

## Bargaining in the Dark: the Normative Incoherence of Lawyer Dispute Bargaining Role

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## Articles

### BARGAINING IN THE DARK: THE NORMATIVE INCOHERENCE OF LAWYER DISPUTE BARGAINING ROLE

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#### INTRODUCTION

There is a contradiction in the prevailing understanding of lawyer dispute bargaining role, between what might be thought of as bargaining's practical norms and its ethical norms. The practical norms provide rules for maximizing long range client and lawyer returns. They tell lawyer bargainers to distribute resources effi-

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ciently, preserve bargaining relationships, and satisfy party interests in the aggregate. The ethical norms provide rules for representing clients competently and diligently. They tell lawyers to get the most they can for present clients, when so instructed, irrespective of the effects on resource distribution and future bargaining. Trying scrupulously to comply with both sets of norms, each for different reasons, lawyers frequently find themselves under contradictory commands, without meta norms to sort out the contradictions or rank order the commands, and thus, "in the dark" with respect to the central question of how they should act. This contradictory set of role commands has several effects, but one of the least salutary is that it seems to encourage the stylized adversarial maneuvering commonly associated with lawyers and dispute bargaining (e.g., exaggerated argument, insulting tone, routinized trading, circumspect and deceptive disclosure), which is now widely thought to make such bargaining inefficient, unpleasant, and unfair. If these effects are to be avoided, and bargaining role to be made more coherent, it is necessary that bargaining's ethical and practical norms be reconciled, or if that is too ambitious, at least their contradictions described in sufficient detail so that others may work on the problem. These are the purposes of this Article.

The discussion has five parts. Part I describes the nature of legal dispute bargaining, emphasizing the distinctive combination of adjudicative and legislative properties that make it both legal and bargaining, and explains the analytical dilemma of lawyer role, the so-called bargainer's dilemma, through which the pull of bargaining's practical norms is most readily seen. Part II describes two sets of practical norms that presently compete for allegiance. The first, an older and perhaps weakening "lawyer-as-adversary" view, sees bargaining as an essentially competitive enterprise in which one party's gains are the other's losses, bargaining conversation as the advancement and rebuttal of position and demand, and "looking out for number one" as the overriding objective. The second, a newer "lawyer-as-colleague" view, sees bargaining as a cordial, principled, and problem-solving undertaking in which party interests are complementary rather than antagonistic, and in which reaching the best outcome for all concerned is more important to each participant than achieving the most favorable outcome for its particular side. The lawyer-as-colleague view seems to have carried the day in the academic literature, and perhaps in parts of practice as well, and Part II summarizes and evaluates the arguments through which this was done.

Part III describes bargaining's ethical norms, as articulated in

the American Bar Association's Model Rules of Professional Conduct and the statutes and doctrines of the various jurisdictions, which lawyer bargainers are bound to obey at the peril of being sued, disciplined, or thought unethical by themselves and others. Contrary to practical norms, ethical norms make loyalty and diligence in the pursuit of individual client goals the overriding rule. A lawyer is obligated to do for a client what the client wants done, as the client sees it, as long as it is legal, to the detriment of whoever and whatever stands in the way. These individually oriented, adversarial, and maximizing norms often command action contrary to that required by bargaining's community-focused and cooperation-oriented practical norms, and it is in particular instances of conflict between the two sets of norms that the contradiction in lawyer bargaining role most clearly appears.

Part IV describes the frequent impossibility of being both ethical and practical, and examines lawyer efforts to avoid and adapt to this difficulty. Certain stylized types of deceptive, contentious, and unmannerly lawyer bargaining behavior, long the object of criticism by opponents of the lawyer-as-adversary view, are reinterpreted in light of this role contradiction, and explained as a natural if not always felicitous adaptation to role confusion. In Part V proposals to eliminate the confusion are described and evaluated, and a preference is indicated.

## I. BARGAINING AS STRATEGIC INTERACTION

For simplicity's sake, let us make the familiar assumption that legal bargaining takes two principal forms, dispute settlement and deal making.<sup>1</sup> Dispute settlement is the resolution of disagreements in which different conceptions of law play a central role, both in de-

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1. The distinction is Eisenberg's, see Melvin A. Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638 (1976), and others have followed it. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 758 n.6 (1984). Like most dichotomous categorizing, it is often problematic, see DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 39-40 (1989) (discussing the problematic character of Eisenberg's dichotomy, using the terms "dispute resolution" and "transactional negotiation"); Franco Ferrarotti, *The Destiny of Reason and the Paradox of the Sacred*, 46 SOC. RES. 650-54 (1979) (discussing the inadequacies of dualistic thinking); Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties*, 33 S.C. L. REV. 181, 188 (1981) ("these two categories . . . would collapse into a single type were it not for the availability of a court to which parties could resort upon failure of negotiations"), but those difficulties do not come up in this discussion. For other bargaining typologies, see HERBERT M. KRITZER, *LET'S MAKE A DEAL* 118-27 (1991); GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 2-5 (1983).

fining the problem and determining its outcome, and in which the parties may pursue, have pursued, or are about to pursue the conflict in court.<sup>2</sup> Deal making, on the other hand, is the definition of, and agreement to, voluntarily undertaken rules and relationships for governing future behavior. Deals create rights that did not previously exist and that may serve as the basis for defining and resolving future disputes. Individual lawyers do both, but often the two types of bargaining are conducted by different parts of the bar, in accordance with different conventions and practices, and through the use of different maneuvers and techniques.<sup>3</sup> While outwardly different, therefore, the two types of bargaining are also structurally alike, particularly with respect to the manner in which offers and proposals are advantageously presented and exchanged in what may be thought of as the trading dimension of each. Because in one sense this Article is about advantageous trading, its analysis often will apply equally well to both types of bargaining. Nevertheless, discussion will be limited to dispute settlement. Working with just one scenario should make the discussion easier to follow, and dispute settlement is the harder case for the Article's claims. If the analysis can be made to work in that context, the reader will have little difficulty in extrapolating its principles to deal making, or deducing its equivalent arguments.<sup>4</sup>

Dispute settlement is a complex, often contradictory process, which resists attempts at explanation in terms of some single all-encompassing metaphor. It is characterized by its own distinctive set of participant objectives and expectations, structural incentives and constraints, prudential behavior patterns, and interactional con-

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2. The civil lawsuit is the paradigm example. "Court" in this context includes all formally created adjudicative bodies with their own rules of procedure, no matter how minimal, and specifically defined jurisdictional authority. In addition to institutions called courts, this includes all types of administrative agencies, most arbitrators and arbitration panels, and many mediators and mediation panels. For a discussion of the many meanings and functions of "court" in the American judicial system, see Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 1-3 (1981).

3. See Hazard, *supra* note 1, at 193. For other discussions of the ways in which law practice is stratified, see JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); FRANCES K. ZEMANS & VICTOR G. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* (1981).

4. Extrapolating to deal making would involve the use of additional conceptual tools. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 305 (1984) ("[F]inance and transaction cost economics now provide tools necessary for serious inquiry into a theory of private ordering and for bringing the theory to bear . . . on understanding how people order their relationships in the absence of regulatory interference.").

ventions and norms. It is a hybrid of the ordinary social experience of disagreeing with a friend or acquaintance on the one hand, and the unusual and highly stylized work experience of arguing to a court on the other. It asks one to be adversarial but not antagonistic, personal but not intimate, truthful but not candid, and informal but not relaxed. It is a study in tensions, located between the worlds of self and other, friendship and work, law and morality, formality and informality, efficiency and justice, and it carries with it a correspondingly complex set of obligations for those who participate.

For example, dispute settlement sits prominently astride the well-known public-private distinction.<sup>5</sup> It is, at one and the same time, both a part of the state's formal system for redressing legal injury and a partial escape from it. It is nonlegal and private in that it is unmonitored and party run, so that when bargainers agree (an important and less common occurrence than is typically thought) to be arbitrary, collusive, extra-legal, or even lawless, there is little the formal adjudicatory system will be able to do or want to do about it.<sup>6</sup> Yet, law also largely defines dispute settlement's form and content.

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5. The literature on this topic is quite extensive. See, e.g., Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

6. "Agree" means agree in fact, not just behave in a manner that will later be treated by a court of law as evidence sufficient to support the finding of an agreement (e.g., signing a consent decree). Parties often sign agreements based on inaccurate understandings of their rights, see Robert J. Condlin, "Cases on Both Sides": *Patterns of Argument in Legal Dispute-Negotiation*, 44 MD. L. REV. 65, 131-32 (1985), or because they were coerced by features of the settlement process, see HOWARD S. ERLANGER ET AL., COOPERATION OR COERCION? INFORMAL SETTLEMENT IN THE DIVORCE CONTEXT 7-21 (Institute for Legal Studies, Working Papers Series 7, Mar. 1986). Such agreements cannot be said to be voluntary in any noncasuistical sense of the term. See also MARYGOLD S. MELLI ET AL., THE PROCESS OF NEGOTIATION: AN EXPLORATORY INVESTIGATION IN THE DIVORCE CONTEXT 26 (Institute for Legal Studies, Working Papers Series 7, Dec. 1985) (maintaining that "true agreement between the parties is much less common than the frequency of settlement might indicate"). Nevertheless, courts often enforce such agreements, see *Air Line Pilots Ass'n, Int'l v. O'Neill*, 111 S. Ct. 1127, 1136 (1991) (upholding rational, but seemingly bad union settlement), notwithstanding that their "ability to provide meaningful review of [the] settlement's adequacy is questionable." Janet C. Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 499 n.5 (1991). For a discussion of the point that parties may agree to "extra-legal" settlements, see Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 208-09 (1987) ("[W]here one of the parties to a consent decree cedes more than the utmost a court could have exacted on its own authority, there are grounds to suspect that the decree reflects collusion between the parties or some element of distortion or misrepresentation by one of the parties[;]" however, "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after trial . . . to the extent that the consent decree is not otherwise shown to be unlawful.'" (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525-26 (1986))). As to why we should

Legal rules create rights and obligations that make tactical and strategic moves available and serve as bargaining chips; shadow verdicts<sup>7</sup> act as standards against which to judge the desirability of different outcomes; and the possibilities of deadlock and removal to court serve as leverage for parties whose rights are not adequately recognized or protected by informal processes. Even the compromise of rights for practical considerations, the quintessential non-legal maneuver, is to a considerable extent grounded on and influenced by a legal analysis of the strength of the rights compromised.

Dispute bargaining is also a complex social process consisting of distinctive political, moral, and strategic dimensions. It is political in the sense that it resolves questions of legal entitlement as an adjunct to formal adjudication by making binding determinations about the identification and compensation of legal wrongs. It is moral in the sense that it proceeds through a series of truth claims made by individuals in face-to-face interactions, which are grounded in determinations about the limits of deception, the proper use of power, and the obligations of personal fair dealing. And it is strategic in the sense that it involves the bilateral presentation, evaluation, and selection of conflicting claims to real world goods and opportu-

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care about settlements unconnected to the merits of parties' legal claims, see Alexander, *supra*, at 568-70.

