morality and Advantage*, 76 PHIL. REV. 460-75 (1967).

Second, Axelrod creates an interesting new dilemma for practicing lawyers bent on following the advice to negotiate more cooperatively. See *infra* note 34. Axelrod shows that tit-for-tat is the obvious choice among cooperative strategies. It maximizes individual gain and eventually drives other strategies, both competitive and cooperative, out of the bargaining universe. Since tit-for-tat is a strategy for maximizing gain over the long run, however, rather than in any particular case (in fact, it cannot win any single encounter outright, by definition), how does a lawyer justify its use to a client who says, "I don't care about the future, I want you to get as much as you can for me, in this case, now!" What if the client also refers the lawyer to MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1979) or the MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983), and the body of case law construing the concept of "conflict of interest," arguing that a tit-for-tat strategy amounts to the impermissible trade-off of the interests of future clients for those of present ones. In short, it may be that lawyers cannot cooperate in the manner game theory shows to be the most efficient and still adhere to the espoused ethical norms of the legal profession. And since these norms are grounded in considera-

often uncover areas in which they agree. But even this outcome will be a product of a conversation that is in large measure competitive in that it consists of advancing one's own position, rebutting the adversary's, and withholding private information.

This analysis holds even for negotiators who strive honestly to reach settlements that are legal and moral. This is because definitions of legality and morality reasonably can differ. Occasionally, underlying norms will be the same for both sides, but one side tries more scrupulously or skillfully to adhere to them. But most differences are explained by the fact that there are no unanimously shared conceptions of legality and morality. Reasoning logically from different yet defensible starting points, scrupulously legal and moral negotiators can pursue a wide array of justifiable outcomes.³² While for each individual there may be only one result consistent with the individual's legal and moral beliefs, the number of such reasonable beliefs is more numerous than one. Thus, even in bargaining for settlements that are moral and legal there can be a winner and a loser, depending upon whose conception of morality and legality prevails. When winning or losing are possible, competitive argument is rarely absent.³³ One can acknowledge as legitimate,

tions other than efficiency or maximization in the long run, one side of the equation might have to give way. Put another way, there may be a conflict between some of the profession's formal norms, (e.g., those having to do with conflict of interest), and informal norms embodied in lawyer practices used to maintain the smooth operation of the institutions of law practice. Cf. Luban, *Calming the Hearsed Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 460-62 (1981) (discussion of distinction between moral and practical norms in the legal profession).

32. For example, a philosophical system that focuses on acts (Kantianism) or states of affairs (utilitarianism) will resolve particular problems differently from a system that focuses on the character of the agent (Aristotelianism). Yet each resolution would be justified within the terms of its respective system.

33. See generally Mindes & Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RESEARCH J. 177, 220-29 (discussion of cultural, social and professional pressures on lawyers to be competitive). For a quasi-moral justification of competitive behavior, see Brown & Dauer, *Professional Responsibility in Nonadversarial Lawyering: A Review of the Model Rules*, 1982 AM. B. FOUND. RESEARCH J. 519, 527-28.

It is difficult to resolve the questions of how and when competitive argument is justified in moral and political terms. Is competitive argument—like killing in self-defense or fighting in a just war—acceptable when legitimate ends outweigh questionable means? See generally PUBLIC AND PRIVATE MORALITY (S. Hampshire ed. 1978). Or is such argument necessary to the effective functioning of a dispute resolution system that, as a system, produces sufficient public or social good to excuse the bad acts of individual negotiators who operate the system? See generally Luban, *The Adversary System Excuse*, in THE GOOD LAWYER, *supra* note 5, at 83 (discussing systemic excuses for the adversarial system). If either is true, it is still not altogether clear what consequences for lawyers, and for the legal system as a whole, flow from the practice of "killing in self-defense" several times a day.

therefore, the call for more cooperation, disclosure, and even-handedness in dispute-negotiation, without denying the occasional appropriateness and more frequent inevitability of competitive argument as well.³⁴

34. The call for increased cooperation is associated principally with Roger Fisher and William Ury, and their recently popular book, *GETTING TO YES* (1981). For another expression of the "cooperation" view, see Menkel-Meadow, *Toward Another View of Negotiation: The Structure of Legal Problem Solving*, 31 UCLA L. REV. 754 (1984). Fisher and Ury imply that most bargaining involves the resolution of "cognitive conflict" that in which the actual interests of parties coincide, notwithstanding their seemingly antagonistic positions. R. FISHER & W. URY, *supra*, at 43-45. (The term "cognitive conflict" comes from Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 543 (1978).) In their view, bargaining is amenable to "objective" and "principled" resolution "on the merits," in which bargainers deduce resolutions to particular disputes from consensus meta-norms. R. FISHER & W. URY, *supra*, at 84-91. Bargaining is analytical problem-solving more than accommodation and compromise.

Fisher and Ury's claim that dispute-negotiation is amenable to "objective resolution" is frequently wrong. Not all values or belief structures are commensurable in terms of each other or some common denominator. On some issues there are competing conceptions of the good and discussion of those issues in terms of the parties' underlying interests, rather than overt postures, will not change this fact. See generally S. BACHARACH & E. LAWLER, *supra* note 6, at 165-66 (discussing this problem in terms of "qualitative" vs. "quantitative" issues); O. BARTOS, *supra* note 6, at 14-16 (negotiation terminates only overt social conflict behavior, not the underlying conflicts of interest of the negotiating parties); R. WALTON & R. MCKERSIE, *supra* note 6, at 17-19 (discussion of "dissimilarity between the value systems of the two parties"); M. WALZER, SPHERES OF JUSTICE 79 (1983); J. WILLIAMS, *supra* note 1, at 62-66 (description of differing conceptions of justice); Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1402-18 (1981) (discussion of the "category mistake" in disregarding incommensurability of many values, using environmental disputes as examples). (Differences about conceptions of the good are also at the core of the "rights" debate referred to *infra* note 39.) The popularity of the idea that conflict is usually grounded in misunderstanding may be traced to Anatol Rapoport. See generally A. RAPOPORT, FIGHTS, GAMES AND DEBATES (1960); A. RAPOPORT, *supra* note 20. Rapoport's analysis was largely speculative, and experimental findings over the years have done little to confirm it. See, e.g., Walcott, Hopmann & King, *supra* note 10, at 199.

Recently Fisher has repudiated some of the more obvious weaknesses in this view, in part through a resuscitation of the doctrine of intelligible essences. See Fisher, *Essay Review, The Pros and Cons of Getting to Yes*, 34 J. LEGAL EDUC. 120, 122-24 (1984). But see R. UNGER, KNOWLEDGE AND POLITICS 31-32 ("there are no intelligible essences"). But he continues to insist that distributional issues are best settled by cooperative bargaining. While Fisher never says explicitly that a cooperative approach will *always* or *usually* fare better, he implies it, and his notoriety depends upon that reading of his view. The cooperative approach is superior, Fisher contends, because both parties have a shared and, implicitly, overriding "interest in identifying quickly and amicably a result acceptable to each, if one is possible." *Id.* at 121. But surely this will be true only some of the time. For example, Fisher describes two men in a lifeboat quarreling over limited rations. A insists that he will sink the boat unless he gets 60% of the rations, and B insists that he will sink the boat unless he gets 80%. Fisher suggests that their problem ought to be thought of as the common one of "how to divide the rations without tipping over the boat, while getting the boat to safe waters," and that the negotiator who approaches the problem in this way will fare better. *Id.* But surely this depends upon such

D. Argument in Negotiation

Argument of all types is central to dispute-negotiation in at least two ways. First, in an instrumental sense, it is nearly a logical precondition to a negotiated agreement. A settlement is attractive or not primarily in comparison with alternative dispositions. In dispute-negotiation the principal alternative is a decision by a court. In settling, each side compares a proposed agreement against its prediction of what a court will do, minus the transaction costs of having a court do that. Since a court will apply the law, the parties must be able to predict that application; to do this, they must understand the legal issues from the perspective of both sides. Because they cannot talk frankly and unguardedly with one another, argument is the vehicle best adapted to this task.³⁵

factors as whether *A*, *B* or both can swim, the proximity of land, the availability of help, and the like. If *A* could swim and *B* could not, and land was within sight, *B* might be advised to take *A*'s threat seriously, especially in dangerous waters, and give him 60% of the rations. And if there was no continuing relationship, so that *B* could not pay *A* back, *A* would forever be out the value of some portion of the rations (probably 10% if they would split the rations in half if neither side had superior leverage) if he followed Fisher's advice. There are other considerations that might cause *A* not to approach the ration-distribution problem in this way. (For example, there can be nonstrategic, normative reasons for bargaining cooperatively, but these would control behavior only when both parties subscribed to the normative scheme, and, as the text describes, it is often difficult for negotiators to know when this is so. Fisher argues that cooperation is generally good strategy, however, not just good morality, and this is what he has yet to establish.) But positing an overriding joint interest with *B* in not sinking the boat begs the question. Fisher could add features to the hypothetical that would support his claim, but in so doing he would establish that his view holds only when those added features are present. This would undercut his claim to have developed a generally applicable approach. Joint interests sometimes may override individual interests, e.g., when one side has no, or only a slight, strategic advantage—but even the judgment of when this is so is typically made from a competitive rather than cooperative perspective. Only when *A*'s and *B*'s positions are perfectly interchangeable will Fisher's analysis be true, and this condition is not likely to occur much of the time. I have responded to what I take to be the spirit of Fisher's lifeboat example, (i.e., that disputes ought to be resolved according to mutually advantageous and nonresentment producing principles) rather than to his literal words (i.e., that bargainers ought to reach results "acceptable to each") (emphasis added). One-sided and competitive negotiation can produce results that are "acceptable" in the sense that one bargainer likes them and the other can live with them (i.e. they are the lesser of all evils), but I take it that this type of settlement is not what Fisher has in mind.

A more sophisticated conceptual framework, such as Raiffa's idea of "cooperative antagonism" fully developed or Regan's theory of "cooperative utilitarianism," is needed to analyze the relationship between cooperation and competition in dispute-negotiation. See Raiffa, *supra* note 6, at 18; Regan, *supra* note 23, at 135-42; 207-11.

35. It is hard to know unilaterally what a court will do. See, e.g., Mnookin and Kornhauser, *supra* note 6, at 969-71. Awareness of where one would like the court to come out distorts one's perspective and makes objective prediction difficult. Preparatory research done from this perspective gives unwarranted salience to arguments for (rather

The second reason for argument's importance is that, as the embodiment of the parties' legal claims, it is one of the aspects of negotiation most directly responsible for the justice of a negotiated agreement.³⁶ When they use the legal system, parties are entitled to

than against) one's position, and makes the conclusions of that research less trustworthy. And important factual data necessary to making the prediction are often within the control of the adverse party and thus unknown. Because the possibility of unrealistic prediction is high and known to be so, a negotiator is almost compelled to argue law.

36. The assumption here is that dispute-negotiation is a normative as well as a strategic process. Negotiators subscribe to background norms that make up the positive law and formulate their notions of good and bad legal argument in terms of accepted canons of interpreting these norms. Cf. P.H. GULLIVER, *supra* note 6, at 190-94 ("[T]he dispute begins in terms of norms, whatever else may be involved That is to say, the dispute itself . . . is defined in part by a normative framework that both parties more or less accept in the situation."); Eisenberg, *supra* note 1, at 650-51 ("[I]nternalization of moral standards and the pressure of peer-group and public opinion contribute to the force of principles and rules in negotiation."); *id.* at 639 ("[I]n most cases of dispute-negotiation the outcome is heavily determined by the principles, rules and precedents that the parties invoke."); Mnookin & Kornhauser, *supra* note 6, at 968 (Parties "bargain in the shadow of the law [T]he outcome that the law will impose . . . gives each [bargainer] . . . an endowment of sorts."); *id.* at 977-80 (description of the ways in which different substantive norms "give various amounts of bargaining chips to the parties"). In this respect, dispute-negotiation is a hybrid of bargaining and adjudication, and thus unlike the bargaining dominated subjects of the rich social science literature on negotiation. See, e.g., Druckman, *supra* note 6, at 24. For a description of the continuities and dissimilarities between adjudication and dispute-negotiation, see P.H. GULLIVER, *supra* note 6, at 3-24; H.L. Ross, *supra* note 6, at 137-42; Eisenberg, *supra* note 1, at 644-45, 649-65. Perhaps for this reason, this literature has comparatively little to say about the nature and effect of argument in influencing negotiation outcome. For summaries of the limited experimental studies about argument, see Walcott, Hopmann & King, *supra* note 10, at 194-203, 208-09. Game-theoretic and most economic models commonly assume argument away. See generally S. BACHARACH & E. LAWLER, *supra* note 6, at 6-25 (game-theory—particularly that of John Nash and John Hicks); *id.* at 26-36 (economic theory—particularly that of Frederick Zeuthen and Jan Pen); P.H. GULLIVER, *supra* note 6, at 190 (economic theory); J. WILLIAMS, *supra* note 1, at 68 (economic and game-theoretic models); O. YOUNG, *supra* note 6, at 135-36; 138-41 (same); *id.* at 136-37 (economic theory that allows for strategic and manipulative interaction); *id.* at 23-36 (game theory). Some social psychological models provide for argument. See, e.g., J. RUBIN & B. BROWN, *supra* note 6, at 261-62. But applications of this model focus almost exclusively on threat, promise and appeal. See, e.g., *id.* at 278-88 (discussing only appeals, demands, promises, and threats); T. SCHELLING, *supra* note 6, at 33-46 (discussing only threat, promise, and commitment); J. WILLIAMS, *supra* note 1, at 79-81 (section on "argumentation," which discusses only concession making).

Even the best of these writers usually treat bargaining as a series of strategic moves that are made over time and converge on a middle, in which little attention is paid to explicit attempts to persuade an adversary of where that middle lies. See, e.g., O. BARTOS, *supra* note 6, at 10; O. YOUNG, *supra* note 6, at 131-32; but see Pruitt & Lewis, *The Psychology of Integrative Bargaining*, in NEGOTIATIONS, *supra* note 6, at 161 (a conceptualization of bargaining that combines elements of persuasion and problem solving). These commentators often agree that argumentation (or debate as it is more frequently called) is an important feature of negotiation, and that it has been unwisely neglected, see, e.g., P.H. GULLIVER, *supra* note 6, at 10; Walcott, Hopmann & King, *supra* note 10, at 208; but

presume that their disputes will be resolved according to law.³⁷ 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.³⁸

If a party accepts a settlement based on an incomplete consideration of the relevant legal claims, the justice of that settlement is in question. The absence of good legal argument increases this risk. Incomplete and undeveloped argument causes claims to go unprotected because they are never raised. Weak and ineffective argument causes claims to be too easily conceded. Routinized or stereotypical argument causes claims to be determined on the basis of status quo, conservative norms that treat all cases as alike and systematically bias outcome in favor of the haves. Stylized, ritualistic argument causes claims to be determined on the basis of factors

there is little follow-up to that conclusion. The popular negotiation literature has devoted more attention to the topic but this discussion is usually ad hoc, anecdotal, and unsophisticated. See, e.g., H. COHEN, *YOU CAN NEGOTIATE ANYTHING* 85-87 (1980); C. KARRASS, *GIVE AND TAKE* 146-47, 188-89 (1974); C. KARRASS, *THE NEGOTIATING GAME* 78-90 (1970); T. WARSCHAW, *WINNING BY NEGOTIATION* 177-94 (1980).

37. Not everyone believes that a settlement must be based, in part, on a consideration of existing law in order to be just. For some (libertarians are the most obvious example), the relevant moral standards for private ordering are those freely chosen by the negotiating parties, and those choices are the ones implicit in the specific agreement reached. All affected interests must be represented and there must be an absence of force and fraud; but if these conditions are met, a settlement is just when the parties agree to accept it. For descriptions of philosophical positions compatible with this view, see generally F. HAYEK, *THE CONSTITUTION OF LIBERTY* 21 (1960); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 150-64 (1974).