For a discussion of the special kind of lawlessness in which lawyers are inevitably engaged, see Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 381-86 (1987).

7. For perhaps the most sophisticated discussion of the relationship among and the interpenetration of formal norms, courts, and informal processes, see Galanter, *supra* note 2, at 4-17, 27-34. For a discussion of shadow verdicts, and how legal claims operate as bargaining chips, see Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-77 (1979). See also HERBERT M. KRITZER, THE FORM OF NEGOTIATION IN ORDINARY LITIGATION 10 (Institute for Legal Studies, Working Papers Series 7, Dec. 1985) [hereinafter KRITZER, FORM OF NEGOTIATION]; HERBERT M. KRITZER, THE LAWYER AS NEGOTIATOR: WORKING IN THE SHADOWS *passim* (Institute for Legal Studies, Working Papers Series 7, Jan. 1986) [hereinafter KRITZER, LAWYER AS NEGOTIATOR]; DAVID LUBAN, THE QUALITY OF JUSTICE 11-31 (Institute for Legal Studies, Working Papers Series 8, June 1988); Galanter, *supra* note 2, at 8-9 (tracing the origins of the shadow metaphor). But see MELLI et al., *supra* note 6, at 8-12, 20-21, 30-37 (arguing that while background substantive law and availability of formal adjudication influence negotiation outcome, a wide range of nonsubstantive factors also play a large role); Alexander, *supra* note 6, at 567 ("[I]n a world where all cases settle, it may not . . . be possible to base settlements on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes . . . . In short, there [may be] nothing to cast a shadow in which the parties can bargain."); Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 227 (1990) (summarizing and discussing economic perspectives on the effect of substantive entitlements on strategic behavior).

nities, shaped by a strategic plan for advancing such claims successfully.

In fact, it is this strategic dimension that gives dispute bargaining its distinctive nature and form. Dispute bargaining is almost created by strategy, undertaken in the first instance not because it is intrinsically worthwhile, aesthetically pleasing, important to personal development, or the naturally best way for people to interact, but because it is an instrumentally effective method for settling conflicting claims to limited resources, opportunities, and the like. It is not an essential human activity, and it probably would not exist, at least not pervasively, in a world without scarcity. Instead, it is a socially constructed process in which participants manipulate a complex web of interpretive, advocative, and trading practices in order to put individual objectives in their best possible light and increase the likelihood that they will be realized. It takes its form in the first instance from a process of reasoning backwards instrumentally from such objectives. Strategy is not all of bargaining, of course, but it is an inescapable, irreducible part, the core out of which the process's moral, political, and social issues emerge, and from which they take their own special character and shape. A bargainer has no choice but to be strategic, other than the choice not to bargain at all, and this reality acts as a backdrop to all understanding of lawyer bargaining behavior and role.<sup>8</sup>

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8. See Oran R. Young, *Introduction to Manipulative Models of Bargaining*, in *BARGAINING: FORMAL THEORIES OF NEGOTIATION* 303-07 (Oran R. Young ed., 1975) ("[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." *Id.* at 303.). There is a body of feminist political theory, grounded in the work of Carol Gilligan and others, see, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 871 n.174 (1990); Paul T. Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237, 1292-96 (1988), that may view this emphasis on strategy as a particularly male way of seeing things. See, e.g., Menkel-Meadow, *supra* note 1, at 763-64 n.28. Nevertheless, being strategic in this context means only being purposive, that is, having a conception of the appropriate ends of the bargaining relationship and a method of proceeding for realizing those ends. A feminist view of appropriate ends and means might (almost assuredly will) be different from a nonfeminist view, but it still will be purposive. For example, an ethic of "nurturing and care" (or even "sympathy," see Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 679-88 (1990)), if it is appropriate to characterize this as a feminist ethic (and there is controversy about whether it is, see Douglas MacLean & Claudia Mills, *Love and Justice*, 9 QQ—REPORT, INST. FOR PHIL. & PUB. POL'Y 12, 13 (Fall 1989); Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1049-50 (1991) ("Worthy and precious as it is, the ethic of care as we know it may also be a cultural complex of traits useful to a group existing under oppression . . . [and not] essential or peculiar to women."); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 624-25 (1990); Helen Vendler, *Feminism and Literature*, N.Y. REV. OF BOOKS, May 31, 1990, 19, 21-23), can be seen as a



In this world of strategic interaction, uncertainty, thought of as incomplete and imperfect information about the factors a rational actor should take into account in deciding how to proceed, is dispute settlement's most salient attribute. Parties come to bargaining with diverse and not always compatible expectations about outcome, and often incommensurable beliefs about the legitimacy of their respective positions. While they know in advance that such incompatibility and incommensurability are possible, they do not know in any particular case to what extent they are present. When they enter a negotiation, therefore, bargainers do not know for certain whether they will be friends or enemies, focused on questions of efficiency or fairness, able to work together or locked intractably in combat. As a result, they must approach the negotiation prepared for all of the above.

Uncertainty results in part from the fact that in law, and in life generally, there are competing conceptions of the good,<sup>9</sup> and thus no necessary consensus on how a dispute ought to be resolved, or even on the principles on which a resolution could be grounded. Not everyone believes, for example, that property rights count for as much as personal rights (or even that rights discourse is the best framework for resolving questions of resource distribution), that all values can be expressed in terms of some common denominator such as money, that proceeding forward efficiently is more important than determining responsibility for present states of affairs, that properly promulgated laws are necessarily valid, or that procedural justice is the same as justice simpliciter. Parties starting from such diverse premises often reach different conclusions about what result a bargaining interaction ought to produce, and with good reason. The effect is that bargainers usually cannot say with precision at the beginning of a negotiation what their counterparts will accept to set-

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strategic (in the sense of purposive) response to the bargaining problem based on a specific conception of the appropriate ends of bargaining and its related means. Whether an ethic of care is an appropriate response, or whether there is such a thing as an ethic of care, are complicated subjects on which there is room for doubt, but there is no doubt of feminism's purposivism.

9. This, again, is a topic on which many volumes have been written, both making this point and articulating differing conceptions of the good. See, e.g., MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 79 (1983); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 743-44 (discussing a similar point under the rubric of ideology); Howard Lesnick, *The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives*, 1991 DUKE L.J. 413, 420-39 (discussing conservative, liberal, and radical "world views"); Rhode, *supra* note 8, at 635-38.

tle the dispute.<sup>10</sup> They can make predictions, and these often will come close, particularly if their past dealings involved similar disputes or were long standing. But they cannot be exact in these predictions or do more than specify a range of possible outcomes. If it were otherwise, there would be no need to bargain. Each would offer the minimum the other would take, because to offer more would be to make a gift and not a bargain.

Uncertainty is exacerbated by the fact that bargainers must make statements and describe intentions in their clients' best light, and therefore, in the strongest credible terms that the most generous or compliant (hypothetical) adversary might accept. Consequently, what is said in bargaining is usually an exaggerated version of what is meant, and known to be so. Yet, bargainers need to know whether particular adversaries are the most generous, or of what generosity consists in a given case. Therefore, they must learn during the course of the bargaining interaction what their counterparts truly believe and would be willing to do, and to do this they must interpret actions and statements of the other side as much for what they reveal as for what they say.<sup>11</sup> In such a world, communication itself is another source of uncertainty. Every disclosure is viewed as (and is) potentially a concession, every argument potentially a provocation, and every proposal potentially a gift. In speaking at all, then, bargainers understandably will be cautious and circumspect, revealing as little and defending as much as possible until the other's intentions are known. While this is only prudent—one does not bare the throat until it is clear that it will not be cut—the effect is to make communication more difficult. Suspicion increases, candor diminishes, and indirect and self-protective methods of expression replace open and straightforward ones.

Uncertainty is also increased by the recursiveness of the bargaining dynamic. In the process of trying to dope out, influence, and trade favorably with one another, the state of mind each bargainer tries to understand has as one of its properties the fact that it is also trying to understand the other. Bargaining is thus a process of mutually assessed mutual assessment, in which each party makes moves that carry fateful implications and that must be chosen in

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10. See Katz, *supra* note 7, at 239 n.62 ("In reality, it is difficult for one party to know the other's valuation of relevant outcomes with precision, especially if one allows the possibility of nonmonetary or psychic aspects of value.")

11. For a discussion of this process, described as "assessment," see Condlin, *supra* note 6, at 67-68. See also Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1239-41 (1990) (describing "best lights" discourse).

light of one's thoughts about the other's thoughts about oneself, and so on. Such information is unknowable in any final sense, of course, because it changes at the moment it becomes known, by virtue of the fact that it is known. Bargainers can make assumptions about what their counterparts believe, about what they (the bargainers) believe, about what the others believe, and so on, but to the extent that they try to understand these beliefs finally, they will inevitably be trapped in an outguessing regress.<sup>12</sup>

In short, the lack of perfect information about adversary wants and needs, the possibility of competing conceptions of the good, the practice of a "best lights" discourse, recursiveness, and ordinary prudence combine to cause dispute bargainers to approach a bargaining relationship cautiously and to communicate strategically. Dispute bargainers must and do learn to trust, of course, for without trust bargainers could not settle disputes. But this is an instrumental understanding of trust, as predictability, or the capacity to know when others will honor their commitments,<sup>13</sup> and trust as predictability does not do much to soften the cautiousness and suspicion that is built into the structure of the bargaining conversation or to change bargaining's distinctive and identifying character as strategic interaction.

Calling dispute settlement strategic does not diminish the importance of the moral and political dimensions of choosing a bargaining approach. It is often more important to be candid or fair than to be instrumentally successful. Nor does it resolve the question of how to behave when settling disputes. There are different and often contradictory strategies for achieving bargaining objectives, ranging from the most cooperative and mutual on the one end, to the most competitive and individualistic on the other, and similarly different ways of defining the hierarchy of bargaining goals so that anything from obtaining the maximum share of the bargaining pot to preserving working relationships with other bargainers and principals could be at the top. To see dispute settlement as

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12. For a discussion of the recursiveness problem and the "outguessing regress," see Erving Goffman, *Strategic Interaction*, in STRATEGIC INTERACTION 99-101 (1969).

13. For a recent discussion of methods to ensure that bargainers carry out their commitments, see Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORGANIZATION 5, 9-25 (1985). The classic discussions that Professor Kronman updates are those of THOMAS C. SCHELLING, *STRATEGY OF CONFLICT* (1960), and Goffman, *supra* note 12. See also ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 182 (1984) ("Whether the players trust each other or not is less important in the long run than whether the conditions are ripe for them to build a stable pattern of cooperation with each other."); Sissela Bok, *Can Lawyers be Trusted?*, 138 U. PA. L. REV. 913 (1990).

strategic, however, is to see it as bargainers see it, to recognize what drives it, and to understand the way in which questions about it, even moral and political questions, must be framed. We now turn to one of those questions.

## II. THE PRACTICAL NEED TO COOPERATE

If dispute settlement is primarily strategic, its central strategic choice is whether to cooperate or compete, both in deciding how to make each of the hundreds of individual tactical maneuvers and moves that make up a single negotiation, and in selecting an overall bargaining strategy. These decisions include whether to share information or conceal it, exploit leverage or seek a fair return, browbeat an adversary or discuss and analyze views evenhandedly, and describe wants accurately or inflate and state them as demands. With respect to the selection of an overall strategy, these decisions also include whether to give the opponent the benefit of the doubt and cooperate until betrayed, or to assume the worst and try for a pre-emptive or decisive first strike. Successful bargainers are those who blend cooperative and competitive choices into a unified approach so that they are able to share private information without making themselves disproportionately vulnerable, test differing legal views without weakening their support for nonrelated issues, and invent and make multiple proposals for settlement without committing themselves to the worst of the possibilities. They cooperate with an eye toward protecting their competitive positions and compete so as not to preclude the development of mutual trust and bipartisan effort, even though competitive strategies make cooperation more difficult and cooperative moves make parties disproportionately vulnerable to competitive responses.<sup>14</sup>

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14. See Diego Gambetta, *Can We Trust Trust?*, in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* 213, 214-15 (Diego Gambetta ed., 1988) (discussing the interrelation of cooperation and competition in society). Not everyone likes the terms "cooperative" and "competitive," but it is the language of rational choice theory, where most of the research on bargaining has been done. See KRITZER, *supra* note 1, at 76-80 (discussing cooperation and competition in bargaining); Katz, *supra* note 7, at 234. For another use of the cooperative-competitive dichotomy, in the context of a discussion of Dean G. Pruitt's "strategic choice model," see GIFFORD, *supra* note 1, at 22-24. See also DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* 15-16 (1981). Gifford defines "competitive" and "cooperative" differently than I, and in ways that are not always helpful. For example, he sees the universe of bargaining behavior as falling into three tactical categories: competitive, cooperative, and problem solving. Competitive tactics are those "designed to undermine the other negotiator's confidence in his bargaining position," cooperative tactics are those "based on what is fair and just," and problem-solving tactics are those that "identify and exploit opportunities for joint gain." GIFFORD, *supra* note 1, at 8. He also defines the categories in terms of their views about appropriate bargaining ends. *Id.*

As David A. Lax and James K. Sebenius have shown,<sup>15</sup> these properties cause the bargaining process to have much in common with game theory's famous prisoner's dilemma.<sup>16</sup> When both bargainers cooperate they receive the benefits of joint action and produce an outcome that is favorable for both. When one cooperates and the other competes, the competitor usually exploits the cooperator and does better. When both compete, they waste resources in ego battles, leave money on the table out of exhaustion and polarization, and frequently end up with a mediocre outcome.<sup>17</sup> In any single negotiation, choosing presents a dilemma because the rational choice for each individual bargainer often leads to a mutually undesirable outcome.<sup>18</sup> There are ways out of this dilemma in repeat bargaining that, while simple, are not always obvious, and these are discussed later.<sup>19</sup> But in any single negotiation, where there is no prospect of future dealing, it is usually irrational for individual bargainers to act cooperatively, and that is the bargainer's dilemma.<sup>20</sup>

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at 14-15. The rest of his book explicates this tripartite division, and it is one of the work's principal analytical contributions. Yet, these definitions do not seem to sort out hard cases. For example, if I have a fair and just claim to a certain resource, which the bargainer on the other side does not accept, because of some error, willful or otherwise, in her assessment of the bargaining problem, may I browbeat, intimidate, or in some other way coerce her into recognizing and agreeing with my view? It will not always be the case that when bargainers disagree one is right and the other wrong, but it will sometimes be so, and that is the situation on which I want to focus. If I do coerce the other side, through the use of some extra-substantive leverage, have I bargained competitively or cooperatively in Gifford's terms? I have certainly tried to "undermine the other negotiator's confidence" in her bargaining position, yet I have done so on behalf of a claim that is "fair and just." If the response is that I have been both competitive and cooperative, is this not always the case in bargaining, because all bargaining behavior "based on what is fair and just" tries as one of its goals to "undermine the other negotiator's confidence in [her] bargaining position" (for the reason that what she is asking is not fair and just)? At this point, Gifford's categories no longer separate one type of bargaining behavior from another and are not helpful.

15. See DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 38-41 (1986). This is surely the best book to come out of the Harvard Negotiation Project, and one of the best books (if not the best) on bargaining theory in the last decade.

16. The prisoner's dilemma and its application to legal dispute bargaining are discussed in detail, *infra* notes 138-183 and accompanying text. For an introduction to game theory and the prisoner's dilemma, see J. KEITH MURNIGHAN, *THE DYNAMICS OF BARGAINING GAMES* (1991); ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* (1990).

17. See *infra* notes 141-142 and accompanying text for a discussion of this payoff structure.

18. See *infra* text accompanying note 142.

19. See *infra* notes 146-165 and accompanying text.

20. For an explanation of why this is so, see *infra* note 142 and accompanying text.

The bargainer's dilemma is a practical problem, concerned with the question of how to behave in order to obtain the largest share of whatever is bargained over, both in individual negotiations and over the course of a bargaining career. According to traditional wisdom, lawyers resolve the dilemma by always choosing the competitive option. They reportedly disclose information selectively and misleadingly, overstate substantive views and discuss them contentiously, inflate needs and state them as demands, clean out opponents when given a chance, and do all of these on principle or out of habit, not just when provoked by the other side.<sup>21</sup> This is the popular lawyer-as-adversary view, and while there is reason to doubt much of its accuracy,<sup>22</sup> for the moment let us suppose that it is true—that law-

21. This is the premise of the vast amount of literature critical of lawyer "positional" or "adversarial" bargaining methodologies. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES* 3-8 (1981); Menkel-Meadow, *supra* note 1, at 764-94; David Schuman, *Beyond the Waste Land: Law Practice in the 1990s*, 42 *HAST. L.J.* 1 (1990).

22. Many have found that lawyers often bargain cooperatively, processing cases as much as fighting over them, and colluding with one another more than competing. See, e.g., H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 151-62 (1970) (describing the "game" of negotiation); Alexander, *supra* note 6, at 505-23 (sampling securities class actions settled at a "going rate," which did not correspond to probable trial outcome, but could be predicted from the dollar amount of the market loss); James B. Atleson, *The Legal Community and the Transformation of Disputes: The Settlement of Injunction Actions*, 23 *LAW & SOC'Y REV.* 41, 56-60 (1989) ("community" of labor and management negotiators resolve disputes according to their own definitions of appropriate picket line behavior, which are more restrictive than the legal definitions); Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 *NLADA Briefcase* 106, 108 (1977) [hereinafter Bellow, *Solutions*] (discussing routine processing as "slotting"); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4, 28-30 (1983) [hereinafter Galanter, *Landscapes*] (describing routine processing); Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 *J. LEGAL EDUC.* 268, 272-73 (1984) [hereinafter Galanter, *Deals*] (describing "bargaining arenas"); KRITZER, *FORM OF NEGOTIATION*, *supra* note 7, at 12-16 (describing negotiation as routinized process); Gary Neustadter, *When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office*, 35 *BUFF. L. REV.* 177, 195-96, 202-28, 239-41 (1986) ("The high degree of similarity in the financial profiles of many clients coupled with large client volume is likely to influence lawyers toward a stereotyped conception of the categories of client situations and toward routine procedures for and solutions to categories of cases." *Id.* at 240.); Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 *LAW & SOC'Y REV.* 93, 109-13 (1986) (describing ways in which lawyers "transform . . . disputes from a battle over . . . legality and morality . . . to a negotiation over . . . more narrow and tangible issues," *id.* at 112, reaching standardized outcomes); Memorandum from Professor Gary Bellow to the Dean of Harvard Law School 27-30 (May 15, 1975) (proposing research project for spring semesters, 1976-77) [hereinafter Bellow, *Memorandum*] (discussing routine processing as "slotting"); see also Gilson, *supra* note 4, at 306-13 (discussing Japanese system of contracting, where parties do not behave opportunistically *vis-à-vis* each other). Herbert Kritzer's excellent discussion of "ordinary litigation" explains, in part, why this cooperation occurs. See KRITZER, *supra* note 1, at 41-55, 66-71.

yers characteristically make the competitive choice and, as a result, produce the mediocre outcome. The adversarial approach has now come under heavy fire for its inefficiencies, unpleasantness, and lack of fairness from legal scholars aligned in one way or another with the so-called "alternative dispute resolution movement."<sup>23</sup> These

In ordinary litigation the potential costs involved in processing the cases are inevitably going to constitute a substantial fraction of the amount at issue, and when combined with the uncertainties inherent in litigation, this creates powerful incentives to move cases through quickly with as little investment of expensive resources as possible. This is facilitated by costs that are large relative to stakes, creating wide, greatly overlapping zones of acceptable settlements. Thus first offers, or, failing that, second offers, are very likely to fall within those zones of acceptability, usually resulting in settlements after only one or two exchanges of demands and offers.

*Id.* at 64-65.

In this view, often described as routine or bureaucratic processing, lawyers fit cases into categories of worth. These categories are crude approximations of the analytical categories of jury verdict research, in which dollar amounts are attached to clusters of stereotypical characteristics of litigants and harms, *see, e.g.*, JURY VERDICT RESEARCH INC., *How to Use the Personal Injury Valuation Handbooks to Evaluate Personal Injury Cases*, 1 PERSONAL INJURY VALUATION HANDBOOKS 5-20 (1991) (applicable categories for completing a personal injury evaluation), with heavy doses of lawyer and system interest mixed in to define categorical boundaries. *See* Alexander, *supra* note 6, at 547 ("Thus, plaintiffs' firms may find it more economic to maintain a large portfolio of cases, spending sufficient time and effort on each to manage it through a routinized motion, discovery and settlement process leading to a uniform settlement for a guaranteed fee than to concentrate on intensive preparation of a few cases for trial."); Bellow, Memorandum, *supra*. In the routine processing view, bargaining consists of lawyers interacting with nominal adversaries in a manner similar to cobureaucrats in an organization. In this view, lawyers make decisions in accordance with privately understood conventions and norms, turn cases over expeditiously with a minimum of expense and formality, and sell the results to clients with the aid of "cooling-out" techniques developed by the profession over time. *See* Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 733-34 (1990) (lawyers exaggerate the level of difficulty or effort needed to achieve settlement to encourage clients to accept it); LUBAN, *supra* note 7, at 37-39 (describing practice of "cooling out"—overstressing risks of litigation to encourage acceptance of a settlement); Sarat & Felstiner, *supra*, at 115 (giving example of "cooling out"); ERLANGER et al., *supra* note 6, at 14-15 (citing an extreme example of "cooling out"); JOSEPH S. LOBENTHAL, JR., POWER & PUT ON 68-69 (1970) (particularly egregious example of "cooling out").