38. This is particularly true at the present time in American courts, where there is strong pressure on litigants to settle cases privately. See Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1073-74 (1984); Luban, *Just War & Human Rights*, in *PHILOSOPHY & PUBLIC AFFAIRS* 160, 167 (1980). In fact, for all practical purposes, a negotiated settlement is the chief outcome of the adjudication process. With Fiss, I agree that something important is lost in this shift, both in the way of justice for particular litigants and in public learning and debate about the nature and limits of legal norms. Because adjudication is now, in effect, negotiation, it is necessary to show how the normative safeguards and public properties of the adjudication process can be incorporated into the structure of dispute-negotiation without destroying the efficiency and economy of the latter process. If informal settlement is to be the legal system's formal response to disputes, standards of justice should not be left completely to the contingent properties of particular disputes and disputants. Increasing the role of legal argument in dispute-negotiation is one way in which adjudication and negotiation could begin to be integrated.

such as stamina, verbal facility, persistence, tolerance for conflict, or ruthlessness that have only a coincidental correlation with justice. In a legal system that is itself just, the justice of negotiated outcomes exists, at a minimum, to the extent the parties' competing legal claims are competently raised, debated, and resolved.³⁹

III. GOOD ARGUMENT

Argument must be good to perform the functions assigned to it in dispute-negotiation. Bad argument does not inform, instruct, or even manipulate, for understandable reasons; though qualities that make argument bad at one of these functions might make it good at another. Argument is good to the extent that it advances reasons that are credible within an adversary's legitimate frame of reference.⁴⁰ Because an adversary is usually a stranger, in significant respects, a negotiator must begin with a stereotype of that frame of reference. This section sets out the elements of that stereotype.⁴¹

39. I frame these propositions in terms of "claims" rather than "rights" to stay out of the most intensely raging debate in American legal scholarship. See generally Dworkin, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81, 105-23 (1982); Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 169-73 (1982). For other perspectives on rights, see Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Mashaw, *Rights in the Federal Administrative State*, 92 YALE L.J. 1129 (1983); Michelman, *Politics as Medicine: On Misdiagnosing Legal Scholarship*, 90 YALE L.J. 1224 (1981); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1982).

Whether theories of rights, of whatever kind, have independent content, or are politics masquerading as determinate rule analysis, is for others to resolve—and more power to them. My point is simpler. Whether described as rights, claims, interests, rules, principles, tradition, or whatever, parties to a dispute must share a set of authoritative background norms, no matter how rudimentary or limited, for principled conversation about differences to be possible. See generally R. FLATHMAN, *THE PRACTICE OF POLITICAL AUTHORITY* (1982) (discussing the importance of shared background norms). Participants in the rights debate acknowledge this, and differ primarily on the contours and nature of those norms. Legal argument is the invocation and interpretation of shared norms, within the language and conventions of the "community of interpretation" of lawyers. See Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676, 685-86 (1975) (discussion of legal "communities of interpretation").

40. Both the instrumental ("credible" reasons) and normative ("legitimate" frame of reference) aspects of this definition are important. For example, a logically correct argument based upon a false premise about existing law (e.g., a contributory negligence argument in a comparative negligence jurisdiction) that persuades because the listener does not know that the premise is false, might be effective but not good. Whether it was good or not would depend upon whether manipulative argument was justified in the particular instance. See *supra* note 33. Good is not a synonym for "anything that works," but what works is an important part of the definition of good.

41. These elements do not make up a "theory" of argument in either a strong or

These elements are advanced as minimal, consensus standards of law-trained people. The list is not exhaustive, and it could be conceptualized differently, but in its essence, it is offered as the core of mainstream views.

The minimum obligation of good argument is ordinary rationality.⁴² Argument must be supported by relevant reasons and evidence that are internally consistent, and logical. Certain kinds of reasoning may be thought inappropriate for particular circumstances or issues,⁴³ but objections to such reasoning themselves must be supported by reasons and evidence. Within the legal culture these canons of rationality are meta-procedures, accepted as binding by persons holding different types of substantive beliefs. In the act of arguing, one acknowledges and accepts the obligation to abide by the canons of rationality.⁴⁴

Law-trained people also subscribe to additional characteristics that are often equally important in determining what and whom to believe. There are six such characteristics, and an argument that possesses each in appropriate measure, *ceteris paribus*, is more likely to be credible than one that does not. The six characteristics are: detail, multidimensionality, balance, subtlety, emphasis, and emotionality.⁴⁵

A. Detail

A good argument is fully developed. It is particular as well as general, graphic as well as abstract, and complicated as well as clear. If based on an analogy, it includes an item-by-item comparison of the elements of the situations alleged to be analogous. If based on a rule, it asserts each of the rule's parts, clarifies relevant ambiguities,

weak sense. For theoretical discussions, see C. PERELMAN & L. OLBRECHTS-TYTECA, *supra* note 16; K. REARDON, *supra* note 18; C. SMITH & D. HUNSAKER, *THE BASES OF ARGUMENT* (1972); S. TOULMIN, *THE USES OF ARGUMENT* (1958); C. WILLARD, *ARGUMENTATION AND THE SOCIAL GROUND OF KNOWLEDGE* (1983). For an application of the Perelman/Olbrecht-Tyteca theory to legal argument, see Haynes, *The Language and Logic of Law: A Case Study*, 36 U. MIAMI L. REV. 183 (1981).

42. See C. WILLARD, *supra* note 41, at 13-15 (critique of the concept of "rationality").

43. See, e.g., Sagoff, *supra* note 34, at 1410-18 (discussion of inappropriateness of economic reasoning for certain kinds of political questions).

44. Persons starting from incompatible substantive beliefs are likely to disagree at the ends of their chains of reasoning, despite adherence to the canons of rationality. The canons are a procedural system, and make argument, but not necessarily agreement, possible.

45. These are secondary characteristics in the sense that they depend on the importance of the underlying substantive topic for their influence. A detailed, multidimensional, balanced, subtle, emphatic, and emotional argument about a trivial point might be persuasive, but is also likely to be insignificant in influencing negotiation outcome.

and reports on similar applications. And if based on a policy, it provides evidence that the policy is genuine, and analysis that the policy makes sense. Detail can be factual, as in a complicated story line, evidentiary, where each aspect of the story line is supported in several independent ways, legal, where the rule, policy, or principle framework on which the argument hangs is itself elaborate, or any combination of these at the same time.

Detail helps a listener to see that an argument holds up to whatever length it is played out. More than a surprising insight, or an unusual twist on a familiar point, detail convinces a listener of the integrity of a position, on the principle that something about which so much can be said is often likely to be right.⁴⁶ But detail also has a point of diminishing return. If an argument is so complicated that a listener cannot comprehend it within the time available to respond, his most rational course is to ignore it and feel justified in doing so. The use of detail is thus qualified by a rule of saturation. Detail is appropriate as long as it informs, instructs and convinces, but not when it overwhelms.

B. *Multidimensionality*

For each issue of each legal claim, one may frame arguments from the perspectives of rule, policy, principle, analogy, consequences, and custom.⁴⁷ The best arguments are made in all of these

46. If a private contest takes place in every negotiator's head, in which one's own arguments are compared with another's, the other starts with the deck stacked against him. Arguments in the head are seen as exquisite, and complete, filled with detail, multidimensionality, subtlety, and balance. It is not that one's own arguments are regularly this good, just that it is the private myth of most that they understand more deeply than their words express. When they introspect, they see this depth, or think that they do, but when they listen to another express his equivalent private vision they do no such filling in, as indeed they cannot. They are not "in" his head. They give him the benefit of his words and their necessary inferences, and no more. When they judge who has the better view, their "more developed" picture wins out, as in one sense, it should. Only by expressing argument in all of its setting, so to speak, does one have a chance of neutralizing a listener's self-provided presumption of detail.

47. For example, in making a claim that a tenant will not be evicted from a rental property because the property has housing code violations, a lawyer might argue, *inter alia*, that particular statutory or case language articulates such a rule; that in this case an underlying policy to maintain housing stock is served by enforcing the rule; that the principle that one must have clean hands before claiming legal rights applies to this landlord; that this case is like another in which eviction was refused; that the worst of all outcomes—e.g., a rent strike—will occur if the eviction goes ahead; and that, as a practical matter, the housing court never evicts a tenant until his rental unit is brought up to code. Each of these arguments could be quite elaborate, both in establishing the legitimacy of its norm and in applying that norm to the circumstances of its case. See G. BELLOW & B. MOULTON, *supra* note 16, at 883-84. Argument from analogy may more

dimensions, where each dimension registers in its own right, but also builds upon the others and is independently significant for what it contributes to the sum of the argument's parts. This cumulative effect usually increases in importance as the argument proceeds. Multidimensionality demonstrates that a position holds up whatever the listener's angle, perspective, or approach. It reflects a comprehensive, sophisticated, and thorough understanding.⁴⁸ As with detail, there is a rule of saturation. Too many dimensions can overwhelm and cause the listener to break off discussion.⁴⁹

C. Balance

Good argument is rarely one-sided. If a dispute reaches the point where lawyers have been hired, pleadings filed, discovery taken, and no resolution achieved, there is probably something to be said for each side's position. There are familiar exceptions—the strike suit, the neighborhood feud, the recidivist litigator—but for the most part people do not throw good money after bad. At a minimum, negotiators usually believe that they are acting reasonably,

properly be labeled argument from example. See Haynes, *supra* note 41, at 246-53. But analogy is the more familiar term in legal discourse. See E. LEVI, AN INTRODUCTION TO LEGAL REASONING 5 (1949). The idea of principle is intended to be broad enough to include such notions as Bobbitt's "ethical" argument. See Bobbitt, *supra* note 16, at 726-43.

48. In their competitive forms, multidimensionality and detail trade on the elements of insecurity and surprise. The listener has been told something new which he feels, in retrospect, he should have discovered in advance. He is embarrassed by his oversight and this embarrassment produces internal agitation that makes analysis and argument more difficult. He also may fear that there is more to the problem than he is able to understand, and he may begin to wonder if the speaker ever will run out of new, relevant arguments. In such circumstances concession often looks more attractive than resistance. In the literature this phenomenon is discussed under the rubrics of image loss and loss of self-esteem. See, e.g., D. PRUITT, *supra* note 6, at 23-25 (discussing relationship between image loss, face saving and concessions); J. RUBIN & B. BROWN, *supra* note 6, at 130-36 (discussing both self-esteem and public image problems in negotiation).

49. A detailed and multidimensional argument can sometimes be so complex that the negotiator must deliver it all at once, in a soliloquy. A soliloquy is looked on with suspicion, however, even when the listener cannot say how its argument fails. This reaction seems based on the belief that a soliloquy is obviously prepared, and that an obviously prepared argument is usually wrong; strong arguments write themselves, so to speak. To avoid this problem, detailed and multidimensional argument is often advanced in a consciously conversational form. An argument's elements are made to seem to slip out, as if occurring to the speaker at the moment (or shortly before) they are articulated. Points are not forced into openings where they do not fit, arrangement and sequence are adapted to the arrangement and sequence of the underlying conversation, and positions for which the appropriate moment does not arise are dropped. Formal, highly structured negotiation cannot always be made conversational, but most two party dispute-negotiation is amenable to this move.

and this belief initially must be taken as sincere. It is usually not reasonable, therefore, to contend that one's own views are intelligent and fair, and another's unintelligent and self-serving, and argument that does so is presumptively suspect. Legitimate considerations on each side must be acknowledged, and the resulting balance if closely struck, described as such. What is important is that the adversary know, in his own terms, that his position has been understood and taken into account in arriving at one's present view.

D. Subtlety

Parties believe, rightly, in arguments they have an active hand in shaping, and are suspicious of those preached to them. A listener should work to understand an argument, and even discover dimensions that its proponent does not see. Subtlety is the quality that makes this participation possible.⁵⁰ It is achieved principally by leaving constituent parts of argument implicit. Analysis the listener can be expected to provide need not be expressed. Biases, beliefs, and values that the listener is known to possess may be neutralized or triggered, as appropriate, by choices of concepts, theories, language, and evidence. Relevant characteristics of the setting (e.g., plaintiff bias in a particular court, community anger at a particular party) may be allowed to operate without being appealed to directly. At its best, subtlety makes argument truly bilateral, and takes it out of the realm of oratory into that of analysis.

E. Emphasis

Argument needs focus. The structure of individual arguments, and the arrangement of argument as a whole, should emphasize certain points above others.⁵¹ A listener should not feel at the end of the proverbial "shotgun," picking points out of some larger, undifferentiated barrage. In most arguments certain issues are more important than others. Sometimes this is because they represent thresholds, such as jurisdictional claims, that must be overcome before remaining claims have relevance. Other times it is because

50. In the speech-communication and rhetoric literature this quality is often referred to as the enthymematic property of argument. See, e.g., C. PERELMAN & L. OLBRECHTS-TYTECA, *supra* note 16, at 230, 234; C. WILLARD, *supra* note 41, at 40-41. Enthymeme is Aristotle's term for the syllogism of rhetoric. See ARISTOTLE, RHETORIC, I, 1, 1355a; II, 22, 1395b.

51. Structure and arrangement are complicated subjects in their own right, see, e.g., G. BELLOW & E. MOULTON, *supra* note 16, at 901-14, but conceptually, they are subsets of the idea of emphasis.

they have ripple effects (e.g., arguments about witness credibility), or because they make available extraordinary recoveries (e.g., punitive or treble damage theories) or multiple substantive theories (e.g., claims of malice, wantonness, intentionality). Failure to distinguish between important issues and those of lesser rank indicates that a negotiator misunderstands his problem in fundamental ways, and this misunderstanding makes his insights less trustworthy. Failure to provide emphasis also may make argument unnecessarily confusing. Particularly if it is complex, argument is more easily understood and discussed if subdivided, periodically summarized, and sequentially developed. The absence of these properties increases the risk that important points will be missed because they are lost in a mass of detail.

F. Emotionality

Trustworthy argument has an emotional as well as an analytical side; believable argument is always more than just logically arranged words and ideas. This emotion is rarely extreme. Seriousness is usually more appropriate than anger, annoyance more appropriate than disgust, conviction more appropriate than certainty. Emotion is necessary, in principal part, because argument is about right and wrong. Whether moral and political norms are discussed as such, or as embodied in legal rules, argument is advanced to achieve justice, no matter how attenuated a negotiator's awareness of this purpose may be. Discussions of right and wrong involve more than the solving of intellectual puzzles. They are serious political and moral undertakings and persons engaged in them must likewise be serious. If they are not, their views will be thought less worthy of attention.⁵²

52. This does not mean that a negotiator must believe in the literal truth of his client's arguments before he can corroborate them with emotion. Like the actor, the negotiator can juxtapose a text—his argument—to an authentic emotional state—e.g., anger—called up by focusing part of his attention on an experience with which the emotion is genuinely associated. For discussion of this dramatic technique, see C. EDWARDS, *THE STANISLAVSKY HERITAGE* 149-59 (1965); S. MOORE, *THE STANISLAVSKI SYSTEM* 54-57 (1960). The emotional state must be authentic, but it need not be produced by the experience of the text. If the text and emotion are juxtaposed correctly, the listener's most logical inference is that the cause of the emotion is what is said. Whether a lawyer is morally entitled to "act" in a given instance is a separate and difficult question. See *supra* note 33.

Emotion also helps avoid a kind of vulgar double-bind. If a negotiator advances an argument, the thrust of which is serious, yet does not seem serious, he sends two messages rather than one. This will confuse the listener, who will not know which message to trust. While confused, a listener is likely to suspend judgment, and not believe anything until the messages sort themselves out. The nonverbal, emotional realm must corroborate the verbal, or it will undercut it.

The foregoing characteristics of good argument work in combination. Each checks the excesses and bolsters the contributions of the others. For example, emphasis and subtlety prevent detail from becoming unwieldy and insulting. Emotionality prevents multidimensional argument from becoming overly clever, and is itself restricted by the requirement of balance, and so on. Good argument is an amalgam of these characteristics, each in appropriate measure. Emphasizing all aspects of the typology equally is a starting point. But as negotiation proceeds, and assessment makes the adversary's frame of reference clearer, good argument emphasizes those characteristics that have the greatest salience within this frame of reference.

The concepts of this and the preceding section provide a framework for analyzing the argument excerpts in section V. But they also suggest important qualifications on conclusions drawn in that analysis. Negotiation argument is a complex phenomenon that depends heavily on context for its meaning, and much of that complexity is lost when argument is isolated for analysis.⁵³ Arguments that look ill-advised on their face often have important strategic purposes. Hyperbolic or inflammatory argument can goad an adversary into revealing secret information about his theory of the case. Clever but flawed argument can test an adversary's skill at analysis. Argument based on incorrect summaries of evidence, or on false descriptions of court practices, can measure an adversary's level of preparation or extent of experience. Repetitive or routinized argument can create space between offers, to help make concessions appear grudging. While deficient as pure advocacy, each of these kinds of argument, in context, could be intended to serve important negotiation objectives. Accordingly, complete evaluation of negotiation argument always must ask more than "Does it persuade?" For the most part, the arguments in section V may be taken at face value as efforts to persuade—at least this is the judgment that was made in selecting them. But a certain caution is required in analyzing these arguments, and if the arguments are unconvincing, it does not follow that they served no purpose.