If clients resist, judges help out by staging elaborate ceremonies in which clients are told that the present deal is the best they can expect, and that they should take it. *See* J. Skelley Wright, *The Pretrial Conference*, 28 F.R.D. 141, 145 (1960) ("I tell them: 'This case is worth \$20,000 for the settlement,' and I tell them why; and I tell them further to go tell their clients that I say so."); Marc Galanter, ". . . A Settlement Judge, Not a Trial Judge." *Judicial Mediation in the United States*, 12 J. L. & Soc'y 1, 4-6 (1985) [hereinafter Galanter, *Settlement Judge*] (describing "techniques of judicial participation" in the settlement process); MELLI et al., *supra* note 6, at 19-20; Dale A. Oesterle, *Trial Judges in Settlement Discussions: Mediators or Hagglers?*, 9 CORNELL L.F. 7, 8 (1982); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 343-48, 351-53 (1986) (describing an extended and particularly complicated judicial intervention). For a critique of judicial intervention, see Oesterle, *supra*, at 9-11.

23. *See* SUSAN SILBEY & AUSTIN SARAT, DISPUTE PROCESSING IN LAW AND LEGAL

commentators argue with considerable force that lawyers ought to trade in adversarial<sup>24</sup> bargaining practices for more cordial, principled, and problem-solving approaches, and have identified at least three distinct bases for and versions of this argument.<sup>25</sup> Each ver-

SCHOLARSHIP: FROM INSTITUTIONAL CRITIQUE TO THE RECONSTITUTION OF THE JUDICIAL SUBJECT 5 (Institute for Legal Studies, Working Papers Series 8, June 1988); Marc Galanter, *The Quality of Settlements*, 1988 MO. J. DISP. RESOL. 55, 56. The "alternative dispute resolution movement" is an admittedly ironic name for a group concerned as much with mainstream as alternative processes. See FLEMING JAMES, JR. & GEOFFREY C. HAZARD, CIVIL PROCEDURE 300 (3d ed. 1985) ("fundamentally the American system is one of compulsory bargaining in response to claims of right"); Galanter, *Deals*, *supra* note 22, at 269 ("On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation[;] . . . it is the central core."); MELLI et al., *supra* note 6, at 7-8. The movement also has little to say about genuine disputes, and its proposals for reform suppress conflict as often as they resolve it, see *infra* notes 129-137 and accompanying text.

24. Some cooperative bargaining theory uses the term "positional" to describe the objectionable bargaining practices it seeks to replace, see FISHER & URY, *supra* note 21, at 3-8, but because position taking is involved in all types of bargaining, including cooperative bargaining, "positional" does not seem to be the right term. My view of what bothers cooperative bargaining theorists, though no doubt some of them will disagree, is the competitive manner in which legal bargaining defines ends, and the overly contentious manner in which it advances them. These qualities seem better captured in the term "adversarial," and I will use it interchangeably with "positional." See Menkel-Meadow, *supra* note 1, at 756 n.3.

25. See Gambetta, *supra* note 14, at 213-14 n.2, for a definition of cooperation elastic enough to encompass all of these variations on the argument. For a recent comprehensive treatment of the idea of cooperation, see BARBARA GRAY, COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS (1989). In its own small way, the debate between cooperative and adversarial bargaining theories may be a "for instance" of a larger debate in legal scholarship. This larger debate is between civic republican and pluralist views of legal theory, between those who think that deliberation and reasoned exchange can settle legal differences and those who think that accommodation and compromise are often all that is possible. For a defense of deliberation, see generally Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Richard A. Epstein, *Modern Republicanism—Or The Flight From Substance*, 97 YALE L.J. 1633 (1988); Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673 (1988). For a defense of compromise, see generally Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988). For a discussion of the "paradox of compromise," see David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHIL. & PUB. AFF. 397, 414-16 (1985).

The debate on cooperative versus adversarial bargaining should not be confused with the debate about the comparative advantages of formal versus informal dispute settlement processes generally. The latter is a struggle over the role and importance of law in society, see generally SILBEY & SARAT, *supra* note 23, at 2-25; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985), and has provoked widespread discussion. See, e.g., ROBERT BARUCH BUSH, DEFINING QUALITY IN DISPUTE RESOLUTION, TAXONOMIES AND ANTI-TAXONOMIES OF QUALITY ARGUMENTS 7-14, 21-70 (Institute for Legal Studies, Working Papers Series 8, June 1988); ERLANGER et al., *supra* note 6, at 6-21; 1 THE POLITICS OF INFORMAL JUSTICE (Richard L. Abel ed., 1982); TOM R. TYLER, THE QUALITY OF DISPUTE RESOLUTION PROCESSES AND OUTCOMES: MEASUREMENT PROBLEMS AND POSSIBILITIES 9-28 (Institute for Legal Studies, Working Papers Series 8, June 1988); Albert



sion emphasizes a different aspect of dispute bargaining and is based on different and important insights into the nature of the process. Taken together, they complement and support one another as if separate pieces of a single mosaic.<sup>26</sup> To understand the contradiction in dispute bargaining role, therefore, it is necessary first to appreciate the importance of the practical need to cooperate, and thus to understand the nature of these arguments for cooperative bargaining.

### A. Cordial Bargaining

The earliest theories of cooperative bargaining emphasized sociability. Being nice, it was thought, would cause other bargainers to reciprocate, with the net result that bargaining would take the form of pleasant, non-self-interested, mutual concession-making to agreement.<sup>27</sup> While few if any legal commentators adopted this

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W. Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Robert Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. CONTEMP. LEGAL ISSUES 1, 15-19 (1989); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Sally Engle Merry, *The Discourses of Mediation and the Power of Naming*, 2 YALE J.L. & HUMAN. 1 (1990); Thomas D. Rowe, Jr., *American Law Institute Study on Paths to "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824. With many of these authors, I believe that the comparative advantages of informal processes have sometimes been overstated, often substantially, though in a "sound-bite" culture a certain amount of hyperbole is probably necessary just to be heard. For purposes of this discussion, however, it does not matter how the question of formalism versus informalism comes out, as long as there continues to be some form of informal dispute settlement. That seems a safe bet.

26. One may quarrel with the claim that each of these arguments is distinctive. Admittedly, none makes a unique point, each mentions most of the points raised by the others, and the overlap among them is considerable. Yet the proponents of each argument write as if they believe that each of the others is slightly off the mark. In discussing the arguments, therefore, I have tried to describe each in terms of what seemed to be its most distinctive feature or features. The decision to describe arguments for cooperative bargaining in terms of the views of individual bargaining theorists follows Silbey and Sarat's telling of the history of alternative dispute resolution in the form of stories about moral entrepreneurs. See SILBEY & SARAT, *supra* note 23, at 12-38.

27. See, e.g., CHARLES E. OSGOOD, *AN ALTERNATIVE TO WAR OR SURRENDER* (1962) (describing "graduated reciprocation of tension reduction" method of conflict resolution, in which one of the parties to a negotiation makes unilateral concessions as a means of inducing the other to reciprocate). These early theories were often based on a standard of bargaining akin to a paraphrase of the golden rule: that is, cooperate with others because that is what you want them to do with you. Gifford calls the golden rule the premise of cooperative bargaining theory. See GIFFORD, *supra* note 1, at 8. The problem with unconditional cooperation, however, as Axelrod points out, is that by pro-

view completely, the equation of niceness with success is a central theme in the first distinctively legal theory of cooperative bargaining, that of Gerald R. Williams's bargaining as cordiality.<sup>28</sup> Williams set out to prove that "the most effective [legal] negotiators [are] characterized by positive social traits and attitudes and by the use of more open, cooperative, and friendly negotiating strategies."<sup>29</sup> Effective bargainers, in other words, are those who are friendly, trustworthy, and fair.<sup>30</sup> Being friendly means avoiding insulting, rude, threatening, and belligerent behavior; being trustworthy means sharing information, recognizing the needs of others, and estimating the value of cases realistically; and being fair means looking at a problem from both sides' points of view, basing discussion on common ground, communicating a sense of shared interests, and not seeking any special advantage.<sup>31</sup>

In a complicated research program involving questionnaires, interviews, and videotaped observations,<sup>32</sup> Williams asked one thou-

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viding bargainers with an opportunity to exploit others, it "tends to spoil [bargainers]," placing "a burden on the rest of the community to reform [them]." AXELROD, *supra* note 13, at 136. He suggests that reciprocity is a better foundation for bargaining than unconditional cooperation. *See id.* For a recent attempt to resuscitate the unconditional cooperation view, at least with respect to establishing bargaining relationships, see ROGER FISHER & SCOTT BROWN, *GETTING TOGETHER: BUILDING A RELATIONSHIP THAT GETS TO YES* 37-39 (1988).

28. *See WILLIAMS, supra* note 1, at 14 ("The intensity of emotion and ill-will generated by litigation is frequently overlooked, particularly as regards the opposing attorneys."). The cordiality characterization is mine, and one I expect Williams would be reluctant to adopt. He uses the more general descriptive term "cooperative" to describe his view of the preferred bargaining approach. While it is true that his view generally fits within the mainstream of cooperative theories, he is one of the few to rank good manners highly. *See id.* at 27 (effective bargainers are "careful to observe the customs and courtesies of the bar").

Cordiality may be coming back into fashion. Its loss (or the loss of civility or professionalism, as it is also put) is regularly bemoaned in bar journals, legal newspapers, and association meetings. Many jurisdictions, including Maryland, Georgia, and Texas (and probably dozens of other states), along with the Seventh Circuit (and probably most of the others) are drafting amendments to their codes of professional practice, and mandating special courses of instruction, to require and teach lawyers to be more civil. *See, e.g.,* Catherine T. Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 1017-22 (1991); Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 643-46 (1990); Jef Feeley, *Md. CA Requires New Course On Professionalism*, DAILY RECORD (Baltimore), June 24, 1990, at 1, 11; Randall Samborn, *Panel Says Civility Declines*, NAT'L L.J., Apr. 29, 1991, at 3, 14, 26; Gary Taylor, *Texas Sets its Sights on Rambo*, NAT'L L.J., July 31, 1989, at 3, 24. Judge Reavley also points out that the loss of civility is not a uniquely modern problem. *See Reavley, supra*, at 639-42.

29. Gerald R. Williams et al., *Effectiveness in Legal Negotiation*, in *PSYCHOLOGY AND THE LAW* 127 (Gordon Bermant et al. eds., 1976).

30. *See id.* at 42-44.