IV. THE *LERCH* SIMULATION

Lerch v. McDane is a simulated negotiation problem developed to collect representative data on negotiation argument. The goal of the simulation was to determine whether negotiation argument pos-

53. See Walcott, Hopmann & King, *supra* note 10, at 193.

sessed the characteristics described in the preceding sections, and if it did, why it was not taken more seriously by lawyers and law students. The simulation placed participants in a life-like negotiation setting, in which part of the task was to resolve substantive law differences between antagonistic parties to a lawsuit.⁵⁴

The problem involved the transfer of an inmate (Lerch) of the

54. The simulation was given to approximately 200 law students in three law schools (one elite and the other two non-elite), in three geographical regions over a five-year period. The students responsible for the argument excerpts in section V had combined grade point averages and Law School Admission Test scores that put them in the top 10% of all law school applicants, and all were in the top third of their class at an elite law school. (The simulation also was done by 16 lawyers, but this quantity is not large enough to be representative.)

There is reason to be skeptical of research based on student subjects. As a group, they do not always embody habits, beliefs, and values in proportions representative of the subject population at large, and in using students, one may discover nothing "more profound than the 'social psychology of the college sophomore.'" J. RUBIN & B. BROWN, *supra* note 6, at 297. In the present research this concern is less serious. Most of the students (including all of those whose argument excerpts are reproduced in the next section), were in their third year of law school, had worked in law firms for at least one and often two summers, and had practiced law in their own right during the school year under a student practice rule. They were well along the path to being socialized into the lawyer role. In addition, the task studied—legal argument from doctrine, rule, and policy—is performed similarly in both real life and simulated settings, and is as much within the capacities of students as lawyers. The nature of the motivation to perform well, principally the desire to impress professional colleagues with one's craftsmanship, is also the same in both settings. See generally Landon, *Lawyers and Localities: The Interaction of Community Context and Professionalism*, 1982 AM. B. FOUND. RESEARCH J. 459, 477; Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137 (1964).

The subjects aside, it is also difficult to generalize from research based on simulated problems. It is easier to concede one's own interest (in the simulation) than a client's; a hypothetical client interest is not as compelling as a real one; and academic games are not often thought worthy of a serious, all-out effort. In addition, simulation subjects frequently play to the "audience," i.e., anyone recognized as entitled to evaluate their performance, and seek positive evaluation by behaving in accordance with the audience's preferred positions, whether the subjects would choose the same positions for themselves or not. See J. RUBIN & B. BROWN, *supra* note 6, at 43-54. In the parlance of law school, simulation subjects often "give the experimenter what he wants."

These concerns notwithstanding, *Lerch* participants worked hard, worried about their performances, pulled few punches, and invested hours in preparation, taping, and review. Inadequate effort (e.g., arbitrary conceding to end the exercise, collusive bargaining about how to win at the exercise, or other examples of out-of-role behavior) appears on less than 5% of the total tape time, and all of the meetings between the bargainers were taped. It is hard to imagine the participants being more strongly motivated in any other setting, including law practices. Playing to the audience was a serious problem, however, and is discussed *infra* pp. 128-29.

The simulation was somewhat non-lifelike in that it emphasized substantive legal argument. This emphasis may be traced to three factors. First, the hypothetical facts were thinner than those of real life. The bargainers knew little about the testimonial qualities of the parties and witnesses, or the predilections of the judge or jurors who would decide the case if settlement was not reached. This made it difficult to argue factual disagreements to a conclusion, since resolution of such disputes would often turn

Virginia prison system from a minimum to a maximum security facility, without a hearing and under the authority of a new and untested prison regulation (the new transfer regulation) providing for inmate "assignment."⁵⁵ Lerch had a history of disorderly conduct, fighting, stealing drugs, and threatening other inmates, and, according to prison officials, was transferred for these reasons. Lerch believed that he had been made the scapegoat for disturbances created by other inmates, and that he was transferred on the basis of false and misleading information given to prison officials by informants within the prison. The transfer ended Lerch's treatment for drug addiction and deprived him of access to prison rehabilitative and education programs.

The central legal question to be resolved by the negotiators was whether Lerch had a due process right to a pre-transfer hearing. At

on the credibility of persons who would tell the conflicting stories. "Legal" argument had to take up the slack.

Second, real client needs were missing, and the students were not familiar with the physical and emotional experience of prison. This made arguments based on principle and consequences difficult, because the listener would know that the arguer's heart was not in it. Arguments about cases and statutes are the essence of law school conversation, however, and this familiarity gave them credence, even in a simulation. Put another way, only the legal argument was real.

Third, the background norms of the simulation differed in significant respects from those of law practice. In practice, the case would have a stereotypical settlement point (or points, closely bunched) known to each side as a category in its lawyer's head. *See supra* note 3. There might be disagreement about whether the case fit into one category or another, and perhaps a discussion of whether it could be categorized at all, but with these issues resolved, deciding upon a settlement amount would consist of applying a shared norm. This would discourage extensive argument. Lawyers would believe that they knew what the case was worth and that arguing about it would not change that assessment. They would argue some, because stating a bottom line at the outset could easily be misinterpreted, but not in as much detail as someone not privy to the background norms. The background norms of a law school simulation have to do with the comparative quality of arguments more than the value of legal claims. Students know how to distinguish good argument from bad, but not how to put a value on cases, and would apply these standards of argument even without planning to. This predisposition reinforced the problem's bias in favor of legal argument, albeit of the game-playing variety.

55. The regulation provided that:

Prisoners shall be assigned according to the nature of the offense for which convicted, the prospect of rehabilitation and the need for professional or medical care, to the correction facility which best meets the circumstances of that case. Although prisoners may be reassigned to another prison facility for disciplinary reasons, no prisoner shall be assigned to any institution if such assignment will impair ongoing rehabilitation, prevent adequate medical treatment or result in the prisoner's incarceration with inmates whose offenses are much more serious than his own, unless such reassignment is absolutely necessary for the protection of any inmate or the security of any institution. (Effective March 1, 1979).

the time of the arguments in Section V, the decisions of *Meachum v. Fano*,⁵⁶ and *Lamb v. Hutto*⁵⁷ were particularly important.⁵⁸ In *Meachum*, six Massachusetts prisoners charged that hearing-less transfers to prisons with conditions less favorable than their own deprived them of rights under the due process clause.⁵⁹ On review, the Supreme Court rejected the notion that any "grievous" loss visited upon an inmate by the state is sufficient to invoke due process protection. "That life in one prison is more disagreeable than life in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated."⁶⁰

The Court distinguished *Wolff v. McDonnell*⁶¹ on the ground that the prisoner liberty interest in *Wolff* originated in a state statute that conditioned the loss of good time credits on a finding of serious misconduct. When the determination of whether misconduct had occurred was critical to the administrative decision, the due process clause required a hearing to prevent arbitrary treatment.⁶² In contrast, in *Meachum* there was no statute-based liberty interest to which due process protections could attach. Since "Massachusetts prison officials [had] discretion to transfer prisoners . . . for whatever rea-

56. 427 U.S. 215 (1976).

57. 467 F. Supp. 562 (E.D. Va. 1979). *Lamb* was decided by the same court that would hear Lerch's claim. Subsequent to these negotiations, the Fourth Circuit, in *Gorham v. Hutto*, 667 F.2d 1146 (4th Cir. 1981), substantially vitiated *Lamb*.

58. The Supreme Court had not then decided *Hewitt v. Helms*, 459 U.S. 460 (1983); *Olin v. Wakinekona*, 456 U.S. 1005 (1983); or *Vitek v. Jones*, 445 U.S. 480 (1980).

59. The prisoners were removed from the general population at the Massachusetts Correctional Institution at Norfolk after a period of serious unrest. After removal but before transfer, each prisoner was given an individual classification hearing, in which he was represented by counsel and given notice of the charges against him. The charges were based on statements by prison informants. *In camera*, and out of the prisoners' presence, the classification board heard the testimony of the prison superintendent, who repeated the information that had been received from the informants. Each prisoner was allowed to present evidence on his own behalf, and each denied involvement in the particular infraction(s) with which he was charged. Although the prisoners were aware of the general import of the informants' allegations, the details of this information were not revealed or included in the Board's report. No prisoner was subjected to disciplinary punishment at his new prison, and none of the transfers entailed the loss of good time. *Meachum*, 427 U.S. at 216-22.

60. *Id.* at 225. The Court was concerned that so broad a reading of the due process clause would subject to judicial review a wide spectrum of discretionary actions traditionally reserved to prison administrators. As an example, the Court mentioned a "transfer made on the basis of informed predictions as to what would best serve institutional security or the safety and welfare of an inmate." *Id.*

61. 418 U.S. 539 (1974).

62. See *Meachum*, 427 U.S. at 226. "The liberty interest in *Wolff* had its roots in state law, and the . . . [due process protections] were . . . required . . . 'to insure that the state created right [was] not arbitrarily abrogated.'" *Id.*

son, or no reason at all, a prisoner's expectation of remaining at a particular prison so long as he [behaved] himself . . . [was] too ephemeral and insubstantial to trigger procedural due process protections."⁶³ The Court concluded with a warning against federal judges sitting in supervision of the day-to-day functioning of state prisons.⁶⁴

In *Lamb v. Hutto*⁶⁵ a Virginia prisoner (Lamb) alleged a deprivation of free speech and due process rights because he had been transferred without a hearing⁶⁶ from the Virginia State Penitentiary to the Mecklenburg Correctional Center. Summary judgment was granted against the first amendment count,⁶⁷ but on the due process claim the Court found that "in Virginia . . . it appears to be standard practice that pre-transfer hearings, conducted according to published procedural standards, are afforded inmates who are about to be reclassified or transferred to a higher security level,"⁶⁸ and held "that reliance upon published institutional regulations creates a 'justifiable expectation to a hearing rooted in state law.'"⁶⁹ The

63. *Id.* at 228.

64. *Id.* at 228-29. *Meachum* is complicated by the fact that three Justices (Stevens, Brennan, and Marshall) dissented. Relying principally on *Morrissey v. Brewer*, 408 U.S. 471 (1972), they would have held that prisoners, even while confined, have liberty interests more extensive than those originating in the Constitution or created by state statute, and would have interpreted the due process clause to include protection against any "sufficiently grievous" change in status. What constitutes "grievous" would be decided case by case, and the dissenters would have found the loss in *Meachum* grievous. *Id.* at 229-35.

65. 467 F. Supp. 562 (E.D. Va. 1979).

66. *Id.* at 564. Lamb was given an Institutional Classification Committee hearing prior to his transfer, but contended that the Committee did not follow its own procedures at the hearing. He made additional claims of being beaten and having his mail stopped that, at least explicitly, were not factors in the part of the *Lamb* opinion relevant to *Lerch*. *Id.* at 564-65.

67. *Id.* at 565-66. The Court agreed that Lamb's interest in testifying was a first amendment interest, and though a transfer does not generally give rise to due process protections, it may not be used to retaliate for the exercise of constitutional rights. Analogizing to cases involving the failure to renew the contracts of nontenured public employees, the Court held that a constitutional violation could be established only by showing that the decision to transfer would not have been made absent the occurrence of the constitutionally protected conduct. "The Court [must] determine if plaintiff's transfer was justifiable on grounds other than his alleged refusal to succumb to defendant's alleged threats." *Id.* at 566. It found ample evidence that it was, in un rebutted prison official affidavits recounting a history of disciplinary offenses by Lamb. *Id.*

68. *Lamb*, 467 F. Supp. at 566.

69. *Id.* (citation omitted). This and the preceding passage, particularly their distinctions between a practice and published regulations, and reclassification and transfer, would prove to be the most controversial part of the *Lamb* opinion. The thrust of the passages was subsequently rejected in *Gorham v. Hutto*, 667 F.2d 1146, 1148 (4th Cir. 1981).

Court also concluded that Lamb was entitled to notice of the charges against him and the right to call witnesses, and gave him leave to amend his complaint to state how these rights had been denied.⁷⁰

The *Lerch* problem was similar to *Meachum* and *Lamb* but identical to neither. Lerch's transfer was not in retaliation for the exercise of substantive constitutional rights, but his regulation-based rights to "rehabilitation, medical treatment, and incarceration with people whose offenses are no more serious than his own,"⁷¹ made his claim more than one for a prison of his choice or for favorable conditions of confinement. The new transfer regulation made no mention of a hearing, but its recitation of the above restrictions, in effect, may have conditioned transfer on the occurrence of "specified events,"⁷² the existence of which must be found in a hearing.

There were additional legal issues present in *Lerch*. For example, it was not clear whether the new transfer regulation impliedly repealed the regulations relied on in *Lamb*, or whether those regulations continued in effect and provided Lerch with an independent basis for his due process claim. Nor did the new transfer regulation specify whether a Virginia prisoner could be assigned or transferred to a higher security facility without being reclassified, or if reclassification was necessary, whether it could be done without a hearing. And finally, a key issue was whether a practice of providing pre-transfer hearings created an expectation rooted in state law, independent of statutory or regulatory language. These were not the only issues, but they were the most important ones in the argument excerpts that follow.

Simulation participants represented Lerch or McDane, then the Virginia Commissioner of Corrections. Each was given a detailed background file,⁷³ and each was permitted to ask for additional information he believed he would have had in the actual negotiation

70. *Lamb*, 467 F. Supp. at 566-67.

71. See *supra* note 55.

72. *Meachum*, 427 U.S. at 227.

73. This file included personal information about Lerch or McDane, a history of events (including trial and appeal) leading up to Lerch's incarceration, an account of Lerch's prison behavior prior to his transfer, summaries of relevant documents in Lerch's prison file, a copy of the new Virginia transfer regulation, findings by correction officials on which Lerch's transfer was based, and an account of Lerch's difficulties (including medical difficulties) in adjusting to his new prison facility. Appropriate parts of this information were provided in two versions, one written from Lerch's perspective and the other from McDane's. Participants also were encouraged to draw on what they knew about the personalities and facilities that made up the Virginia prison system, and popular attitudes about prisons and prisoners in the state in general.

of the case.⁷⁴ Participants were given three weeks to reach an agreement.⁷⁵ They could meet as frequently as they liked, and at any time; all negotiating sessions were videotaped.⁷⁶ Three argument excerpts have been selected from the tapes of the negotiations.⁷⁷

74. All requests for public or discoverable information were answered. If information would have come in discovery, the adversary was told what was provided.

75. If they did not settle, participants were required to write a brief (of no less than ten pages) on the merits, within five days of deadlock. This requirement was intended to approximate the cost in having to prepare for trial. Some refused to allow self-interest to dictate a bad settlement, but most avoided the brief at any cost.

Three weeks was probably not enough time. In practice, one prepares for negotiation in stages. One has one level of understanding when giving preliminary advice at the initial client interview, another when drafting the complaint, another after discovery, and perhaps another after preparing for bargaining itself. In the intervals, understanding percolates and evolves, even when the case is not being worked on, contributing in hard-to-describe but nonetheless real ways to making subsequent views more sophisticated. In *Lerch*, the time between introduction to the problem and the bargaining itself left little opportunity for mulling around, percolation, or editing. Students spent as many total hours on *Lerch* as they would have in practice, but having to compress that time into a three-week space was a problem.

76. A room permanently outfitted with recording equipment, controlled from a studio in an adjoining room, was reserved for the bargaining sessions and a technician was always available to operate the studio. Participants had only to enter the room and begin to bargain. They were not wired for sound, normal lighting was used, and the room was furnished as a law office conference room. The taping was intended not only to collect data, but to prod participants into trying hard to succeed. It was assumed that students would be motivated by the desire to do a craftsmanlike job, and the camera stood as a proxy for the audience. See *supra* note 54.

77. The excerpts are misleading in two respects. First, each negotiation is made up of more than argument. The bargainers exchanged pleasantries, discussed tangential issues, traded a wide variety of items through offers and counter-offers, and marked time by talking about little or nothing of significance. The discussions had many of the overall qualities of ordinary conversation. On the other hand, argument is the best representative of the emphasis in the conversations. This is because the participants were unable to answer the question "What does your client want?", a commonplace starting point for experienced lawyers. This fuzziness about objectives is explained by the absence of instructions in the problem's materials (by design, as part of the task was to formulate a definition of successful outcome), by the fact that the students were novices at thinking about negotiation in terms of outcome, and by the absence of a client to consult. They did know, however, that they wanted to have the better of the legal argument.

Second, each excerpt is not the whole of the negotiator's argument. It was common to add new points at irregular intervals throughout the negotiation so that cumulative argument was more sophisticated than any single statement of it. It is not clear, however, that subsequent and irregularly made points had a measurable effect. After issue was joined and disagreement registered, argument often became repetitive and routinized. Attention diminished and participants looked for means other than argument to reach an agreement. Often, they did not hear new points or did not see them as connected to earlier arguments. While the excerpts do not present all of the participants' views, therefore, they present those parts that probably had the most effect.