31. *See id.*

32. For a description of Williams's methodology, see *id.* at 15-18. Williams was one

sand lawyer subjects to rate the last attorneys with whom they had bargained, on scales of both effectiveness (effective, average, ineffective) and approach (cooperative or competitive). He discovered that nearly half of the bar was seen as effective, and four out of five effective bargainers were also viewed as cooperative.<sup>33</sup> On the other hand, he also found that some cooperators were seen as only average, some ineffective and, more difficult to comprehend, that some competitive bargainers were seen as effective.<sup>34</sup> He concluded "that it is not regard or disregard of the social graces which determines an attorney's negotiating effectiveness," but legal astuteness, that is, being "perceptive, analytical, realistic, convincing, rational, experienced and self-controlled" in the preparation and presentation of one's bargaining case.<sup>35</sup> Legal astuteness was the principal quality effective competitors had in common with effective cooperators, and cooperators who were not astute were rated only as nice, not effective.<sup>36</sup> In Williams's words, bargainers were effective in proportion to

the quality of the legal work being performed, including the expertise with which an attorney had investigated the facts of his case, studied and understood the legal rules applicable to it, taken a realistic position with respect to the value of the case, and presented his position in ways that other attorneys accepted as being rational, fair and persuasive (convincing).<sup>37</sup>

Notwithstanding these conclusions, Williams argued for the superiority of a cooperative, as in cordial, approach to bargaining. He considered it significant that four of five effective bargainers also were cordial, and concluded that this was so because bargainers preferred the cordial style, recognized it more readily when used by others, and understood and worked with it more easily than with other approaches. A bargainer who wants to communicate clearly, avoid confusing and sometimes antagonizing distortions, make mutually advantageous trades, and avoid needless unpleasantness, will have a better chance of doing so, in Williams's view, in a cordial

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of the first legal commentators, if not the first, to recognize the importance of careful empirical study of the skill dimension of the bargaining process. His work is important for that reason, and legal bargaining theory is very much in his debt.

33. *See id.* at 18-19.

34. *See id.*

35. *Id.* at 28, 39, 40.

36. *See id.* at 28, 35-36.

37. *Id.* at 40.

manner.<sup>38</sup> When most of the world is cordial, or thought to be so, one should go along to get along.<sup>39</sup>

Apart from the lack of perfect fit between this recommendation and the results of his research, Williams's analysis has several difficulties that undercut its ability to provide a complete grounding for the argument for cooperative bargaining. To begin with, it is difficult to determine precisely what the study shows. The study asked lawyers to judge bargaining effectiveness, but it does not define effectiveness. Williams discusses effectiveness at length, and mentions factors that could be used in a definition,<sup>40</sup> but he never says what, in his view, identifies a bargaining approach as effective or ineffective, and does not indicate that he gave any more guidance to his subjects.<sup>41</sup> This is an important omission. Like bargaining power, effectiveness is far from a self-evident notion, and a noncircular definition may not be possible.<sup>42</sup> When Williams's lawyers rated their adversaries as effective or ineffective, therefore, we do

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38. *See id.* at 19 ("The higher proportion of cooperative attorneys who were rated effective does suggest it is more difficult to be an effective competitive negotiator than an effective cooperative [negotiator]."); *id.* at 41 (arguing that there are more cooperative effective attorneys than competitive effective attorneys).

39. Williams makes additional arguments for the efficacy of cordiality (e.g., that impasse and deadlock are more common when bargainers are not nice, that being unpleasant has long term reputation effects which will play a role in the settlement of future cases), *see id.* at 50-52, but these points are not developed.

40. *See id.* at 7-10. Perhaps the closest Williams comes to defining effectiveness is when he states that "people have a wide variety of beliefs about what constitutes effectiveness in negotiation." *Id.* at 8. While he also presents "a set of hypotheses about effectiveness," *id.* at 42, he indicates that they are not correct, are biased in favor of cooperative approaches, and so far as one can tell, were not communicated to his subjects. *See id.*

41. This is most apparent in the chapter describing Williams's research methodology, where he gives no indication of how to determine whether a prior bargainer was effective or ineffective. *See id.* at 15-17. While asked to correlate effective and ineffective negotiation with an extensive list of bipolar adjectives, the initial characterization of effective or ineffective was left to Williams's subjects to make on their own, based on whatever criteria they chose to use. *See id.* at 137-39.

42. For a discussion of the difficulty in avoiding question-begging and circularity in the attempt to define bargaining power, see P.H. GULLIVER, *DISPUTES AND NEGOTIATIONS* 186-90 (1979). The difficulty is in formulating a conception of power that allows one to make predictions about bargaining outcome. It is often possible to determine retrospectively at the close of a negotiation what factors were powerful in shaping the result, but it is difficult to say at the beginning what those factors will be. No attribute or resource is inevitably powerful, including superior understanding of the bargaining problem or resources to prosecute it. Many commentators seem not to see this as a problem. *See* GIFFORD, *supra* note 1, at 67-69; JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION* 212-16 (1989); Roger Fisher, *Negotiating Power: Getting and Using Influence*, 27 *AM. BEHAV. SCIENTIST* 149, 156-57 (1983); Menkel-Meadow, *supra* note 1, at 833-34. For a cogent synopsis of and commentary on the bargaining "power" literature, see KRITZER, *supra* note 1, at 72-76.

not know what they thought they were asked, or what they were saying.<sup>43</sup>

For example, effectiveness might have meant being pleasant and personable, legally knowledgeable, verbally facile, on the same wavelength (appraising the case in the same way), or disproportionately successful. We do not know whether ends or means were important, or some combination of the two, but we can speculate. It is unlikely, for example, that effectiveness meant obtaining disproportionately favorable settlements. Participants did not have the comparative data necessary to make these judgments objectively,<sup>44</sup> and presumably they would not have agreed to settlements they viewed subjectively as favoring the other side. If effectiveness was not based on ends, then it must have been based on inferences from means. Effective negotiators must have been those in command of the interactional skills associated with good negotiation. Participants could watch their adversaries, and thus had access to the data needed to make this judgment, and acknowledging the other as skillful would enhance rather than undercut perceptions of their own bargaining performance. But if skill was important, what kinds of skills did the participants rate the highest?

The most frequently mentioned characteristic of effective bargainers was that they met rather than traversed expectations participants brought to the negotiations. Effective bargainers were "realistic," "experienced," and "predictable," rather than "ambitious," "greedy," or "demanding." They settled cases efficiently and with a minimum of friction; they knew how to make the system

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43. The fact that only 12% of the bar was rated as ineffective suggests that Williams's subjects were generous in their definition of that term. See WILLIAMS, *supra* note 1, at 20.

44. To know how one does comparatively, one needs to know how other bargainers would settle the same problem. Such data is usually nonexistent for real life bargaining, where cases are settled just once. A facsimile exists, however, when simulated bargaining problems are given to multiple sets of bargaining teams. When several sets of bargainers settle the same case, even if only hypothetically, participants know more about where they fit comparatively because they know how many bargainers got more of the bargaining pot (however measured) than they did, and how many got less. Williams ran such a simulation, see WILLIAMS, *supra* note 1, at 6-7, and others have conducted similar experiments, see, e.g., DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 202-05 (1974) (multiple evaluations of single case by panel of experts); Alexander, *supra* note 6, at 505-23 (Comparative study of "a number of contemporaneous cases involving virtually identical claims about very similar companies." *Id.* at 500.). In those situations, objective determinations of comparative effectiveness were possible. There is no indication, however, that such data was available to Williams's subjects, and it could not have been, because participation in the study was based on the evaluation of real life bargaining, not simulations. WILLIAMS, *supra* note 1, at 16-17.

work.<sup>45</sup> It is difficult to know what to make of such statements, however, because they also could describe ineffective bargaining. Bargaining usually involves adjusting adversary expectations as much as meeting them. Preparing a case from a client's point of view makes a bargainer's perspective one-sided—client interests seem more worthy than adversary interests because justifying client interests is what the bargainer has thought most about<sup>46</sup>—and the adversary must correct this imbalance in perspective during the course of the settlement discussion. Arguing for such adjustments can sometimes appear “ambitious,” “greedy,” and “demanding” to one who does not understand how her perspective could be one-sided; but such arguments must be made nonetheless.

Perhaps Williams's subjects overlooked the importance of adjusting adversary expectations because they subscribed to a routine processing conception of dispute bargaining.<sup>47</sup> Routine processing is usually faster and less contentious than more substantive and individualized methods of settling disputes, and that may account for its popularity, but whatever its efficiencies, it is not always a model of distributive justice. It favors status quo distributions of wealth and power, gives repeat players an advantage, and encourages stereotypical settlements in which bargainers smooth over or ignore the idiosyncratic features of individual claims. Whether Williams's lawyers were routine processors or not is hard to know, however, given the way in which the study's inquiries were framed. As a result, it is equally difficult to know how much to credit the study's claim about the close relationship between effectiveness and cooperation.

Another difficulty with Williams's discussion permeates other work on the topic as well. Williams does not distinguish between substance and style in categorizing bargainers as cooperative or

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45. See WILLIAMS, *supra* note 1, at 27-28, 37.

46. See Condlin, *supra* note 6, at 80 n.35. The incentive theory of Irving Janis suggests how this could happen. See Irving L. Janis, *The Influence of Incentive Conditions on the Success of Role Playing on Modifying Attitudes*, 1 J. PERSONALITY & SOC. PSYCHOL. 17, 17-18 (1965) (“[I]mprovising arguments in favor of a point of view at variance with [one's] own . . . increases the salience of the positive arguments and therefore increases the chances of acceptance of the new attitude position.”); see also LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957) (suggesting that in attempting to reduce the dissonance caused by believing one thing and doing another, a person changes her beliefs so that they become consistent with her public behavior); LUBAN, *supra* note 7, at 37-40 (discussing “adaptive preference formation”); Daryl J. Bem & H. Keith McConnell, *Testing the Self Perception Explanation of Dissonance Phenomena*, 74 J. PERSONALITY & SOC. PSYCHOL. 23, 23 (1970) (arguing that “individuals come to ‘know’ their attitudes and other internal states partially by inferring them from observations of their own overt behavior”).

47. See *supra* note 22 for a definition of routine processing.

competitive, and yet these are distinctively different domains in which to cooperate or compete.<sup>48</sup> Take competition. One can threaten, make *ad hominem* attacks, use a didactic or condescending tone, or otherwise try to score debater's points irrespective of content. This is stylistic competitiveness, and its goal is to win the interaction at the level of rhetorical (in the vulgar, colloquial sense) skill. Conversely, one can make strong demands when warranted, refuse to change views without good reasons, and support positions with well-developed if complicated and hard-to-follow arguments, albeit in a friendly and personable manner. This is substantive competitiveness, and its goal is to have one's views about applicable law or practical concerns adopted by the parties as the basis for settlement, and thus, to produce the best outcome consistent with the strength of one's substantive claims.