That the excerpts contain "just words" also warrants mention. The bargainers had individual and interdependent histories as classmates, friends, and co-simulants. They had racial, sexual, and class identities. They communicated nonverbally through

Each of the excerpts illustrates a different approach to the due process argument, and each is the best representative of a genre of argument found generally in the tapes. Collectively, the excerpts represent the participants' most common approaches to the due process question.⁷⁸

V. EXAMPLES AND ANALYSIS

A. *DE v. ML**

This excerpt defines one end of the spectrum of *Lerch* arguments—the weakest arguments. The negotiators are highly excited and seem to be resolving difficult questions, but in fact, they never join issue on any substantive point. They are combative rather than assertive, intransigent rather than firm, and belligerent rather than aggressive. One of the parties is disproportionately responsible for these qualities, but it was also common for each to be equally at fault. This excerpt is an example of the failure to argue, and is found about ten percent of the time on the *Lerch* tapes. DE represents Lerch and ML represents McDane.

- 1) ML: Okay, let's go over this Complaint a little bit to see what you have.
- 2) DE: Well, we're asking for relief in five different areas, and if you don't mind, I'd like to take them one at a time.
- 3) ML: I don't mind.
- 4) DE: The first thing we're asking for is reassignment, and we want to go back to where we came from.

gesture, tone, expression, pace, and inflection. And the exercise as a whole took place within an institutional and social setting that had its own practices, procedures, and substantive norms. These factors gave meaning to their communication that is not captured completely in transcriptions of their words. For a discussion of such factors, see Condlin, *supra* note 20, at 251 n.68. Not that words are unimportant, but in analyzing texts a certain modesty is called for. A text is a slice of reality, and not always the most important slice. This analysis may be thought of as a hermeneutics of negotiation argument. For a discussion of hermeneutics, see Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thought to Legal Phenomena*, 36 U. MIAMI L. REV. 379, 398-404 (1982); cf. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1982) (discussion of the need for more historicist legal scholarship).

78. Due process arguments have been selected because due process was the most important issue in the problem. It was irrational to try to resolve the dispute without talking about Lerch's due process rights, and no one tried to. Such argument also is paradigmatically legal, consisting of case interpretation and policy analysis, and loses little of its nuance when based on hypothetical facts.

* These initials are not those of the actual participants.

- 5) ML: Well, where you came from was out in society at large, so you are not going back that far.
- 6) DE: No.
- 7) ML: Just how far back in time do you want to go? Now, for you to get any kind of . . .
- 8) DE: Well, listen, the reassignment thing, I don't think we should spend that much time on it. We've got the law on our side, the case of *Lamb v. Hutto* has just been decided recently. This is decided by a guy who, that the judge in this case had decided previously in other cases against us on the same issue, interpreting the law on this point. There's really no sense in . . .
- 9) ML: Well, I think there is sense in talking about that case, if you want to talk about that case in particular.
- 10) DE: Well, I'm not, well, I'm just talking about the holding in that case. It said that what happened here can't be done, legally. I mean . . .
- 11) ML: That's not true. If we were dealing with a case that had arisen at the same time as *Lamb v. Hutto*, that might be a little bit different. However, this case arose somewhat later. As you know, the regulations in the prison have been changed. Now *Lamb* came down in March of 1979, March 29. These new regs came out on March 1. These new regs were not the subject of the decision in *Lamb*. That case came up that fast.
- 12) DE: The new regs that are ours now are even more in our favor than the *Lamb* reg.
- 13) ML: That is not quite clear.
- 14) DE: Well in any case, if you are willing to litigate this issue of transfer you're going to lose.
- 15) ML: Fine, But anyway I would still like to see now why I am going to lose. I would like you to tell me where in this new reg, I think *Lamb* we can just throw out because *Lamb* does not . . .
- 16) DE: What your people did here was transfer somebody without reclassifying him. Their claim is that he needn't be reclassified . . .
- 17) ML: Under the new regs?
- 18) DE: Yeah, he was sent from a minimum security prison to a maximum security prison.
- 19) ML: It happens.
- 20) DE: But it shouldn't happen.
- 21) ML: Under the regs transfers are excepted from the jurisdic-

- tion of the ICC [Institutional Classification Committee]. I believe you know that. You should know that. That is the way that our system is set up.
- 22) DE: Well then let's talk about the system because . . .
- 23) ML: Let's talk about the reg.
- 24) DE: I think I'm more interested in the system right now.
- 25) ML: Well right now I'm interested in the reg. I would like to know in the reg where you derive the kind of liberty interest that you have to show which would allow a due process claim in this case. I would just like to see it in the regs.
- 26) DE: I think I am going to talk to you about the prison system as a whole, then, because I think we can use this case as a way to settle. . . . I've got six other cases pending on this kind of thing. If you want to make a big . . .
- 27) ML: Let's talk about this case.
- 28) DE: I'm not that interested in this case.
- 29) ML: I am. I mean that's the authority that I have.
- 30) DE: See all this stuff here? This is information on six other cases that I've got coming down. Same case as this one, same issue as this one and I don't want to sit here across from you talking about the same thing five more times. So maybe we should set up something regarding the whole system whether or not . . .
- 31) ML: Well, let me tell you this. I am here on authority right now to discuss *Lerch*.
- 32) DE: And that's it?
- 33) ML: And that's it. I am not here to discuss the other cases. Let's talk about *Lerch*. If we can work something out in the context of *Lerch* that might help you with these other cases, fine. Right now . . .
- 34) DE: Are you going to transfer *Lerch* back?
- 35) ML: We're not going to transfer *Lerch* back.
- 36) DE: Then let's talk about . . .
- 37) ML: Let's talk about this reg which is going to be the same basis of the decision that you're going to be seeking in all these other six cases. Let's talk about the reg. That's the basis of this transcript. Why are you afraid to talk about this regulation?
- 38) DE: I am not afraid to talk about this regulation. I find no value in talking about the regulation because you are not going to convince me that you have acted lawfully

and legally here and that my guy, if I went to court, would not get transferred back.

39) ML: Show me how. Just show me how.

40) DE: What do you mean show you how?

41) ML: Show me how you're going to prevail on a constitutional claim, on a due process claim, given the reg that is on page two of the record.

42) DE: This regulation on page two says that no prisoner shall be assigned to any institution if such assignment will impair ongoing rehabilitation. Is he being rehabilitated?

43) ML: Did it impair the rehabilitation?

44) DE: Was he being rehabilitated? Through medication?

45) ML: Attempts were being made.

46) DE: Was he getting medication?

47) ML: He was getting medication.

48) DE: Is he getting medication now? Is it the same kind of medication?

49) ML: No.

50) DE: Okay, so there's an argument. Would it prevent adequate medical treatment?

51) ML: Time out, time out, time out! If you want to go through the reg we are going to go through it but I am not going to go through the reg . . .

52) DE: I am not going to go through the reg with you. This is a threshold issue as far as we're concerned.

53) ML: Well then let's . . .

54) DE: Reassignment.

55) ML: Let's start at the threshold.

56) DE: The threshold is reassignment. I want him reassigned. I believe that *Lamb* is sufficient in itself, that regulation is sufficient in itself, if we litigate this issue there is no doubt in my mind that he will be transferred back. I am willing to talk about the other things. We are not going to talk any further about this unless you want to put it in the context of five different cases that I have got right here that can fit within this type of thing. Otherwise, reassignment now.

57) ML: Get one thing straight. I make the decisions for the prisons and you don't. All right? Fine. Now.

58) DE: Make your decision, make your decision, reassignment or no.

59) ML: No.

60) DE: Okay, then we are not going to talk about . . .

- 61) ML: Yes we are. I am just going to tell you one thing.
62) DE: Yeah.
63) ML: And you're going to just sit there and listen because I have the right to talk at this hearing too.
64) DE: I know.
65) ML: All right, so just listen for a second.
66) DE: Reassignment, tell me about it.
67) ML: Reassignment. They have no right to reassignment first of all. Just cool it. You think *Lamb* controls. *Lamb* did not decide on the basis of this reg. The basis of *Lamb*, *Lamb* acknowledged under *Meachum* there is no general right for pre-transfer hearing.
68) DE: Not correct.
69) ML: Is that the general basis, yes or no?
70) DE: Wrong.
71) ML: The general basis.
72) DE: Wrong, wrong, wrong.

Several times ML encourages DE to analyze the due process question, and even makes an argument that such analysis is necessary. Occasionally he sermonizes but not without provocation, or for very long, and at the end of the excerpt he is still trying, though less enthusiastically, to provoke such a discussion; but DE refuses to join issue. He deviates from this pattern on only two occasions and even this characterization gives him the benefit of the doubt. DE's statements are little more than unsupported, self-serving conclusions. It is not just that he fails to give reasons for his assertions, but that he overstates, is incongruously emotional, and seems closed to any other view. His statements are not so much bad argument, as the refusal to argue, and in the end, he may bring ML to his level. Particular examples will illustrate these points.⁷⁹

DE takes the first position, that *Lamb v. Hutto* dictates reassignment (8, 10). As he states it, the claim lacks detail and multidimensionality. *Lamb* is not analogized to *Lerch*; its holding is not formulated as a rule to be applied to *Lerch*; and the cases are not compared in any other dimension, whether policy, principle, or con-

79. Interpretations throughout are intended as suggestive rather than exhaustive. For a discussion of the limitless possibilities of such analysis, see Condlin, *supra* note 20, at 251 n.68. I draw on information about the participants and the setting that make my interpretive frame of reference different from the reader's (just as any single reader's will be different from any other's). It is inevitable that I do this, though I shall try to support conclusions with evidence taken only from the dialogue.

sequences. DE could not do all of this in an opening statement, of course, but he does not even begin to do it, and he does not develop such points at any time in the exchange. ML's response (11) ignores several factual differences between *Lamb* and *Lerch*, and, in its own way, suffers from a lack of detail, but it begins an analysis of *Lamb* and as such, is an invitation to go more deeply into the topic. DE changes the subject (14, 16).

In statements 16-20, a limited argument seems to appear. DE makes a distinction between transfer and classification, and asserts that *Lerch* was transferred without being reclassified (16). He does not identify the significance of this distinction, or say how it is related to the regulation being parsed (12, 15), but his comment invites a response. Unfortunately, he is cut off (17), and does not take the opportunity for more extended remarks when it becomes available (20). ML responds briefly, and is still discussing the issue (21) when DE changes the topic again (22). It may be incorrect to describe this as an argument. Issues are identified more than analyzed and few if any of the properties of good argument described in section III are present, but it is as close as the parties get to a substantive exchange, though they get this close often.

In segment 22-33, DE avoids substantive argument by making what might be a threat to bring a class action. If a threat, however, it is largely inchoate. He does not talk in terms of the elements of a class action, such as common questions of law and fact, typicality of claims, and numerosity, or indicate in any other way that he has thought out the class action issue (30). At the same time, ML continues to encourage analysis of the transfer regulation, initially with questions (25), and requests (23, 27), but eventually, with his own kind of threat: That is, if you persist on this topic, we shall have to break off negotiation because I am not authorized to discuss it (29, 31, 33). Sometimes he is subtle (25), and sometimes direct (37), but DE refuses all overtures (38), seemingly on the ground that substantive issues are non-debatable ("you are not going to convince me . . . that my guy, if I went to court, would not get transferred back") (38). He seems to be saying that his is the only reasonable view.

DE's intransigence takes its toll. ML frames as a demand what could be put as a question (39), and his tone becomes strident, his pace quick, and his expression angry. This may cause DE to waiver, because for a moment he makes what might be thought of as a textual argument for *Lerch's* right to rehabilitation. But the argument refers to the regulation's text more than analyzes it (44, 46, 48, 50) and its tone does not invite a reply. After one final effort ("Let's

start at the threshold.") (55), which DE rebuffs ("no doubt in my mind") (56), ML abandons his effort to analyze the regulation, and simply asserts his authority (57, 61, 63, 65). After this flare-up, he invites substantive discussion again (67), but there is little likelihood now that the parties will discuss substance.

As the negotiation continued, the tone became harsher, the exchanges shorter, threats, including the threat of deadlock, more frequent, and strong opinion more prominent. After forty minutes, the parties acknowledged that they were at an impasse and turned to pure trading to resolve the dispute. Legal issues were not discussed, except as "filler,"⁸⁰ from that point on.

DE's arguments are obviously bad, to the point of being nonexistent. They have no detail or multidimensionality, their emphases are erratic, and their emotions extreme. Norms are referred to rather than invoked, and demeaned rather than elaborated. Issues are occasionally identified, but never pursued. The arguments have few of the characteristics described in section III, and many characteristics that could be expected to (and did) produce impasse.⁸¹ This excerpt illustrates the substitution of conflict for argument.

B. *RK v. BM*

This exchange takes place a few minutes after the parties begin to talk.⁸² It is interrupted by a long aside (omitted), in which one of the bargainers introduces a surprise argument—a reading of the

80. Generally, in the latter stages of negotiation, argument became more routinized and automatic, and seemed to be used to fill time while new moves were being planned, or to create space between offers so as to make concessions appear more grudging. This is what is meant by "filler" argument.

81. It is hard to know what to make of such statements coming from intelligent and successful law students. They look like the ferocious bellowing of two great bulls (the students were male) about to enter mortal combat over territory or a mate. The arguments would not be surprising as opening moves, while the negotiators were jockeying for position, but the patterns did not change, and, if anything, got worse as the negotiation progressed. Argument of this sort is all too common in the *Lerch* negotiations. A typical scenario is that of *salvo-salvo-truce*. Each side overstates in comparable measure; the overstatements cancel each other out; impasse is acknowledged; and the dispute is resolved on nonsubstantive grounds.

Perhaps this is done to show membership in the lawyer club, and facility at lawyer wordplay. Or perhaps it is intended to allow each participant to think that he did all that he could for his client because he shouted at his adversary (literally as well as metaphorically), while simultaneously avoiding conflicts sufficiently important to rupture social relationships. DE's actions, in particular, may be explained as attempts to advance his position without revealing private information, to intimidate ML, or to rub in his belief that, after *Lamb*, he could not lose in court. None of these motives sees argument as a mechanism for connecting substantive norms and negotiation outcome.

82. Each of the excerpts is taken from somewhere near the beginning of its meeting,

Virginia prison system enabling act that allegedly gives different powers to the Director and Assistant Director of Corrections—that, on reflection, proves inconclusive. Including the aside, the exchange continues for twenty minutes. RK represents Lerch and BM represents McDane.

This excerpt has less antagonism and defensiveness than the first. The parties seem interested in substantive analysis and make what appears to be a good faith effort to achieve it. In the end, however, their argument is only marginally more sophisticated than the first exchange.⁸³ Issues are not defined to each party's satisfaction, the discussion does not progress logically or in an organized fashion, issue spotting is more common than analysis, and the negotiators talk past one another throughout, never finding a common ground. Structural confusion is the defining feature of the segment. This was the dominant pattern in the *Lerch* arguments as a group. It appeared to some extent on virtually every tape and was the principal characteristic on over half. This excerpt looks like the single largest group of *Lerch* arguments.

- 1) BM: I guess what I'm asking you is under what authority, legal authority that is, you feel that you are entitled to a reassignment, first of all expungement, second of all inspection, third of all, etc.
- 2) RK: Well, we think going under 1983, I'm sure you are familiar with the cases of *Meachum*, *Haymes*, *Wolff*, that series of cases indicating that when in state law practice a prisoner has a justifiable expectation in not being transferred unless certain things happen, that he is entitled to minimum due process and in those cases, as I am sure you know, the prisoner was given a hearing, and all sorts of things, and the question really turned on whether or not he could cross examine people. Here, we, this guy was awakened at 5:00 in the morning, and taken way across the state. He never was given an explanation the whole way through. He didn't know what was going on and there was no hearing of any type. It's not a question

but not by design. As it turned out, the due process question was usually discussed first, and the most developed examples of that argument appeared early in the negotiations.

83. What is perhaps surprising about the excerpts is how little one can learn about the substantive law of prison transfers by reading what the participants say and making all reasonable inferences.

of whether the due process he was given was adequate. There was none.

- 3) BM: Well, I'm under the impression that in *Meachum* and *Lamb* it was a question of whether or not there was an entitlement to a hearing, as well as in *Wolff*.
- 4) RK: Well in *Wolff* . . .
- 5) BM: It was basically the same issue.
- 6) RK: Well, okay in *Wolff*, I may have my facts wrong . . .
- 7) BM: I think so.
- 8) RK: Okay. Well, at any rate, we claim that a hearing and the basic twenty-four hour notice to a hearing, notice for a hearing, at least that and the right to produce more evidence, to bring witnesses, to testify on our side, that we should have gotten that minimum due process. And the reason we think that, is that . . .

* * * *

the language in *Meachum* says a reasonable expectation or justifiable expectation, and I think that given this, you certainly have to agree that Lerch, being aware of these regulations, had a justifiable expectation that he would not be sent at 5:00 in the morning across the state like he was.

- 9) BM: Uhm.
- 10) RK: And I also believe that *Meachum* uses the language "justifiable expectation rooted in state law or practice," and I think we can look to a series of cases that establish that, though not constitutionally mandated, Virginia has followed a practice of giving pre-transfer hearings, whether or not it has to do with reclassification.
- 11) BM: Are you referring to hearings prior to this regulation?
- 12) RK: Yes.
- 13) BM: Because if you wanted to establish a pattern you would have to say that these cases [referring to other transfer cases pending in RK's office] relate to various transfer cases since October, 1979. There were in fact no transfer hearings for these five prisoners, who were transferred from lesser to greater security prisons. And if they are pursuant to that regulation, then it would suggest that the pattern of practice is that there are no hearings.
- 14) RK: I think what that suggests is that we have a class action on our hands. It is the practice in Virginia. We can,

Lamb v. Hutto establishes that. In fact *Meachum* makes no distinction between state law; it doesn't say state law only, it says state law or practice; in fact, we have had a practice or a history of that happening. I think that clearly puts us within the *Meachum* rule. Let me see if I can . . .

- 15) BM: *Lamb v. Hutto*, you have to remember, came out probably after the . . .
- 16) RK: No, in fact, *Lamb v. Hutto* came out before. *Lamb v. Hutto* came out March 29, 1979.
- 17) BM: And when were the incidents?
- 18) RK: October. October 26, 1979.
- 19) BM: Nevertheless, *Lamb v. Hutto* is based on prior regulations which I, you know, being that I can't get ahold of all the regulations, I am presuming that that was overruled by this regulation.
- 20) RK: Okay, I know it could be, may not be, but really doesn't meet the question.
- 21) BM: So it's not authoritative on this particular regulation.
- 22) RK: Well, it's not authoritative as far as the state law branch of *Meachum* goes, but it is authoritative as far as the state practice in *Meachum* goes. Let me show you where it says that.
- 23) BM: I know what you are talking about.
- 24) RK: Okay. So, . . .
- 25) BM: It does basically depend and makes itself verbally depend upon reliance on "published institutional regulations which are the equivalent of a justifiable expectation in state law."
- 26) RK: Okay, you're talking about *Lamb v. Hutto*.
- 27) BM: Yes.
- 28) RK: Okay, certainly, certainly so, but that's still practice right?
- 29) BM: No.
- 30) RK: Do they still do it?
- 31) BM: Practice based on regulations, yes. But not practice independent of . . .
- 32) RK: Well, could have been, could have been. I'll tell you, the question is whether there was a practice and I don't think there is any way you can refute that there was practice, that they've done it.
- 33) BM: Well, obviously they didn't do it in the case of *Lerch*. So they don't always do it.

- 34) RK: Well, that's why we're here. That's exactly why we're here.
- 35) BM: So it's not necessarily their established practice. I don't have facts to the effect that they do it 50% of the time.
- 36) RK: Well I have a district court case. It's called *Peterson v. Davis*, that says, that acknowledges that it is the practice.
- 37) BM: *Peterson v. Davis* goes against you.
- 38) RK: Well nevertheless, it still acknowledges that there was a practice of pre-transfer hearings.
- 39) BM: Right, but it doesn't require it.
- 40) RK: That's not the question. The question is whether there's a practice, right?
- 41) BM: No. The question is whether it is constitutionally required.
- 42) RK: No. That has nothing to do with it. The way the analysis goes is, it is not constitutionally required. I won't argue that, but if there is, if the state gives the prisoner any reason to think that he is going to have a hearing, then it is constitutionally required.
- 43) BM: Well, that's what I'm saying.
- 44) RK: Okay, okay.
- 45) BM: But, whether there is a practice such that it is constitutionally required is the issue, and I think it is a factual question whether there's a practice, it's a factual question whether there's a regulation which we can determine now. A factual question for a jury or a judge whether or not there was a practice.
- 46) RK: I think, well . . .
- 47) BM: Whether there is an established practice that would give the defendant the expectation that he had a right to the hearing. I think there is in fact a case that says that.
- 48) RK: Uhm. Where's that cite?
[pause]
- 49) BM: It is a factual question. Unrefutable really.
- 50) RK: [Reading from *Wolff*] "Since prisoners in Nebraska can only lose good time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and requires procedural due process appropriate to the circumstances."
- 51) BM: I don't understand what you are saying.
- 52) RK: Okay, so what I'm saying is that when you have a regulation such as this, or you have a practice on which a pris-

oner can base a justifiable expectation of having a hearing . . .

53) BM: But what is a justifiable expectation but a factual question?

54) RK: Well I think it has been decided as a matter of law many times, but even . . .

55) BM: Not a practice.

56) RK: Even if it is.

57) BM: A regulation yes, not a practice.

58) RK: I think we've got it on either count. Anyway . . .

59) BM: You're basing your argument on either a practice prior to this regulation, which is a factual issue as far as I see it, or on this regulation, which in fact exists. I will certainly admit that.

60) RK: Okay.

61) BM: Which came out after the *Lamb* decision, which is the only authoritative, . . . speaking to this issue.

62) RK: I don't think so. I think, as we acknowledged a minute ago, that *Peterson v. Davis* has a lot to say about it. And we're going to take this thing to the district court here, and we have already got a district court judge who said that, who has admitted it's Virginia practice, to have a transfer hearing. I really don't . . . think we are spending a lot of time on this. We probably should move on. Have we come to any agreement on it? I feel like we've got a pretty good case.

63) BM: Well I don't feel like we have come to an agreement. I feel like you have a case and I have a case.

64) RK: What's your case now? I'm sorry.

65) BM: My case is that there is at least for the purposes of today's discussion, you cannot make the assumption that there is a pattern or practice established that will justify the defendant's expectation that he has a constitutional right to a hearing.

66) RK: Okay, ah . . .

67) BM: Because it's a factual issue. My second point is that it is unclear what effect that regulation has on the Director and his discretionary power. And my third point is that *Lamb v. Hutto* does not control any interpretation of that regulation. And I'm not saying . . .

68) RK: According to the law . . .

69) BM: I'm not saying yes you're wrong and I'm right. Absolutely not, don't get me wrong.

- 70) RK: Yeah.
- 71) BM: All I'm saying is that it is unclear that in a court of law it would clearly come out that your case was persuasive.
- 72) RK: I think given the drift of the district courts, the Fourth Circuit and the Supreme Court, I just, I just, I really don't feel like there's any question. I think that I have given you a reasonable explanation why there is no question.

These arguments lack detail and multidimensionality, but their biggest failing is lack of structure and organization. The due process issue is intertwined with related issues, and the parties hop to and from these issues in serendipitous fashion, not always clear about which issue they are discussing. Many arguments are raised, but they are not pursued beyond one or two statements, and no conclusions, even tentative, are reached. As they shift from topic to topic, the parties add new points, sometimes from new dimensions. At first, this makes their arguments appear multidimensional and cumulative. But the arguments are just numerous, not cumulative, and multidimensionality without detail produces just another form of superficiality.

The negotiators' inarticulateness,⁸⁴ when combined with their different agendas, adds to the confusion. From different conceptions of the due process issue, each listens to the other through filters, interpreting what is said as a response to his own argument. Because these conceptions are not radically different and because the comments are vague, many comments could be taken as responsive, and there are periodic statements of ostensible agreement. But, in fact, the two pass one another continually, approaching but never interlocking. They probably realize that this is happening, yet neither attempts to diagnose and remove the confusion.⁸⁵ Again, particular examples will illustrate these general points.

RK's opening emphasizes the content of the due process protections (notice, a hearing, right to present evidence and cross-examination, explanation of the decision) rather than the threshold

84. The excerpts are literal transcriptions, with punctuation placed as it seemed appropriate based on the speakers' cadence, pace, and tone. Throughout, they are ungrammatical and inarticulate, but in reviewing the tapes, participants were not bothered by this. Almost always, they "knew" what the adversary wanted to say, and edited his remarks toward that end, sometimes correctly. Inarticulateness is a weakness in the arguments, listener compensation notwithstanding.

85. Compare the behavior of FM at *infra* p. 118, statement (86) (acknowledging confusion).

question of whether the clause applies, though he does not ignore the latter altogether (10). If this opening suggests that the threshold question is nondebatable, it lacks balance. On the other hand, if it indicates that the threshold question is the easier of the two, it is probably wrong, but it could help RK define a favorable agenda.⁸⁶

The central issue in the excerpt has to do with the negotiators' different conceptions of the due process question. RK argues that Virginia has a practice of providing a hearing, and that this is the legally significant factor. BM counters that Virginia does not have a regulation providing for a hearing, and that this is the legally significant factor (33-38). RK is clearer than BM, but the latter's point seems implicit in the totality of his remarks. The discussion that follows reflects these two different conceptions, but does not articulate them. The ensuing confusion is neither acknowledged nor resolved. The negotiators seem locked into different agendas and are not articulate at identifying the differences.⁸⁷ It is certainly possible to discuss the question of whether a practice or a regulation is the legally significant factor. But to discover that this is the question is a necessary first step and the negotiators do not take it.

The exchange about *Meachum* has an additional weakness. RK's use of *Meachum* rests on an incorrect reading of the case. He refers to *Meachum* three times, saying first, that "he believes that" *Meachum* uses the "rooted in state . . . practice" language (10), second that "in fact," *Meachum* uses it (14), and finally, that he will show BM where in *Meachum* the language appears (22), but BM does not accept the offer. More interestingly, BM seems to agree with RK's summary of *Meachum* (23) although this agreement clearly is not in BM's best interest. This is good for RK, as *Meachum* speaks only of "roots in state law," and the term "practice" does not appear any-

86. Another tactical move appears in RK's discussion of the facts. RK personalizes Lerch's story by arguing from the circumstances of the transfer ("awakened at 5:00 in the morning and taken away across the state") and is one of the few negotiators to do so. He is not likely to convince BM on this point as these items are excessively hypothetical in a simulation. But by adding a personal dimension, he rounds out his argument and, perhaps, if only subliminally, makes it appear more complete.

87. This type of confusion is common, and when it occurs the typical response is to change the subject. Parties act as if the topic, and not they, produced the confusion. Often, the new discussion becomes confused and the topic is changed again. Sometimes whole negotiations consist of little more than one confusing, abandoned discussion after another. Each participant usually comes out of such a meeting calling the adversary unprepared, unintelligent, and irrational, and the transcript usually reads as above. Non-consensual definition of the issue is regularly associated with bad argument. See S. BACHARACH & E. LAWLER, *supra* note 6, at 164.

where in the opinion.⁸⁸ It is possible that RK has deliberately misstated the *Meachum* language, but knowing him, one would think this is unlikely. It is hard to imagine that both negotiators failed to read *Meachum*, and that each missed so crucial a point as the distinction between a practice and a regulation, but it is also hard to explain their discussion of *Meachum* in any other way.

There is a similar weakness in RK's argument that the new transfer regulation repeals the regulation relied on in *Lamb*, and thus makes *Lamb* beside the point (19). He does not say that this repeal must be by implication, or discuss the elements of the doctrine of implied repeal. He may not know of the doctrine, or may not have expected to argue it, but, if so, this would be surprising. Along with the argument that a practice does not create an expectation,⁸⁹ and the argument that the new transfer regulation does not provide for a hearing, the implied repeal argument is an essential element of RK's best theory for arguing the case.

One final point emerges. BM and RK may not have the same understanding of the objectives of good argument. BM seems more equivocal, less certain, and more conciliatory than RK. He sometimes makes RK's arguments for him, and acknowledges that there is something to them (59). By his own admission he does not believe that RK is wrong, and that he is right (69), or that RK would lose in court and that he would win (71). At first, this might look like balance, that BM sees reasonable positions on both sides, notwithstanding that he thinks that his own view is correct. But in context, these qualities could also express a desire for a draw, in which each side admits that the other has a case (63), ("there are cases on both sides"), and agrees to divide the stakes evenly. BM may view argument as a dance toward the middle rather than an analysis of rights and obligations, but if so, this attitude is confusing. His reading of *Lamb* is as sophisticated and perhaps more so than RK's, and he raises (if he does not develop) a larger number of arguments. He has more reason to hold firm.

The source of the weaknesses in this exchange is difficult to trace. In their failure to identify the existence and causes of their confusion, their blatantly mistaken understandings of *Meachum*, and RK's seeming unawareness of the implied repeal doctrine, the nego-

88. *Perry v. Sinderman*, 408 U.S. 593, 599-603 (1972), establishes the point that a practice can create an expectation to procedural due process.

89. BM makes the argument that a practice does not create an expectation (see, e.g., statements 25-32, and see 31 in particular), but perhaps not clearly enough for RK to understand (see, e.g., statement 28).

tiators evidence a confusion and ignorance usually associated with lack of basic ability or inadequate preparation. Yet neither of these negotiators lacked ability, and both had prepared for the negotiation.

C. *MW v. FM*

This excerpt starts five minutes after the negotiation opens, and concludes twenty minutes later. While it is more than twice as long as either excerpt one or two, it is the easiest of the three to read. Issues are raised in a somewhat logical sequence, moving from the most comprehensive to the most specific; most comments are on point; and each stage of the discussion usually grows logically out of the stage that precedes it. The excerpt is an example of good argument, at least as good as argument gets on the *Lerch* tapes. While not without weaknesses, (e.g. there is considerable inarticulateness and organizational confusion, but unlike before, these properties do not prevent the negotiators from analyzing the transfer regulation and case law in some detail), the argument is "in-depth" in an imperfect but real sense of that term. Argument of this type occurs about twenty percent of the time on the *Lerch* tapes, but appears on only about ten percent of the tapes. FM represents Lerch and MW represents McDane.

- 1) MW: Okay, well, . . .
- 2) FM: First of all, starting with due process rights, . . .
- 3) MW: Okay.
- 4) FM: I am sure you are aware of the *Meachum* case. All right? Which says that, only where, only that where a statute gives complete discretion to prison officials to transfer, is it true that no due process rights attach. And under this case the regulation . . .
- 5) MW: Well, let me just draw your attention to the statute in Virginia, Section 53-19.17. "The Director is authorized to transfer or to be transferred any person accused or convicted of an offense against the laws of the Commonwealth of Virginia, or of any state or country," blah, blah, blah. There is no statutory limit on the . . .
- 6) FM: No, that's not true.
- 7) MW: Authority of the Director to transfer.
- 8) FM: Oh, that's not true. The very regulation which you guys promulgated last March reads that "no prisoner shall be assigned to any institution if such assignment

will impair ongoing rehabilitation, prevent adequate medical treatment, or result in a prisoner's incarceration with inmates whose offenses are much more serious than his own, unless such reassignment is absolutely necessary for the protection of any inmate or the security of any institution."

- 9) MW: And how do you, what's your basis for claiming that that regulation invokes the due process protection for the prisoner in this case?
- 10) FM: Well, the *Meachum* case clearly says that where there is a state law or practice, here, let me get out the *Meachum* case, where there is a state law or a practice which creates a legally protected liberty interest, expectation to the liberty interest . . .
- 11) MW: What liberty interest are we talking about?
- 12) FM: Liberty interest, meaning the interest in not being transferred to a maximum security prison without a hearing. And *Meachum* requires that where there is a state law or a state practice, and state regulation in this case, which creates a legally protected expectation that you won't be transferred without some sort of serious misconduct or other occurrence . . .
- 13) MW: But where is the requirement of serious misconduct in this regulation?
- 14) FM: Well, first of all the . . .
- 15) MW: On what actions of the prisoner is the authority of the Director to transfer Lerch in this case dependent, that's comparable to the standard which invoked a hearing under such cases as *Wolff* or *Morrissey*.
- 16) FM: Well, the idea of both *Meachum* and *Wolff* is that where the transfer is punitive in nature then a due process hearing is required.
- 17) MW: I think . . . I am willing to listen to you. And I am not trying to be argumentative, but I think what's clear from both *Meachum* and *Haymes* was that the transfers were inevitably punitive in nature. That the conduct of the prisoner was constantly taken into account . . .
- 18) FM: Here's the precise language.
- 19) MW: "You recognize that the prisoner's behavior influences the transfer decision and that allegations of conduct may be erroneous. Therefore, although the comments would have been proof for other circumstances, therefore, although in other disciplinary actions a

hearing would have been required for these kinds of punitive measures, there is no comparable liberty interest in which prison a prisoner is assigned to and the Director within his discretion can transfer.” That was a holding in *Meachum*. Now . . .