Stylistic competitiveness is almost always inappropriate and usually ineffective, but substantive competitiveness is indispensable to successful bargaining.<sup>49</sup> Without making justified demands and taking stands on principle (while being willing to discuss the strength of these principles), even when they go beyond what the other bargainer expects or thinks legitimate, a lawyer has unilaterally waived a client's rights and conceded rather than negotiated a dispute. And when research instruments, including analytical categories, do not make the distinction between substance and style, one cannot tell whether descriptions of lawyers as "tough," "forceful," and "aggressive," or even as "courteous," "friendly," and "fair-minded," refer to what was said, or how it was said. Until researchers frame inquiries to take this distinction into account, it will be difficult to know what the evidence shows about the relationship between cordiality and bargaining effectiveness.

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48. See WILLIAMS, *supra* note 1, at 27-30. Gifford makes this same point about Williams's analysis, characterizing the point as the failure to distinguish between strategy and style. See GIFFORD, *supra* note 1, at 18-21, 29 n.6. In a sense, Williams himself acknowledges the distinction in his discussion of legal astuteness, see WILLIAMS, *supra* note 1, at 28, where he concludes that being nice is not always enough. Astuteness is a substantive category, describing what bargainers say to one another, not how they say it, and to segregate it as an independent variable in assessing effectiveness is to distinguish between substance and style. See also *id.* at 25 (describing the gap in attitudes between cooperative and competitive negotiators: "Cooperatives feel that cases should be evaluated objectively, on their merits," whereas "competitive attorneys view their work as a game in which they seek to outwit and outperform the other side."). Williams does not describe the point in these terms, however, or continue to make the distinction throughout the remainder of his analysis. One cannot tell whether he recognizes the point or not.

49. See Conclin, *supra* note 6, at 72-79.

### B. *Principled Bargaining*

Articulation of the theory of principled bargaining was the next significant stage in the development of the argument for cooperative bargaining.<sup>50</sup> Starting from the premises that "conflict lies not in objective reality but in people's heads," and that "[t]ruth is simply one more argument . . . for dealing with . . . difference,"<sup>51</sup> principled bargaining theory asserts that successful bargainers are those who "separate the people from the problem," "focus on interests, not positions," "invent options for mutual gain," and "insist on objective criteria."<sup>52</sup>

Separating the people from the problem involves preventing perceptual and psychological errors in communication and interpretation from skewing analysis of the substantive issues presented by the bargaining problem. Principled bargainers recognize that "[n]egotiators are people first,"<sup>53</sup> who

get angry, depressed, fearful, hostile, frustrated, and offended. They have egos that are easily threatened. They see the world from their own personal vantage point, and they frequently confuse perceptions with reality. Routinely, they fail to interpret what you say in the way you intend and do not mean what you understand them to say.<sup>54</sup>

To protect against such potential disasters,<sup>55</sup> principled bargainers are encouraged to "see the situation as the other side sees it,"<sup>56</sup> with the aid of a set of interactive rules of thumb (e.g., do not deduce their intentions from your fears; recognize, identify, and discuss emotion explicitly; confirm interpretations before acting on them; and the like),<sup>57</sup> which make overinterpretation difficult and projection less likely. When bargainers identify communicative incompetence and isolate its effects, proponents of principled bargaining

50. The "originators" of the theory of principled bargaining are Roger Fisher and William Ury, see FISHER & URY, *supra* note 21, at vi, xii, though a careful reader will find much of the theory's content in RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATION* (1965).

51. FISHER & URY, *supra* note 21, at 23.

52. *Id.* at 11-12.

53. *Id.* at 19.

54. *Id.* For further development of this point, see FISHER & BROWN, *supra* note 27, at 25-30.

55. See FISHER & URY, *supra* note 21, at 19.

56. *Id.* at 23.

57. *Id.* at 25-36; see also FISHER & BROWN, *supra* note 27, at 43-106.



claim, the bargaining conversation will deal naturally and successfully with satisfying the parties' respective interests.

The directive to focus on interests rather than positions is a more elusive notion. Interests are "the silent movers behind the hubbub of positions," what causes one to decide on a position, and the "needs, desires, concerns, and fears" that underlie expressed statements of what one wants.<sup>58</sup> In the principled view, reconciling interests, not positions, is the basic problem of bargaining, but it is a more manageable problem because for every interest several positions usually exist that would satisfy it, and behind opposed positions lie more shared interests than conflicting ones.<sup>59</sup> While principled bargainers are soft on people, they are hard on interests. They commit to interests, and make them come alive with all of their "aggressive energies."<sup>60</sup> This is because "[t]wo negotiators, each pushing hard for their interests, will often stimulate each other's creativity in thinking up mutually advantageous solutions."<sup>61</sup>

Inventing options for mutual gain consists of identifying and mulling over multiple solutions to the bargaining problem, and comparing, contrasting, and refining such solutions until a mutually satisfactory outcome is found.<sup>62</sup> It includes "brainstorming,"<sup>63</sup> in which bargainers hypothesize outcomes but do not evaluate them until all imaginable possibilities are on the table, and perspective shifts, where bargainers consider the bargaining problem from the differing vantage points of description, analysis, diagnosis, and prescription, and through the intellectual frameworks of different disciplines and professions.<sup>64</sup> Principled bargainers alter and re-alter the scope and strength of potential agreements, expand bargaining stakes until there is something for everyone, identify and match shared and dovetailing interests, and treat agreements as tentative and subject to improvement until made Pareto optimal.<sup>65</sup> The object of this process is to discover a configuration of the (continually redefined) bargaining pot that leaves all parties with those items or parts of items they value most, and each party with a payoff that is roughly equivalent (or at least perceived to be) to the other's.

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58. See FISHER & URY, *supra* note 21, at 42.

59. *Id.* at 42-43.

60. *Id.* at 52, 55.

61. *Id.* at 56.

62. *Id.* at 12, 14, 62.

63. *Id.* at 62-67. For another description of this process, see GIFFORD, *supra* note 1, at 55-60.

64. See FISHER & URY, *supra* note 21, at 67-71.

65. *Id.* at 72-79.

Principled bargaining's distinctive characteristic, however, is its insistence on the use of objective criteria (the "principle" from which the theory takes its name), as the basis for settlement. To proponents of principled bargaining, objective criteria are important because they allow parties to arrive at lasting agreements amicably and efficiently.<sup>66</sup> Yet, objective criteria also can be seen as a normative response to what David Luban, following John Roemer, calls the "informational poverty of bargaining,"<sup>67</sup> and concerned with justifying the outcomes of bargaining as much as its methods. Objective criteria consist of "fair standards and fair procedures."<sup>68</sup> Standards and procedures are fair when they are "independent of" each side's will, are "legitimate and practical," and pass the test of "reciprocal application"—that is, each side would use the same standards and procedures if bargaining positions were reversed.<sup>69</sup> Examples of fair standards include market value, replacement cost, depreciated book value, competitive prices, scientific judgment, precedent, community practice, what a court would decide, tradition, moral norms, and other consensus standards accepted by the bargaining parties and the community in which they bargain.<sup>70</sup> Examples of fair procedures include "taking turns, drawing lots, letting someone else decide, and so on."<sup>71</sup>

When more than one objective criterion is available as the basis for settlement, or when parties advance different criteria, as will usually be the case, bargainers should "look for an objective basis for deciding between them, such as which standard has been used by the parties in the past or which standard is more widely ap-

66. *Id.* at 86-88.

67. See LUBAN, *supra* note 7, at 19-22, 39-40 ("Bargaining theory relies on information that is just too thin and impoverished to capture any pre-analytic notion of justice." *Id.* at 19.); John Roemer, *The Mismatch of Bargaining Theory and Distributive Justice*, 97 ETHICS 88, 90, 97-102 (1986) (arguing that bargaining theory lacks the information necessary to capture the essence of distributive justice).

68. See FISHER & URY, *supra* note 21, at 88-91.

69. *Id.* at 88-89.

70. *See id.*

71. *Id.* at 90. For another definition of objective criteria, see GIFFORD, *supra* note 1, at 69-70. One of my favorite examples of fair procedures is the rule of "one cuts, the other chooses." *Id.* at 90. Usually described in terms of two children splitting a single piece of cake, this division of power technique is supposed to insure that neither child has an advantage over the other. Anyone who has ever used this stratagem with children, however, quickly discovers that it is better to choose than to cut. It is difficult to divide anything into two perfectly even halves, and the one who chooses is almost always in the position of being able to select a larger piece. See also MURNIGHAN, *supra* note 16, at 103. Rather than solve the bargaining problem, the technique relocates it (and sometimes makes it smaller) to the issue of who will cut and who will choose. Most other "fair procedures" suffer the same fate.

plied.”<sup>72</sup> If there are two (or more) standards that produce different results, but which seem equally legitimate, the parties should “split[] the difference or otherwise compromis[e] between the results” suggested by the standards.<sup>73</sup> Throughout the bargaining process, bargainers should “be open to reason” and yield “only to principle.”<sup>74</sup> Such a stance has the “power of legitimacy”<sup>75</sup> and allows bargainers to prevail on the all-important issue of negotiation style. It allows them to shift discussion from positional bargaining to a search for a solution based on merit, and as such, is a dominant strategy over positional bargaining, giving principled bargainers an edge. “It is a form of ‘right makes might.’”<sup>76</sup>

The concept of principled bargaining has great analytical power and appeal. It builds on the idea of “legal astuteness,” identified, but not elaborated upon, in the theory of cordial bargaining, and in the process adds an important normative dimension to the idea of cooperation. Being cooperative now means adhering to authoritative substantive norms—legal, moral, and political—which form the backdrop of dispute settlement and make its outcomes legitimate and fair. It is no longer enough that bargainers be cordial, predictable, and nice; they must do justice as well. This normative addition transforms bargaining theory from a theory of strategy and manners to one also of morality and politics, and in so doing, helps justify bargaining’s place in the system of adjudicatory justice.

While a major advance, therefore, principled bargaining is not without its difficulties, as one of its leading proponents has acknowledged.<sup>77</sup> A few representative illustrations will show how this is so.<sup>78</sup> To begin with, principled bargaining’s starting point, that

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72. FISHER & URY, *supra* note 21, at 93.

73. *Id.*

74. *Id.* at 92-95.

75. *Id.* at 95.

76. *Id.*

77. See Roger Fisher, *Comment* to James J. White, *Essay Review, The Pros and Cons of “Getting to YES,”* 34 J. LEGAL EDUC. 115, 120 (1984) (“I . . . see some inadequacies in the book”); *Getting to YES Six Years Later*, DISP. RESOL. F. 4-5 (May 1987) (interview with Roger Fisher and William Ury).

78. There is a good deal of critical commentary on principled bargaining. See, e.g., Max H. Bazerman, *Getting Beyond YES: Where Negotiation is Now and Where it Should Go*, DISP. RESOL. F. 3, 8 (May 1987); Menkel-Meadow, *supra* note 1, at 758-59 n.9; James J. White, *Essay Review, The Pros and Cons of “Getting to YES,”* 34 J. LEGAL EDUC. 115 (1984). With the possible exception of some points made by Professor White, I do not plan to retrace ground already covered. I will limit my comments to points not raised elsewhere, either explicitly or in the same form. I do not want to show all that is wrong with principled bargaining theory, but only that it has serious problems.