- 20) FM: In *Meachum*, *Meachum* quoted *Wolff v. McDonnell*: “Since the prisoners in Nebraska can only lose good time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and a minimum requirement of procedural due process appropriate to the circumstances . . .”
- 21) MW: Exactly, that’s my point.
- 22) FM: “. . . to the circumstances must be observed.”
- 23) MW: That’s my point.
- 24) FM: And this regulation created that expectation.
- 25) MW: This regulation is not dependent on identifiable misconduct of the prisoner. And let me draw your attention to two cases . . .
- 26) FM: Well, look, look, wait a minute . . .
- 27) MW: Have you read the case?
- 28) FM: More happened than just the transfer, right? Also, good time credits were revoked. I call your attention to the statute, hold on a second, . . .
- 29) MW: I’ve got it here.
- 30) FM: It’s 53-2.14, where it says “any jail prisoner or convict under the control of the Director, who violates or who has violated any jail or prison rule or regulation, shall forfeit such portion of his accumulated credit for good conduct as may be deemed proper by the Director.” Now that is clearly punitive in nature.
- 31) MW: Okay, what you haven’t, what you have overlooked is that there has been no forfeiture of good time credits in this case.
- 32) FM: Let me just ask you one question. How much is it worth to you to litigate this question, to determine once and for all, to get a judicial determination as to whether this regulation creates a legally protected expectation not to be transferred absent, according to *Meachum*, serious misconduct or other occurrences? I mean, I think you will recognize that this regulation was only promulgated to get around the whole reclassification hearing requirement, the ICC [Institutional

Classification Committee] reclassification hearing requirement. This is a blatant attempt to try to circumvent that. There hasn't been any judicial determination. The Legal Aid Society would just love nothing better than a case like this, which involves the transfer from a minimum security to a maximum security, and most importantly in our case, the fact that our prisoner, our client, was not given any medical treatment for his heroin addiction in a maximum security prison. I think that the Society would like nothing better than to have a case as egregious as that to test this regulation.

- 33) MW: Well, you know, I can't prevent you from bringing any case you want to bring. If you want to talk about prisoner Lerch, we can talk about prisoner Lerch. When we are talking about Lerch, you've got to show that, you've got to show me a violation and you have to show me, you've, in addition to the damages which I . . .
- 34) FM: Let me refer you to the case of *Lamb v. Hutto* in, . . . which was decided by the Eastern District. You realize in that case the court held that, that, and I quote "on the other hand, however, if an inmate can establish that a justifiable expectation of a pre-transfer hearing is rooted in state law then the general rule does not apply. A due process right arguably has been created. In Virginia, although not constitutionally required, it appears to be standard practice that pre-transfer hearings conducted according to published procedural standards are afforded inmates who are about to be reclassified or transferred to a higher security level. The court concludes, therefore, that reliance upon these published regulations is the equivalent of a justifiable expectation."
- 35) MW: Well, obviously, the regulation in question that's effective in Virginia now was not the regulation that was considered by the *Lamb v. Hutto* court.
- 36) FM: Precisely, there are two regulations.
- 37) MW: In addition, the *Lamb v. Hutto* court is a, it's not binding and it's inconsistent with the, it says essentially no more . . .
- 38) FM: They're dealing with the same regulations. It's the same state.

- 39) MW: It says . . .
- 40) FM: Well, the point is, let's make sure we both understand each other. There are two regulations, granted. The first deals with an ICC engaging in a reclassification and transfer, and the published regulations say that where reclassification and retransfer are involved, the hearing is required. When only reclassification is involved, no hearing is required, but when reclassification and transfer is required, a hearing is required.
- 41) MW: Do you have a copy of that regulation?
- 42) FM: Yeah, I sure do. But that's the first regulation. And the second regulation is the one in question, which we would like nothing better than to test in court.
- 43) MW: Is this regulation in the record?
- 44) FM: No, they're published ICC regulations. [Pause] And so therefore, the ICC at least draws a distinction between mere reclassification and reclassification and transfer. When a transfer is involved in a reclassification procedure, a hearing is required and that's mandated by the regulation. Now this regulation is a blatant attempt to get around that. It ought to be tested.
- 45) MW: Let me say, let me say, the response to the *Meachum* opinion and the, you know, there has been a change in the regulations in early 1979, that you might not be aware of, and under the new classification regulations of the Virginia Department of Corrections, transfer hearings are specifically exempted from the purview of the hearings of the Reclassification Committee.
- 46) FM: Admittedly, admittedly. I'm saying that clearly this regulation is, you know, is separate . . .
- 47) MW: No, no, no, no, no.
- 48) FM: And . . .
- 49) MW: This is a regulation that says that transfer decisions . . .
- 50) FM: Ahuh.
- 51) MW: Are excepted, are excluded from the reclassification committee's . . .
- 52) FM: From this committee.
- 53) MW: From that committee. Right.
- 54) FM: As of what date?
- 55) MW: As of early 1979.
- 56) FM: All right, that's precisely the issue I was trying to drive home. The fact that prior to that regulation this was

the system, okay, where a transfer required a hearing and reclassification did not. A transfer required a hearing. Now this is an attempt to get around that somehow, but it still is not good enough.

- 57) MW: No, no, no. This is an attempt to change the expectation of a hearing, upon any transfer decision in the State of Virginia, and the thing is that, see what you're, if you're pressing to handcuff these Department of Corrections people in terms of their ability to manage their prison population, the *Greenholtz* court warns against this. They say if we introduce too much procedural impedimenta to the ability of the Department of Corrections to grant parole releases, . . .

* * *

- 58) FM: . . . I think we can argue forever about whether this regulation creates a legally protected expectation.

- 59) MW: Okay.

- 60) FM: And that's the issue that we would be litigating, obviously, whether this statute does in fact create the same kind of interest that this statute, that this regulation created. And you know we would argue and I think a court would accept it that this is essentially the same thing.

- 61) MW: Well, I think that the thing is, is that what you, I think that you are minimizing the importance of the *Greenholtz* distinction between, the thing about, the common factor that went through *Wolff* and *Morrissey*, that wasn't present in *Greenholtz* and in *Meachum*, was that in *Wolff* and *Morrissey* the statute gave specific conduct of the prisoner which resulted in revocation of . . . in other words you can look, you can look and see what this prisoner . . . you can have a hearing on something, you can look and you can see whether this prisoner did something that required some action. Okay, that came within the purview of the state, or that didn't. But in broader administrative areas, the kind of hearing that you have on the security of the prison are . . . you . . . it's not dependent on the specific conduct of a particular prisoner. In other words, there is nothing you can say that he did or didn't do. It involves a host of other factors which aren't, which

can't be confined to an adversary proceeding with one particular prisoner.

- 62) FM: All right, all right. I think we are arriving at something here. I mean, the point is, whether this language, "unless such reassignment is absolutely necessary for the protection of any inmate or the security of any institution," is analogous, tantamount to the same thing as the language in the statute in *Wolff* and in *Morrissey* which required serious misconduct.
- 63) MW: And that's precisely, that's why I'm talking about *Greenholtz*.
- 64) FM: All right. To determine whether reassignment is absolutely necessary for the protection of the inmate or the security of the institution, implicit is a requirement that they find that that inmate did something.
- 65) MW: No. No. The thing is . . .
- 66) FM: Is guilty of serious misconduct.
- 67) MW: No. No. It's not at all. It's not, see . . . I have to go to the library and get the *Greenholtz* opinion for you because I'm trying . . . The distinction is the distinction that matters . . . all right? . . . between the types of . . . it's not dependent upon specific misconduct. It's a, let me read to you the, well . . .
- 68) FM: I'm talking about the common sense interpretation of the language of this statute, which is after all what a court will have to do.
- 69) MW: The common sense interpretation of the language.
- 70) FM: What are the specific charges, first of all, that prisoner Lerch is accused of committing? Why was he transferred?
- 71) MW: We haven't . . .
- 72) FM: Just some sort of a vague, amorphous, you know, to protect the security of the institution? It has to be something more specific than that.
- 73) MW: Prisoner Lerch was interfering with the drug rehabilitation program, and in the opinion of the Director, based on his record, based on information in that file, he was a security risk.
- 74) FM: In other words he was being accused of misconduct. That he had interfered with the rehabilitation program. You just said it.
- 75) MW: Yeah, but see, the thing is that . . . That's what the court in *Meachum* . . .

- 76) FM: That's why he was transferred.
- 77) MW: The court in *Meachum* and in *Haymes*, both say that the fact that the transfer results from disciplinary purposes, or that arises out of misconduct, does not give the transferee the procedural protection that he would, it does not invoke a due process hearing.
- 78) FM: Show me where they say that.
- 79) MW: Okay.
- 80) FM: Where's the case?
- 81) MW: Yeah, I've got it right here. I'll show you where they say that.
- 82) FM: They say precisely the opposite. What happened to *Meachum*, in *Meachum* there was a statute which gave the Director of Corrections complete discretion to transfer whenever he wanted. Here's the statute in Massachusetts. It says "the Commissioner may transfer any sentenced prisoner from one institution to another and with the approval of the sheriff, except a prisoner serving a life sentence" blah, blah, blah, or for any, in other words it doesn't condition the transfer upon any serious misconduct.
- 83) MW: *Haymes* said that. *Haymes*. The court, the holding was narrower than in *Meachum*. In *Haymes*, the court below held that in disciplinary transfers having substantial adverse impact on the prisoners who were [transferred] called for procedural formalities, and the court said that *Meachum* required overruling the Court of Appeals decision. You know, I've got, I've excerpted the pertinent language here from *Meachum* and I can't just turn to it quickly, but it said that . . .
- 84) FM: All right, listen.
- 85) MW: All right.
- 86) FM: I think we can settle this, but we've got to listen to each other, and I'm probably just as guilty of it as you are at the moment, but somehow we are like ships passing in the night. Now tell me if this interpretation of *Meachum* is not correct. In *Meachum* there is a statute, Massachusetts statute, which gives complete discretion to the Director of Corrections to transfer prisoners whenever he wanted.
- 87) MW: Essentially.
- 88) FM: Here's the statute. Okay.
- 89) MW: Right.

- 90) FM: *Meachum* said, under those circumstances no hearing is required. Right? And it distinguished *Wolff v. McDonnell* because in *Wolff v. McDonnell* . . .
- 91) MW: I understand.
- 92) FM: Guilty of serious misconduct.
- 93) MW: It's statutory . . .
- 94) FM: So that's the distinction. Now we've come to this regulation, we have to determine whether that regulation . . .
- 95) MW: Does not talk about serious misconduct.
- 96) FM: Sure, but implicit in a finding of inmate, protection of the inmate or the security of any institution, implicit in that is got to be a finding that he's guilty of some misconduct.
- 97) MW: *Haymes* overruled, I mean *Haymes* was a narrower case. *Haymes* only dealt with disciplinary transfers. They said there is no procedural right in disciplinary transfers, but even in *Meachum*, which was the broader injunction, they say a prisoner's behavior may precipitate a transfer. Absent such behavior, perhaps transfer would not take place at all. But as we've said, Massachusetts prison officials have the discretion to transfer. Their discretion is not limited to serious misconduct.
- 98) FM: Right, right. Which is precisely the point I just made. There's no restriction at all.
- 99) MW: Yeah. But any power to transfer. Above, they say "that an inmate's conduct in general or in specific instances may often be a major factor in the decision of prison officials to transfer him, is to be expected unless it be assumed that transfers are mindless events. A prisoner's past and anticipated future behavior will very likely be taken into account." And if *Haymes* is the narrower case, where the Court of Appeals had only required transfers for disciplinary purposes. . . And the Supreme Court said the transfers for disciplinary purposes do not invoke due process protection.
- 100) FM: Well, look, at least we have zeroed in on what the conflict between us is, and that's the interpretation of that clause.
- 101) MW: Well, I think . . .
- 102) FM: That's something we have to argue to a court.
- 103) MW: Well, let's move on then.

104) FM: O.K.

With an occasional frolic and detour, this discussion follows Lerch's due process claim from beginning to end as a single, continuous thread. With its singleminded emphasis on rule, the discussion lacks multidimensionality, but in other respects it is superior to the preceding excerpts. In its qualities of detail, balance, emphasis, and cumulation, it is as good as any on the *Lerch* tapes, though still short of what one ideally might hope for. The argument focuses on the important sources of authoritative law (i.e., the transfer regulation, *Meachum*, and the Virginia prison system enabling act); quotes rather than paraphrases case and statutory language; grounds positions in correct legal concepts (e.g., "liberty" interest, "punitive transfer," "justifiable expectation rooted in state law," "reclassification and transfer," "specific or serious misconduct," and "disciplinary transfer"); and moves logically from simple to complex levels of analysis. Overall, these patterns produce a large amount of detail, which builds on itself and causes the arguments to appear somewhat sophisticated. These characteristics are present from the earliest moments of the negotiation, indicating that the parties view detailed legal analysis as an integral part of bargaining. Differences between this and the other excerpts are ones of degree, but this degree is measurable. Again, examples will illustrate.

The negotiators open with a discussion of *Meachum* and the liberty interest concept, and for the first time in these excerpts, discuss these topics extensively and in a sophisticated fashion. In due course, the discussion shifts to *Lamb*, which is summarized by a quotation that includes the qualification that the plaintiff's expectation to a hearing was based on "published regulations" (34). This move in the discussion from one major case to the other is mirrored in a shift from the concept of "liberty interest" to that of "expectation rooted in state law" (34). Each of these features shows more logical order, attention to detail, and balance than do equivalent features of the prior excerpts.

The analysis is not always exemplary. FM's theory of attack on the new transfer regulation—that it is a "blatant attempt to get around [the *Lamb*] regulation" (44)—may indicate that he understands the problem as one of reconciling contradictory regulations, but does not show that he has an argument for how that reconciliation ought to be done. At this point he has spotted the issue, but no more. Similarly, MW's rejoinder, that the new regulation was intended to exempt transfers from the purview of the reclassification committee (45, 49, 51), may be an argument that Virginia has re-

pealed all expectations to a hearing, but if so, it is not put in those terms, or linked, as it must be, to the concept of implied repeal. These are failings of detail. In addition, the rejoinder is made before confusion about the topic on the table is removed, and this is a weakness in emphasis.

Despite these weaknesses, the negotiators reach agreement on the relevant question: Does the new transfer regulation replace or supplement the regulation interpreted in *Lamb*? This question could be discussed. For example, what does it mean to try to "get around" (56) an earlier regulation? Is that, by definition, to repeal it; or, since implied repeal is disfavored, is more explicit evidence of intent required? The parties do not ask these questions or pursue the topic further. MW introduces a prison "supervision" argument, the conversation goes off in that direction (57), and again, the discussion stops at the moment that it might have begun. As before, detail is the missing element.

After an aside about *Greenholtz* (omitted), FM analogizes the *Lerch* transfer regulation to the *Wolff* regulation discussed in *Meachum* (58-76). Interpreting *Wolff*, *Meachum* held that a transfer conditioned on "serious misconduct" must be preceded by a hearing. The *Lerch* regulation does not refer to "misconduct" but it conditions reassignment on a finding of "absolutely necessary for the protection of any inmate or the security of any institution" (64). FM argues that this is the equivalent of a misconduct finding and that *Meachum* controls. As framed initially, the argument is overly broad,⁹⁰ but FM narrows it (70, 72, 74, 76). The argument has weaknesses, but it is inventive and requires an answer. Analogy is an important dimension of argument, perhaps the most powerful with lawyers, and not used enough in these excerpts. This is as good an analogy, with all of its lack of development, as the *Lerch* negotiators made.

MW responds to this argument by asserting that a transfer's tangential connection to prisoner misbehavior does not trigger due process protections. MW probably understands FM's argument, but his rejoinder is slightly unresponsive (77). If he means that a temporal connection between *Lerch*'s misbehavior and his transfer is not the same as a causal connection, and that the latter is required—though by itself not enough—he could say that more clearly. Incon-

90. For example, if *Lerch* testifies against another inmate in court or in a disciplinary hearing, and the inmate then vows to kill *Lerch*, under the "absolutely necessary" standard, *Lerch* presumably may be transferred for his own protection, even though he has not engaged in serious misconduct.

clusive discussion rounds out the treatment of this topic (78-83), and another potentially interesting question is left unexplored.

Intertwined with the "serious misconduct" discussion is another potentially fruitful argument based on *Wolff* and *Morrissey*. MW describes a spectrum of transfer regulations defined on one end by regulations using the "serious misconduct" standard (*Wolff* and *Morrissey*) and on the other by regulations that do not (*Meachum* and *Greenholtz*) (61), and suggests that the difference between these regulations is the difference between disciplinary and administrative action. The former requires a hearing, and the latter does not (61). Mentioned but not discussed in *Meachum*, the administrative-disciplinary dichotomy had produced a split in the circuits,⁹¹ and thus, could have provided considerable grist for analysis.⁹² But this topic also is left unexplored. In addition, intertwining the argument with the analogy to *Meachum* detracts from MW's organization, and raises the risk of having one or both of the arguments go unrecognized.

By the end of the excerpt the number of arguments advanced begins to take its toll. Attention and responsiveness decline precipitously, as FM acknowledges when he comments that they "are like ships passing in the night" (86). This attempt to reduce confusion is laudable and is notably absent in other *Lerch* negotiations. The negotiators may be approaching the end of prepared arguments, where the incompatibility of their positions is most apparent. Acknowledging confusion and changing the topic may be a neutral means for backing away from impasse and keeping the bargaining on track.⁹³ If this was what was intended, this exchange evidences a higher than average tolerance for detail, and a sufficiently balanced perspective to know that there is more to be said for both sides.

In many respects this excerpt is the opposite of the first. In fact, these two excerpts together define a spectrum on which most of the *Lerch* arguments may be located. In the last excerpt, issues are defined jointly, legal concepts are applied in good faith, case law is confronted honestly, and paralyzing impasse is delayed. Most issues are examined at multiple levels, arguments often build cumulatively

91. See, e.g., *Gomes v. Travisono*, 510 F.2d 537, 541 (1st Cir. 1974), *modifying and aff'g*, 490 F.2d 1209 (1st Cir. 1973) (procedures may be required whether transfer is administrative or punitive). But see *Bryant v. Hardy*, 488 F.2d 72, 74 (4th Cir. 1973) (minimum procedures need only accompany disciplinary transfers).

92. See *Meachum v. Fano*, 427 U.S. 215, 222 n.6 (1976).

93. Compare with this tactic Bobbitt, *supra* note 16, at 725-26 (discussion of how different constitutional arguments "seem to pass each other without quite engaging" and how one "can continue a particular line of . . . [argument] despite what appears to be crushing criticism . . .").

and respond to adversary positions, and, in spite of its complexity, the discussion maintains remarkably good order. There is even an attempt to stand outside the negotiation and self-consciously acknowledge unresolved conflict. All of this could be done better, but more than most *Lerch* excerpts, this discussion approaches and sometimes reaches the level of in-depth, rational analysis.

D. The Lerch Arguments in General

As a group, the *Lerch* arguments have few of the qualities described in section III. Their biggest failing is a lack of detail. Some are better than others in this regard, but none is excellent, and perhaps only the third excerpt is adequate. Arguments are identified, or labelled, but not developed. Little of the problem's background factual material about *Lerch*'s behavior, prison system practices, or treatment of prisoners in similar situations is used. The richness of the case law is largely ignored, and the intricacies of the confusing, redundant, and sometimes contradictory Virginia prison transfer regulations are not carefully examined.

The arguments are also unidimensional. They deal principally with the elaboration of rules, to the exclusion of analogy, policy, principle, and consequences. A certain amount of unidimensionality was expected. The problem's time limit, the complexity of its rule questions, the comparatively more hypothetical nature of policy and consequences arguments in a setting that emphasizes doctrinal analysis, together encouraged discussion of the rule aspects of the due process issue. But arguments based on analogy, consequences, and policy are also familiar domain to law trained people, and even in a simulation exercise, they should have been more prominent.

Rarely do parts of arguments build cumulatively on themselves. More often, they are unconnected and isolated episodes, arranged in sequences that are random as much as developmental. Again, there are exceptions. In the third excerpt, the negotiators start from broad foundational questions and narrow, conceptually and factually, to questions tailored individually to *Lerch*. But this is unusual. Most *Lerch* negotiators seem to have a predetermined set of substantive points to make, an idea about where to begin, and a general strategy of "playing-it-by-ear" after that. If an argument builds cumulatively, it does so as a matter of fortuity rather than design.

With few exceptions, the arguments show little balance. DE's behavior in the first excerpt is the most serious offender, but only BM in the second excerpt seems to believe that there is merit on both sides. Stylistically, the negotiators are cordial. Save for the

first excerpt, there is little *ad hominem*, rejection of positions out of hand, "non-negotiable" position-taking, hyperbole, wrapped-in-the-flag language, or parades of horrors, and the absence of these factors contributes to a tone that might be called balanced. But at the level of substance, there is little to indicate that the bargainers view the legal questions as close, or their adversaries' arguments as having merit.

The arguments are not subtle, though they are often elliptical, and sometimes this may reflect a conscious decision to encourage the adversary to join in. But this ellipticality produces confusion more often than bilateral analysis, and the adversary is not so frequently engaged as misled. Evidence of this, particularly in the form of talking past one another, is abundant and suggests the need for more detailed development of the arguments. Yet rarely is this suggestion taken. This may indicate that the ellipticity proceeds more often from an incomplete substantive understanding than from a strategic judgment to engage the adversary enthymematically.

The arguments are poorly organized and arranged. Major parts of most excerpts are characterized by conflicting agendas, rapid topic shifts, random issue spotting, and the lack of explicit structure. In these segments emphasis is weak or nonexistent. In fact, the bargainers add little to the natural emphases inevitable in ordinary conversation.

Written transcripts provide little data about an argument's emotionality, and this is unfortunate. The exchanges are rich in tone, pace, expression, and mannerisms. Particularly in the first excerpt, but to a significant degree in the others as well, the bargainers shout, plead, grimace, smirk, sulk, scowl, frown, and otherwise travel back and forth on a wide emotional spectrum. Unfortunately, much of this emotion reflects an assessment of competitive position, such as anxiety when an argument is rejected or smugness when an adversary is unable to respond, rather than conviction in or doubt about an argument. Thus the emotionality does little to establish the trustworthiness of corresponding substantive statements. As a rule, the *Lerch* negotiators express genuine emotions, but not emotions that bolster their positions.

In addition, the arguments fail because the negotiators seem not to plan their remarks past opening exchanges, and act as if they expect the adversary not to respond. They use cases as controlling precedents rather than conceptual aids to solving analytical dilemmas. They pretend to be knowledgeable when it would be better to

admit genuine (and often transparent) ignorance. They speak before they know what they are going to say; they elevate stylized conflict over differences that are trivial above genuine conflict over differences that are real. They state complicated positions in soliloquies, rather than in pieces as part of an extended exchange. Much of what passes for discussion is predetermined position-taking that could have gone on without an adversary being present, and often looks as if it did.

Overall, the arguments fail on both the cooperative and competitive levels. They fail cooperatively because they are regularly irrational, contain little disclosure or open-ended exploration of issues, and show almost no respect for contrary views. True points are not acknowledged and treated as givens. Factors that make accurate analysis difficult, such as confusion and ambiguity, are allowed to stand, and perhaps are even intentionally produced. These are not the types of discussions engaged in by persons trying to solve problems that vex each side.

The arguments fail competitively because they are overstated and predictable, containing little more than wishful elaborations on stereotypical positions. It is hard to imagine anyone being surprised by what he heard and hard to imagine him as intimidated, awed, or unduly impressed. In making this judgment, a caveat is in order. Sometimes competitive argument is judged as much by how and to whom it is delivered as by what it says, and here the transcripts do not help us. The excerpts reproduce neither the demeanor with which each argument was delivered nor the personal and social baggage that listeners brought to the negotiations. An intimidating manner, a fragile psyche, a prior unsuccessful relationship with the adversary, comparatively lower status and authority in the law school social world, among other things, could cause negotiators to defer to arguments that, in their own right, warranted no such respect, and the *Lerch* arguments could be designed to draw on or trigger these factors. These possibilities notwithstanding, the arguments are caricatures, and caricatures rarely compete successfully. For the most part, one must conclude that the arguments are bad, consistently, comprehensively and irredeemably bad.⁹⁴

94. Arguments of this type are perhaps what Derek Bok had in mind in writing his 1981-82 Report to the Harvard Board of Overseers. See generally Bok, *A Flawed System*, 85 HARV. MAGAZINE 38 (1983). Bok charged that

"Law schools" train their students more for conflict than the gentler arts of reconciliation and accommodation. This emphasis is likely to serve the profession poorly. . . . Over the next generation, I predict, society's greatest oppor-

VI. CAUSES AND IMPLICATIONS

The preceding excerpts provide a tentative answer to the question with which the article began. Argument in negotiation rarely convinces because argument in negotiation is rarely convincing. It does not persuade because it should not. Questions remain about whether the *Lerch* data accurately represent lawyer negotiation,⁹⁵

tunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring out proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.

Id. at 45. Bok would not ask lawyers to suppress legitimate differences, no doubt, but he would seem to require, and rightfully so, that they see argument more as a means to understanding than as a device for achieving power and control. Most of the time, the *Lerch* negotiators have these objectives reversed.

95. If the *Lerch* transcripts are products of the best law students, *see supra* note 54, it does not follow that they represent lawyer argument accurately. There are not many published transcripts of lawyer argument, and those based on simulation exercises have verisimilitude-reducing features similar to *Lerch*. *See, e.g.,* J. WILLIAMS, *supra* note 1, at 17; Rossman, McDonald & Cramer, *Some Patterns and Determinants of Plea Bargaining Decisions: A Simulation and Quasi-Experiment*, in PLEA BARGAINING 77, 79-81 (W. McDonald & J. Cramer eds. 1980). Published transcripts of actual negotiation are about plea bargaining (a special case), and rarely reproduce arguments in their entirety. *See, e.g.,* A. KRUEGER, *THE ORGANIZATION OF INFORMATION IN CRIMINAL LEGAL SETTINGS: A CASE STUDY OF PROSECUTORIAL DECISION-MAKING IN LOS ANGELES* 244-80 (1979); L. MATHER, *PLEA BARGAINING OR TRIAL* 67-121 (1979); Lloyd, *Prosecution Power, Procedural Rights and Pleading Guilty: The Problem of Coercion in Plea Bargaining Drug Cases*, 26 SOC. PROBS. 452, 465 (1979); Maynard, *The Structure of Discourse in Misdemeanor Plea Bargaining*, 18 LAW & SOC'Y REV. 75 (1984).

Three things may be said about the representativeness issue. First, lawyers who have done the *Lerch* simulation argue less often than students, but when they argue, they do so in a nearly identical manner. Persons shown tapes of lawyers and students have difficulty distinguishing one from the other when obvious features such as age or dress do not give the answer away. Experienced and elite lawyers argue better than inexperienced and non-elite lawyers, but data for this comparison is so small that any conclusion is speculative.

Second, generally available instructional videotapes of lawyer negotiation have argument patterns similar if not identical to those of *Lerch*. Compare the following exchange from the so-called *James* negotiation, prepared by the Legal Services Corporation, and perhaps the most venerable of the instructional videotapes used by negotiation teachers in American law schools. Harris' client (VMB) has sued Stan's client (James) for a deficiency after VMB repossessed James' car. James has defended and counterclaimed in fraud, negligent misrepresentation, breach of warranty, and related substantive theories.

Harris: Stan, I want to thank you for coming by today. I thought we'd take a few minutes if we could and chat about this Terry James case we both seem to be involved in. As you know extensive pretrial litigation has not taken place yet and before that occurs I thought maybe we could discuss the merits of this thing and maybe come to some kind of a reasonable solution.

Stan: I'm always agreeable to resolving cases at an early stage. There really is only one issue though and that is how much your client wants to pay my client

but to the extent that they do, they suggest that argument plays a small role in dispute-negotiation because that is all it deserves.

A. Causes

In answering this question about the role of argument, however, a more interesting one is raised. Why would the *Lerch* participants argue so badly? Most of them were verbally facile, bright, and well prepared.⁹⁶ When asked to write out their due process argu-

before we get this matter into court. This is the type of case, Mr. Harris, that I like to try and I want to try. I think you know why. When you have someone ripping off the public as your client has been doing and I'll have no difficulty establishing fraud in this case. I've got a client who is an indigent gal, whose husband is an invalid. First of all, I can't understand why you even sued her. You're not going to collect any money anyway and you know that. And the counterclaim is as valid a counterclaim as I've ever filed, and you know I've been successful in the past and I'll be successful in the future. And as emotional as this case is, where you knock a gal out of her job because of selling her a car which is defective. I'm absolutely convinced we're going to prevail and we're going to get a substantial judgment of compensatory damages. So really, the only issue that we can significantly talk about or successfully talk about is how much your client wants out of this case.

Harris: Well, Stan, let me put it to you like this: If that's the way you want to approach this discussion, and if you feel that way about it, we're not going to get anywhere in this thing. An associate of yours took the deposition with me here a couple of days ago, and let me tell you something about your client that you do not understand, and it's pretty important. If you think we're coming in here with the big black hat you're very much mistaken. This client . . . you talk about ripoff! First of all, this client is going to come across as a heavy-handed lady who has had some problems in the past and all of a sudden figures she's got a winner here. She's a tough cucumber. She argues, she fights, she scratches. She's not going to be your indigent little lady in front of the jury unless you can sandpaper her half to death and, Stan, I don't even think you can do that. Let me tell you something else. The key to this whole case lies in that contract, lies in that purchase money security agreement. And . . . I've dealt with you in the past. This is an old ploy that I've heard you use a million times before, and that is, throw a red herring in there, jump on it and squeeze and get as much as you can out of it. She's a high school graduate—she told you that. She can read and that's where this case lies.

In fairness, the discussion continues for another thirty minutes, but not at a significantly more sophisticated level. Most other instructional tapes are comparable, each in its own way. See, e.g., the transcripts of negotiation tapes in J. WILLIAMS, *supra* note 1, at 149-91.

Third, experience in practice and supervising clinical students suggests that lawyer argument is marginally more polished and considerably less diffuse than student argument, but not good, at least not on a regular basis. It is more impressive when listened to than when reduced to a transcript and read, and that may account for disagreement with this view. These are impressionistic judgments and obviously inadequate to support any strong conclusions about patterns in lawyer negotiation argument. Study of actual lawyer negotiation is obviously needed.

96. See *supra* note 54. Lack of impressiveness may be traceable, in part, to a feature of law classroom dialogue. That dialogue rarely probes deeply. Most students do not

ments in a brief on the merits or in a pre-negotiation planning memo,⁹⁷ they made strong arguments with most of the qualities that their oral exchanges lacked. When asked to articulate characteristics of good argument, they were eloquent and insightful. When shown tapes of other negotiations in which similar arguments appeared, they identified with ease the patterns they planned to avoid. They knew what they wanted to do, and what they wanted to avoid, and yet when face to face with another negotiator they could do neither.⁹⁸

Two explanations for this failure are most obvious. First, simulations have an irreducible element of gaming, which encourages participants to "play" at their roles. Instructionally this is a benefit. Participants are able to discover easily in play lessons that would be more difficult to grasp if studied directly in work. For research purposes, however, the effects are less sanguine. When participants play to an audience, they act in accordance with what they take to be the audience's preferred views, whether they hold such views themselves or not.⁹⁹ Law student perceptions of "audience" beliefs about negotiation argument appear to be exaggerated and vulgar. They seem to think that their teachers see negotiation argument as a variant of moot court, and believe that the best argument is the loudest, quickest, most certain, and most clever. Argument, in this

have their best thoughts under the gun. The depth of the conversation depends on the fortuitous event that the student called on is able and prepared. At some point, before the issue is fully explored, the teacher must break off conversation to tell the rest of the class where they are and where they have been, because there are always more cases to be covered, and too few days remaining to cover them. When the teacher decides to move on, he knows that the discussion has been superficial, but students may not, and may set their threshold of good analysis at the point class discussion typically reaches. Students who do substantial writing in law school may develop more sophisticated standards, but most may not lack the ability to make good argument, so much as an understanding of when such argument has been made.

97. Pre-negotiation memos were added as a requirement of the simulation the second and subsequent times it was used. This modification was a response to the patterns discussed in this Article.

98. This inability suggests that efforts by law schools to assimilate the alternative dispute-resolution movement and make lawyers the providers and administrators of alternative mechanisms may be premature. Even if successful mediation or arbitration were solely a matter of technical skill, which it is not, see J. AUERBACH, *JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS* 3-17 (1983); Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *LAW & SOC'Y REV.* 63 (1974), people who discuss legal questions in the manner of the *Lerch* negotiators seem unlikely repositories of that skill. Without an intervening and radically different educational process, there is some question as to whether lawyers can provide good mediation. It also is not clear that law school, consistent with its objective to train adversaries, can provide this education.

99. See *supra* note 54.

view, is a contest of one-upmanship, control, and harangue, a process partaking more of oratory than of analysis. Success seems to be seen as producing silence, not learning, and arguing well as never having to say you are wrong. Some of the overstatement in the *Lerch* arguments, therefore, is probably attributable to the fact that the arguments are simulated and that the participants thought they had to give a "dramatic" performance.¹⁰⁰

The second explanation is to be found in the nature of dispute negotiation itself. The intrinsic dynamic of face-to-face bargaining makes it difficult to investigate questions deeply. The process is an artificially short one, in which a problem is defined and resolved within a single meeting. Ideas expressed in that meeting are treated as the relevant universe of information, even when they are recognized as incomplete. Participants must analyze and respond to adversary statements immediately upon their completion, and store this information for future reference. This becomes particularly difficult in the middle and latter stages of negotiation when large amounts of information (evidentiary, legal, personal, situational) have been conveyed.¹⁰¹ Moreover, responding to arguments is only part of one of three equally complex strategic processes going on simultaneously,¹⁰² and this strategic dimension itself is part of a larger social context. All of this must be done while, to some extent, maintaining the appearance of not doing it. In some respects, it is remarkable that negotiation argument is as good as it is.