"conflict lies not in objective reality, but in people's heads,"<sup>79</sup> is often just wrong.<sup>80</sup> It is also incongruous with the theory's heavy reliance on the possibility of principled resolutions.<sup>81</sup> Not all beliefs and values can be measured against each other, or against some common denominator (or principle).<sup>82</sup> Bargainers who disagree are not invariably confused or mistaken about what they believe or want; sometimes their beliefs and wants are grounded in irreconcilable notions of entitlement, and interpretive or communicative skill will not make these conflicts go away. If principled bargaining theory claimed only that communication can distort meaning and create the appearance of conflict when none is present, that it can produce "cognitive conflict,"<sup>83</sup> and then argued that cognitive conflict should be avoided whenever possible, few would disagree. These points are not news, however, and are hardly worth the fanfare with which the theory of principled bargaining has been announced and advanced. Instead, principled bargaining seems committed to the stronger claims that substantive differences are

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79. FISHER & URY, *supra* note 21, at 23.

80. The belief in and search for a single definition of the good is understandably attractive to those on the tops of social, economic, and political pyramids, who will feel better if they can believe that everyone below agrees on the legitimacy of the pyramids. Like the structural functionalists in anthropology in the 1950s, those on top view disagreement as a "matter of failed conformity with unproblematic normative standards." SILBEY & SARAT, *supra* note 23, at 46; see also Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 73-74 (1987) ("The more powerful we are, the less we may be able to see that the world coincides with our view precisely because we shaped it in accordance with those views."); Lesnick, *supra* note 9, at 420-39 (discussing ways in which perspective influences patterns of one's thinking). Nevertheless, the universe of principled belief is usually too messy to reward such a search. Shared standards sometimes exist, and when they do, they resolve some and narrow other differences, but even shared standards often run out, to use Charles Fried's phrase, "twenty feet above the ground." Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 57 (1981). The level of abstraction that permits agreement on the standard also often makes its application inconclusive. When principles fail, or come up short, accommodation and compromise are the paths to settlement, but there are no objective criteria for determining how much to accommodate, or when to compromise. See Luban, *supra* note 25, at 414-16.

81. The idea that conflict lies only in people's heads is incongruous with principled resolutions unless the only principle that principled bargaining recognizes is one which holds that bargainers are always mistaken when they perceive themselves to be in conflict. But if bargainers are always mistaken, and in fact conflicts never exist, it is not exactly clear what use bargainers can make of other principles.

82. To believe in the inevitability of common denominators with which differing interests may be compared is to treat all statements of value as essentially alike, and in the process to make a "category mistake." See Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1402-18 (1981) (discussing category mistake). Category mistake may be out of date terminology. See Radin & Michelman, *supra* note 8, at 1029.

83. See John Thibault & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541, 543 (1978) (defining and discussing "cognitive conflict").

most often illusory, and simultaneously that they can be resolved by objective criteria. These stronger claims are what make principled bargaining interesting, but they are also what make it suspect.

Apart from its grounding on a suspect premise, principled bargaining also has weaknesses in each of its core principles. For example, in discussing the importance of separating the people from the problem, the leading proponents of principled bargaining recommend both that bargainers identify with the other side ("see the situation as the other side sees it"),<sup>84</sup> and that they manipulate the other side when it is possible to do so. "Manipulate" is my characterization but it seems fair. For example, a principled bargainer is encouraged to "devot[e] substantial time to working out the practical arrangements" of concessions so as to provide the other bargainer "with an impressive achievement and a real incentive to reach agreement on other issues."<sup>85</sup> Drag out concession-making, in other words, even when one is ready to concede, so that the other side will think it has accomplished more than it has and be correspondingly grateful. This may be instrumentally useful advice, but it encourages bargainers to be strategically inauthentic, and it seems slightly out of place in a bargaining method based on mutual cooperation and empathic identification with the other side. Following the dictates of principled bargaining is not always easy, in part, because the theory is not always clear about whether it is a genuine alternative to discredited positional bargaining, or a set of more sophisticated techniques for operating successfully within the positional mode.<sup>86</sup>

Similarly, the advice to focus on interests rather than positions is based on an unargued premise, that the two are different in some significant sense, which is convincing to proponents of principled bargaining for reasons that ordinary language seems not to explain. In bargaining, all statements of interest are not very thinly disguised statements of position (i.e., that the interest must be provided for by some explicit term in the agreement), and statements of position are inarticulate but usually discernible statements of interest (i.e., that the money or whatever else is being discussed is desired for some

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84. See FISHER & URY, *supra* note 21, at 23.

85. *Id.* at 27.

86. There is even a principled bargaining equivalent to positional bargaining's inflated first offer, to wit, "an illustrative suggestion that generously takes care of your interests." *Id.* at 55. Sometimes Fisher and Ury's capacity for euphemism is considerable. Also unusual is their distinction between a "threat" (bad, because a tactic of positional bargaining), and a "warning" (good, because a tactic of principled bargaining). *Id.* at 142-43.

particular reason or reasons—to feel vindicated, be made whole, take revenge, or the like). It simply is not possible for conversation of any sophistication to be about just one or the other. Principled bargaining implicitly admits this impossibility when it acknowledges that bargaining ultimately must involve the discussion of and agreement on settlement terms (positions), and describes a range of rhetorical and psychological techniques designed to help in this process.<sup>87</sup> Given this acknowledgment, it is perhaps a bit disingenuous to suggest that “focusing on interests not positions” will make bargaining more productive.

Presumably, proponents of principled bargaining make the distinction between interest and position to emphasize the need for flexibility in defining bargaining objectives, and thus to encourage bargainers to take different approaches to solving the bargaining problem when necessary in order to avoid unproductive conflict, polarization, or deadlock. If flexibility is the goal, however, it is promoted by bargainer offer- and concession-making that is imaginative, contingent, and respectful. It is skill in formulating, discussing, refining, and discarding settlement terms (whether thought of or expressed as interests or positions), not skill in labelling them, that is critical. When the end is avoiding polarization, the means must be more than terminological.

There is an understanding of the interest-position distinction that proponents of principled bargaining may recognize, but do not discuss. In this view, interests are the ultimate ends of bargaining, the objectives one would pursue if perfectly and finally aware of what is to one's greatest advantage, judged from the vantage point of perfect information and the perspective of all of time. Positions are intermediate or provisional expressions of those ends, based on imperfect information and incomplete perspective. Ultimate ends are often different from intermediate ones, in the same manner that destinations are often different from way stations, because knowing perfectly what will be in one's ultimate interest is frequently not possible in any real or trustworthy sense within the time frame of bargaining.

For example, the lawyer bargainer must determine which of the client's many selves to consult in determining what to seek from a bargaining transaction. The pleasure-seeking self will want something different than the citizen self, the short term self something different than the long term self, and the public self something dif-

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87. See *id.* at 113-18.

ferent than the private one. The client may want most not to have to decide at all, and wish only that the problem had never arisen. Asked today, she may want one thing, but tomorrow (or yesterday) another. Even when expressed, the description of interests is often likely to be a function of how, by whom, and under what circumstances the questions were asked. Moreover, statements of interests even when made are inevitably at the mercy of new information not taken into account in formulating the statements, and can be shaken to the core, even to the point of being repudiated, by such information. This is a particular concern in dispute negotiation where bargaining interests are partly a function of what outcomes are available, and where the information and understanding necessary to make that determination change constantly as bargaining proceeds. Only after a negotiation has concluded will a client know better what she wanted during it, and she may not know best for months or years to come.<sup>88</sup> The problem with bargaining is that it forces one to articulate objectives that are mixed, contingent, tentative, fuzzy, and incomplete, as if they were discrete, fixed, tangible, and exhaustive. But this is true whether one thinks of objectives as interests or positions, and it is the real problem in understanding and articulating bargaining goals.<sup>89</sup>

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88. More important than time and knowledge, if interests are to be fully and finally known, is the freedom from ideological and social constraints, sought by constructs like Habermas's ideal speech situation, see JÜRGEN HABERMAS, *THEORY AND PRACTICE* 17-19 (1973); THOMAS MCCARTHY, *THE CRITICAL THEORY OF JÜRGEN HABERMAS* 306-310 (1978), or Rawls's original position, see JOHN RAWLS, *A THEORY OF JUSTICE* 17-22 (1971).

89. In one sense, the whole idea of interests is problematic. Are interests everything one wants? See SILBEY & SARAT, *supra* note 23, at 93 ("[I]nterest based claims say 'I want it.'"). If so, should bargaining be designed to give participants everything they want? What if a bargainer wants something to which she has a weak, suspect, or nonexistent claim, under any or all (including communitarian) theories of entitlement? See Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 484 (1989) (discussing the distinction between "volitional well-being," i.e., what one wants, and "critical well-being," i.e., what one should want); Bernard Williams, *Dworkin on Community and Critical Interests*, 77 CAL. L. REV. 515, 515-16 (1989) (arguing for a description of critical interests as "real" interests). In such circumstances, are there legitimate and illegitimate interests? If so, why construct a new entitlement system when there is already in place a longstanding and highly elaborated system of rights performing the same function? See Amy Bartholomew & Alan Hunt, *What's Wrong With Rights*, 9 LAW & INEQUALITY REV. 1, 49-58 (1990), for a relatively nonpartisan discussion of the adaptability of rights discourse to modern political debate. See also Radin & Michelman, *supra* note 8, at 1035-39 (The passion of "rights-critics . . . should be directed not against the very thought of rights, but rather at the characteristic failings of nonideal rights practice in our specific cultural context." *Id.* at 1038-39.). The American Bar Association's Code of Professional Responsibility is subject to a similar critique:

Instead of conceding or recognizing that the situation confronting the lawyer may be one of considerable indeterminacy of objectives or deep ambivalence of

Principled bargaining's third foundational rule, the directive to invent options for mutual gain by expanding the bargaining pie and looking for shared and dovetailing interests, is often a helpful guide in resolving particular disputes, but of more limited use in constructing a general theory of bargaining. Bargainers sometimes get locked into unnecessarily zero-sum conceptions of their situations, and see conflicts where none exist, and when this happens, it can help to redefine issues, clarify goals, and expand the pie. Conceptually, however, this is not bargaining. Bargaining begins at the point where differences must be reconciled, accommodated, or compromised. It is not the same as individual bargainer interest clarification (i.e., learning), and is not needed when interest clarification will suffice. Inventing options for mutual gain is about avoid-

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feeling and attitude, the Code simply erects a concept of "interests" with which the client is inexorably identified. "Interests" is never defined or discussed. The term is rather like a black box into which the lawyer presumably dumps his own projections of what the client should desire, intend, feel, or anticipate.