These structural features of negotiation are dictated by economic and practical considerations or are part of the oral, conversational tradition within which negotiation occurs. They are not likely to change and negotiation argument must take them into account. Not so, however, with students' beliefs about good argument. These beliefs are far removed from the standards described in section III, and need to be changed. Suggestions for reform of legal instruction are beyond the scope of this article, but one thing seems clear: Negotiation argument should not be taught as a mutated form of moot court. It is more akin to analysis than oratory, and teaching it as the latter may insure that it ends up as stylized dance.¹⁰³

100. This still does not explain why students would hold such beliefs, particularly since their teachers (the "audience") had rejected them in pre-negotiation discussion. The beliefs, in part, must stem from something more basic than law school instruction.

101. Cf. Eisenberg, *supra* note 1, at 679-80 (discussion of how momentum of argument creates new sources of obligation).

102. See *supra* pp. 67-70.

103. In suggesting that negotiation argument is properly thought of as "analysis," I do not endorse the idea that dispute-negotiation is always amenable to "objective" and

B. Implications for Negotiation Theory

The *Lerch* arguments also have implications for one prominent theory about the relationship of negotiation argument to negotiation outcome. This view rejects the perception of negotiation as "the transmutation of underlying bargaining strength into agreement by the exercise of power, horse-trading, threat, and bluff."¹⁰⁴ It holds that negotiation is "norm-centered," that it consists of the "invocation and reasoned elaboration of distinctively legal elements—principles, rules, precedents"—and that these elements "heavily determine" negotiation outcome.¹⁰⁵ Under this view, when norms are uncertain and conflicting, elements other than norms (e.g., prominence, personal force, bargaining leverage, and risk-preference) fix the precise point of settlement. But because these elements do not begin to operate until norms "have been focused near their limits of precision," the process is still fundamentally norm-centered.¹⁰⁶ Parties analyze norms until there is nothing left to be learned from them, and resort to non-normative factors to reach agreement only if still apart. Lawyers, in particular, negotiate disputes in this way and in the process, "function as a coupled unit which is strikingly similar to a formal adjudicative unit."¹⁰⁷

The norm-centered view is attractive because it suggests that private ordering is fundamentally lawful, and that legal education's pedagogical emphasis on norm invocation and reasoned elaboration is well placed. The *Lerch* arguments suggest that the norm-centered view is a little too simple. Large parts of the *Lerch* negotiations consist of discussions like those in the preceding excerpts. In such discussions, norms are applied to facts, differences are identified, effects of the norms are clarified, and substantive areas of disagree-

"principled" resolution on the merits. See *supra* note 34. In disputes grounded in competing conceptions of the good, analysis only narrows or clarifies differences so that informed accommodations can be made. The main point of the text is that "speech-making" is usually of little use, either in resolving differences or clarifying them.

Making better arguments will not guarantee that argument becomes the dominant influence on negotiation outcome. Disparities in resources and other forms of power will no doubt continue to play their significant and often dispositive role. But parties and lawyers value being correct (as opposed to "in the driver's seat"), and there is leverage in being able to raise doubts about whether they are. Besides, good argument is usually no more difficult to make than bad, once one gets the hang of it, and in at least those cases where research must be done anyway, the cost to the client is little or nothing extra.

104. See Eisenberg, *supra* note 1, at 638.

105. *Id.* at 637-39.

106. *Id.* at 680.

107. *Id.* at 665.

ment are narrowed. But these tasks are done so badly much of the time that negotiators are often not much closer at the end of a discussion than at the beginning. This may be what the norm-centered view thinks of as "focusing" legal norms, but if so, the picture rarely becomes clear, and it is difficult to see how such a process could "determine" negotiation outcome.

The claim that norm focusing occurs in proportion to the precision inherent in the norms themselves seems equally problematic. Norm focusing differs widely in the *Lerch* tapes. Sometimes it is extensive and other times nonexistent, but in each negotiation norms could be focused more precisely. Parties stop focusing not because the norm is as precise as it can be made, but because they lack experience with the norm, are inadequately prepared, are intellectually or emotionally unable to take the analysis further, or are prevented from going further by limits of the situation. These factors, along with tolerance for conflict, stamina, ruthlessness, oratorical skill, and emotional force, play as large a role in determining the extent to which norms are invoked and elaborated as do qualities inherent in the norms themselves. It is not too strong to say that norms exist interdependently with negotiators who invoke them. They are constituted anew in each discussion, not arbitrarily, but also not uniformly and not necessarily in a way that a perfectly informed legislator or judge would say that the norm was intended to take effect.¹⁰⁸ Individual negotiators define the contours of a legal norm's life, and in the process become as important as the precision inherent in the norm itself.

There may be more serious problems for the norm-centered view. The *Lerch* negotiators regularly reported that their adversaries' invocation of legal norms had little influence on their decisions of what and when to concede. Some admitted to marginal effects (e.g., "his position isn't nearly so hopeless as I thought"), but most found adversary arguments unpersuasive in every respect. They made concessions, not because they were convinced or had doubts, but because they "had to settle."¹⁰⁹ These reports might be wrong.

108. Understandings of substantive law can vary radically. See for example the variable assessments of the same case made by Rosenthal's panel of experts, D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE* 202-05 (1974). Cf. White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669, 1693 (1984) ("[legal] speakers constitute, or reconstitute, through their performance a social universe . . . they define and make real a set of values . . . to which they appeal . . .").

109. One commentator has suggested that the "negotiators . . . realized that there would be no judge or jury deciding the merits of the case if they did not settle" and this caused them "to disregard the importance of argument." Letter from Gary Lowenthal

The *Lerch* participants had heavy ego investments in their preparation and might have feared criticism if they acknowledged that their adversaries told them something new. While participants agreed that this could be a factor, most insisted that their opponents' views were unpersuasive because wrong. In defending this appraisal, many participants identified weaknesses in their adversaries' arguments that were similar or identical to weaknesses discussed in the preceding sections (e.g., "he didn't tell me anything I didn't already know;" "he wasn't on top of the cases—particularly *Meachum*;" "he was confused, he didn't know what he wanted to say."). That they failed to see the same deficiencies in their own arguments does not suggest that these reports are wrong.

Corroborating the participants' above reactions is the fact that no strong correlation seems to exist between outcome and argument much of the time. Admittedly, this is a subjective judgment. It is difficult even to rank outcomes. For example, it is hard to know whether a settlement for *Lerch* that succeeds on every minor issue (e.g., right to inspect the file, expunge false material, enter new information) but loses on re-transfer, is better or worse than one in which those terms are reversed. And few *Lerch* settlement comparisons present this simple a question. It is not possible to say with certainty that outcome-argument correlations do not exist; the data are too slippery for that. But watching the *Lerch* tapes, one cannot help but be struck by the realization that the one who makes the best arguments does not always prevail.

If argument does not shape outcome in a causally direct sense, more needs to be said about what it means for dispute-negotiation

to author (Aug. 2, 1983). The point, I take it, is that in the absence of a real outcome participants responded to sentiments that they otherwise might control. Three things may be said about this.

First, to some difficult-to-measure extent, it is probably true. Simulations have an irreducible element of gaming, which causes participants to "play" at their roles. Second, playfulness was minimized because consequences followed from irrationally intransigent behavior. If agreement was not reached, each negotiator was required to support his decision to deadlock with a brief on the merits. See *supra* note 75. The briefs were reviewed and anyone refusing to settle for insubstantial reasons was penalized with a grade reduction.

Third, law students, as much as any subject population, are predisposed to make argument the basis of settlement, because argument is the dominant element of law student culture. In *Lerch* this predisposition was even stronger because the students had limited experience with the Virginia prison system, and lacked lawyer "categories" to tell them what the case was "worth." Without external evidence that play was the dominant motive (and there is very little), the most reasonable assumption is that the negotiators were serious. It would have appeared rude to their peers, and immature to their instructors for them to be any less.

to be "rule-determined."¹¹⁰ For example, do rules enter negotiation as parts of threats, and have their principal effects in the shadows of these more power based tactics?¹¹¹ If so, how do we know that it is the rule that has force rather than the adversary's lack of stamina, or his intolerance for conflict? Or do rules operate tacitly, as authoritative background norms that act as "slots" in the "heads" of negotiators (developed during the negotiator's socialization in the law),¹¹² and take effect without being invoked explicitly? Or are rules introduced in code (as in labor negotiation),¹¹³ where a phrase, idea, or piece of evidence automatically and unambiguously conveys the full complexity of a point to the adversary, but not to one reading a transcript of the exchange in another context? However rules are introduced and take effect, the assertion that negotiation is rule-determined requires a more finely nuanced analysis than now exists, in which indirect as well as direct relationships between argument and outcome are examined.¹¹⁴

C. *Implications for Justice and Morality*

Argument can influence a decision to settle in at least three ways. It can be true, recognized as such, and produce concessions out of fully informed agreement. It can be un rebuttable within the time frame of the negotiation, though not believed, and produce concessions out of deference to greater skill. Or it can be invincibly sincere and strongly felt, though patently wrong, and produce concessions out of a desire to avoid irrational and uneconomic deadlock.¹¹⁵ Each type of argument works in different circumstances, but only the first has a consistently direct connection to justice. Truth is not all of justice, but it is a part of it in a way that skill and sincerity are not. A person who has been fooled, intimidated, or cajoled into believing that his legal rights do not exist, has not made an informed and free choice to trade off those rights.¹¹⁶

110. On rule determination, see Eisenberg, *supra* note 1, at 639 (discussion of the invocation of rules in dispute-negotiation).

111. See *supra* note 11.

112. See G. Bellow, *supra* note 3, at 26-30.

113. See P.H. GULLIVER, *supra* note 6, at 129-30 (discussion of labor negotiations).

114. So that it is clear, I agree with Eisenberg and others that argument influences negotiation outcome, and people who discount argument are wrong, but I suspect that its effects are more often worked indirectly, in ways implied in the text, as a corollary to, rather than as a direct outgrowth of, discussions about rules.

115. Cf. Eisenberg, *supra* note 1, at 648-49 (parties likely to give some weight to another's good faith belief, even when disbelieved).

116. The justice of negotiation as a system depends upon more than correct moral judgments by negotiators. Certain political questions also must be addressed. For ex-

The *Lerch* arguments are more frequently sincere and skillful (comparatively) than true. They reflect neither a view of truth-seeking as a necessary component of persuasion, nor a belief that bilateral investigation of hard issues is compatible with adversarial advocacy. In fact, in discussions after their negotiations, many *Lerch* participants were cynical about the power of law to settle or narrow disputes. Such views are dangerous because they encourage routinized negotiation, in which problems are treated as types, and "solved" in the abstract, and the settlements are imposed on clients.¹¹⁷ These views also encourage settlements that, in a significant sense, are lawless, that is, inconsistent or only coincidentally consistent with existing law. When negotiation is practiced as in the *Lerch* excerpts, valid legal claims will be abandoned unintentionally, mistakenly, or on the basis of incorrect assumptions about their worth, and when this happens, serious doubts are raised about the fairness of private ordering.

There is a personal ethical dimension to this problem as well. Inadequate legal argument may encourage a negotiator to devalue the importance of moral constraints on negotiation argument. This was a problem in the *Lerch* negotiations. Many of the participants had no views on a number of obvious and frequently encountered ethical questions. Should a negotiator conclude an agreement on the basis of arguments known to be false, suspected of being false, or not analyzed in terms of truth and falsity? And, if an agreement based on a false understanding is legitimate, what authorizes lawlessness? If a court must approve a settlement, does the analysis

ample, should parties be limited in the resources they expend to levels that both parties can meet? Should the lawyer-for-hire system be changed to prevent most of the lawyer skill from gravitating to most of the client money? Should the time frame in which agreement is typically reached be extended so that quickness does not count more than depth? Should bargaining be monitored to detect and penalize deceptive, manipulative, and unconscionable tactics? Should "controversial" legal questions be referred to third parties in the fashion of asking a state supreme court to construe ambiguous state law?

These questions are important, but this section's point is more narrow. It suggests that within a basically just legal system, individual moral choices about negotiation argument must still be made. Taking every advantage the system allows is no more presumptively moral than failing to take any advantage. Whether a particular argument may or must be made is a matter for individual moral justification each time the opportunity for argument occurs. There is no system-based excuse from this responsibility, and no denying that moral and political interests are at stake.

117. Cf. D. ROSENTHAL, *supra* note 108, at 17-22 (traditional view of law practice is that client problems have a single best, routine, and technical solution accessible only to professional understanding). Compare Bobbitt, *supra* note 16, at 734 ("[I]gnoring ethical approaches has yielded the cynical conclusion that mere political bias rather than argument governs much constitutional decision.").

change? Does it matter if an argument takes advantage of a weakness in the system in which negotiation occurs, rather than a personal weakness of the adversary?¹¹⁸ Does a scrupulously honest judgment that one's ends are legitimate justify false argument? And may this judgment be made by a single individual, as an outgrowth of a dialogue with himself?¹¹⁹ These questions are introductory but complex, and one would not expect the *Lerch* negotiators to have fully developed positions. But the complete absence of views on the issues suggests that the *Lerch* negotiators had not yet begun to examine seriously the moral dimensions of negotiation argument.¹²⁰ Lack of interest in ethical questions does not follow automatically from the practice of arguing badly, but the prospect that one's argument is unethical is more difficult to contemplate if one knows of only one (bad) way to proceed.

VII. CONCLUSION

This article describes and analyzes characteristics of negotiation argument and speculates about how those characteristics might retard or advance agreement and justice in dispute-negotiation. It seeks to determine to what extent those characteristics are present in actual dispute-negotiation, and to advance some tentative propositions about what the absence of such characteristics means to negotiation theory and practice. The analysis is preliminary in every respect. More study, particularly of argument's tacit and indirect variations, is necessary before even a beginning understanding of the complex relationship between the argument of positive law and negotiation outcome is possible. Further study should be of actual

118. See Fried, *supra* note 28, at 1081-84. The "weakness of the system—weakness of the individual" distinction is often specious. See Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER*, *supra* note 5, at 29-30.

119. See Arendt, *Thinking and Moral Considerations*, 38 SOC. RESEARCH 417 (1971).

120. The new Model Rules of Professional Responsibility include explicit standards for lawyer negotiation behavior. See ABA Commission on Evaluation of Professional Standards, *Final Draft, Model Rules of Professional Conduct*, A.B.A. J. (Pullout Supp. Nov. 1982). For commentaries on these provisions, see Brown & Dauer, *supra* note 33, at 529; Hazard, *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties*, 33 S.C.L. REV. 181 (1981); White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RESEARCH J. 926. The 1980 draft of the Model Rules had more extensive and interesting provisions. See *Text of the Initial Draft of Ethics Code Rewrite Committee, § 4.0 Negotiator*, Legal Times of Wash., Aug. 27, 1979, at 40-41. For additional discussions of the ethics of negotiation, see Rubin, *Causerie on Lawyers' Ethics in Negotiations*, 35 LA. L. REV. 577 (1975); Schwartz, *supra* note 29; Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER*, *supra* note 5, at 150. For an empirical study of lawyer attitudes about these issues, see Pepe, *Standards of Legal Negotiations: Summary of Preliminary Findings* (unpublished manuscript on file with author).

cases insofar as that is possible. Simulation data is interesting, but the reality of negotiation argument must be studied in its natural setting if it is to be understood fully.

Aside from access to real life negotiation, the most difficult task will be the reproduction of data complete enough to be realistic, but parsimonious enough to be manageable. Ideally, the data should include complete arguments, together with descriptions of the negotiators' personal histories, the nature of their prior relationship, their respective levels of resources, skill, status, preparation, and experience, the content of their nonverbal communication, their states of mind when they argue, trade, and listen to arguments by their adversaries, salient institutional, situational and social conventions and norms, and other factors that contribute either to the leverage possessed by each party or the constraints within which the discussions take place.

Reporting this information objectively and succinctly will not be easily accomplished, and will require considerable methodological inventiveness. Yet without such a complete picture, it will be difficult to identify authoritatively the proportionate degree of influence argument has on negotiation outcome. Argument may be evaluated against consensus standards, as here, and interesting patterns may emerge, but a test of consensus standards themselves—to see if they amount to more than aesthetic preferences—will require the full range of contextual data just described.