Karen L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 327 (1988).

If interest is used to make the point that not everything one wants is best expressed in terms of money or goods, then it is not necessary. The point was already widely understood and regularly made. Interest could be thought to encourage a joint conception of the bargaining relationship, because the idea of interest is more bipartisan than position, making it easier to enlist the efforts of other bargainers in defining it. For a similar argument, though one not made by principled bargaining theorists, see SILBEY & SARAT, *supra* note 23, at 88-96; for a response, see *id.* at 114. But if this is so, the conception must still be reconciled with many other parts of principled bargaining theory that treat others as adversaries, not partners. This is less of an issue for problem-solving bargaining theory, considered next, though ironically, problem-solving theory uses "needs" and not "interests" to describe the currency of bargaining. And "need" is a decidedly less bipartisan concept.

The concept of interest was introduced by legal realism as an outgrowth of its critique of rights, but the realists recognized that interests were as subjective as rights, and thus not yet an adequate basis for grounding legal decisions. See SILBEY & SARAT, *supra* note 23, at 70-86; David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW & CONTEMP. PROB., Autumn 1988, 111, 116-17. On one view, contemporary proponents of principled bargaining seek to overcome this subjectivity problem by converting interests into economic commodities, and measuring them with the aid of objective criteria, see SILBEY & SARAT, *supra* note 23, at 94 n.66, though it is not clear that principled bargaining theorists see their contribution in these terms, or view their work as part of the critique of rights. In the end this matters little, however, as interest analysis fails to solve the contradictions of rights talk. See *id.* at 108-12. For another extended discussion of the distinction between interests and rights, see WILLIAM URY ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* 3-19 (1988), where virtually every argument for an interests-based approach could just as plausibly support a rights-based approach. Like many cooperative bargaining theorists, the authors have a rigid, static, and vulgar understanding of rights, and a flexible, evolving, and sophisticated understanding of interests, so that in the end, their discussion is grounded more on faith than on reason.



ing the need to bargain, an important practical topic, but of limited significance in the theoretical task of explaining bargaining.

Finally, and most interestingly, there are weaknesses in the most controversial part of principled bargaining theory: its insistence on the use of "objective criteria" for determining outcome. "Objective" is an emotionally evocative term, with positive associations for most, but it is ambiguous in an important sense, which the theory of principled bargaining trades on, but does not discuss. Objective can mean neutral or nonpartisan, in the sense of treating each side's interests equally. Flipping a coin or splitting the difference is objective in this sense. Or it can mean fair and legitimate, in the sense of respecting recognized entitlements of the parties, and reconciling conflicts between them through the use of principles, procedures, and substantive norms that are accepted as authoritative. Neutrality and fairness are not always the same, however, as it is possible to be both neutral and unfair, and fair but biased.<sup>90</sup> The theory of principled bargaining does not say so directly, and there may be some waffling,<sup>91</sup> but its suggested examples of objective criteria, such as splitting techniques that divide pots into rough equivalents, consensus community practices, or the parties' past behavior, seem based on an understanding of objectivity as neutrality.<sup>92</sup> Like "neutral" mechanisms generally, however, such criteria have a strong bias in favor of status quo distributions, and the status quo is not always fair, particularly to those who reasonably reject existing definitions of worth, received distributions of resources and power, consensus procedures, or the wisdom of past behavior, their own included. Principled bargaining cannot simply assume that neutral principles will be fair, and if it intends to stand on this proposition, then it must argue for it, directly and at length.<sup>93</sup>

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90. See LUBAN, *supra* note 7, at 19-22; Luban, *supra* note 25, at 402-03. Anatole France has given us perhaps the most well-known statement of the not always identical relationship between fairness and neutrality. See ANATOLE FRANCE, *LE LYS ROUGE* (1894) ("The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, beg in the streets, and steal bread.").

91. For example, the use of "moral standards," "what a court would decide," and "precedent" as illustrations of objective criteria may be intended to suggest that norms based on considerations more extensive than neutrality also qualify as "objective criteria." What happens when, for example, "moral standards" conflict with "market value" is not discussed. FISHER & URY, *supra* note 21, at 89.

92. *Id.* at 88-89.

93. Like Richard Posner after them, Fisher and Ury do not even adopt the minimalist strategy of "theft over hard work." See Eric Rakowski, *Posner's Pragmatism*, 104 HARV. L. REV. 1681, 1683-89 (1991) (discussing Richard Posner's "refusal to enter the relevant jurisprudential and philosophical debates" over the presence or lack of objectivity in American laws, even to the extent of saying what arguments of others he finds convinc-

A second problem with objective criteria, as principled bargaining acknowledges, is that often there will be more than one objective criterion (by whatever definition) available to settle a dispute. In choosing among them, principled bargainers are told to look for second level criteria, or meta-criteria, that will tell one which is the appropriate first level norm.<sup>94</sup> But principled bargaining does not explain why it is reasonable to expect the problem of more than one criterion to go away at the appellate level, or in other words, why it is reasonable to expect to find only one meta-criterion. Thus, in the end, principled bargaining falls into the familiar formalist trap of the infinite rule regress.<sup>95</sup> Principled bargainers are also encouraged to discover appropriate criteria by referring to norms they have used in similar circumstances in the past.<sup>96</sup> If each side comes from a different "tradition" and has done different things, however, or if one or the other now reasonably believes that its past behavior was in error, the theory of principled bargaining does not help. Suggesting that bargainers act like judges rather than advocates is also not useful, unless one is willing to suppose, as few are, that in most disputes there is only one right decision for a judge to make.<sup>97</sup>

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ing). Fairness as equal concessions has its defenders. See, e.g., Jules L. Coleman et al., *A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law*, 12 HARV. J.L. & PUB. POL'Y 639, 663 (1989) (under conditions of perfect information "rational individuals make equal relative concessions"); John E. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. U. L. REV. 750 (1964); John E. Coons, *Compromise as Precise Justice*, in COMPROMISE IN ETHICS, LAW AND POLITICS (J. Roland Pennock & John W. Chapman eds., 1979). David Gauthier has even named the principle at the root of the process, calling it the "Principle of Maximin (maximum-minimum) Relative Benefit." See DAVID GAUTHIER, *MORALS BY AGREEMENT* 154-55 (1986).

94. See FISHER & URY, *supra* note 21, at 93; *supra* text accompanying note 21. Perhaps principled bargaining means to resuscitate H.L.A. Hart's "rule of recognition," Dworkin's critique notwithstanding. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 39-45 (1977). For an interesting illustration of conflicting objective criteria, both of which are authoritative, see Takao Tanase, *The Management of Disputes: Automobile Accident Compensation in Japan*, 24 LAW & SOC'Y REV. 651, 682 (1990).

95. See DWORKIN, *supra* note 94, at 39-45; see also Luban, *supra* note 25, at 414 n.42 ("[O]bjective [criteria] must not [themselves] be . . . principles about which the parties are contesting, else agreement is hardly possible. Thus 'principled' bargaining actually evades principles rather than voicing them."). In the end, the absence of any reasonable basis to expect agreement at the level of meta-principle makes principled bargaining not about principle at all.

96. See FISHER & URY, *supra* note 21, at 88-89.

97. *Id.* at 93. But see DWORKIN, *supra* note 94, at 39-45. Principled bargainers are also encouraged to look forward, not backward, in choosing objective criteria, *id.* at 53-54, but often this will rule out fault as a factor in settlement. This might make sense in the managerial world of business, where getting beyond an immediate problem quickly and inexpensively may be the only or primary concern, but it does not make sense in the moral and political world of law, where assigning responsibility and meting out reward and punishment are also important. See *infra* notes 123-128 and accompanying text.

In principled bargaining, objective criteria are important because they enable bargainers to avoid contests of will, those wasteful and degrading ego spats that cause unnecessary conflict and delay, and leave parties with the sense that their claims have not been understood or respected. Like many things in bargaining, however, avoiding contests of will is good advice to a point, and in principled bargaining, the point is sometimes missed. Objective criteria, like any criteria, are open-ended and indeterminate, and parties must deduce and debate their relevance and meaning on a case-by-case basis. Even noncontroversial points that eventually are accepted may take time to be understood, and a bargainer's resolve in discussing or debating the points is frequently decisive in influencing the extent to which the points are recognized and accepted. In a significant sense then, objective criteria do not exist independently of will, and it is a mistake to think that bargainer resolve plays no role in principled (or any other kind of) bargaining. Some contests of will must always be fought, not for their own sake, but because some points are true and yet some bargainers will be slow or reluctant to accept them.<sup>98</sup>

By proposing a kind of bilateral, private adjudication as the proper understanding of cooperative bargaining, the theory of principled bargaining advances the idea of cooperation beyond the overly simple level of social style and explains the central role of authoritative substantive norms in determining the outcome of bargaining interactions. But for many who think that the resolution of differences from the perspective of individual, self-interested points of view (whether expressed as interests or positions) is destined to fail, principled bargaining's reluctance to jettison the adjudicatory model completely, and its incorporation of some features of adversary advocacy, prevent it from being the final word. This view requires a new orientation to bargaining, one that defines the bargaining task in terms of a mutual effort toward a common goal, and one that does not get sidetracked, however well-intended, into a destructive quest for correct answers to the question of whose substantive views are right and whose wrong. That is where the theory of problem-solving bargaining comes in.

### C. *Problem-Solving Bargaining*

Distancing itself explicitly from cordial bargaining, and appro-

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98. See White, *supra* note 78, at 117 (arguing that Fisher and Ury's suggestion that one can avoid contests of will "is at best naive and at worst misleading").

priating the methods of principled bargaining to its own different purposes, the theory of problem-solving bargaining adds another dimension to the argument for the efficacy of cooperative bargaining approaches.<sup>99</sup> Problem-solving bargaining is characterized by

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99. Carrie Menkel-Meadow's primer on problem-solving bargaining is the leading discussion of the method. See Menkel-Meadow, *supra* note 1. While Professor Menkel-Meadow has written a good deal more on the topic, see, e.g., Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905 [hereinafter Menkel-Meadow, *Strategies*]; Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485 (1985) [hereinafter Menkel-Meadow, *For and Against*]; Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 Mo. J. DISP. RESOL. 1, 31 [hereinafter Menkel-Meadow, *Transformation*]; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 50-55 (1985) [hereinafter Menkel-Meadow, *Portia*], little that is fundamental has changed. For that reason, and because her Problem Solving article is still the best statement of the theory, citations will be made to that work. For a discussion of problem solving's distancing itself from principled bargaining, see Menkel-Meadow, *supra* note 1, at 758-59 n.9. The terms "integrative" and "distributive" are also used to describe the difference between problem solving and positional bargaining. See GIFFORD, *supra* note 1, at 15.

More so than with principled bargaining, it will come as a surprise to many that problem solving is a new and distinctive approach. This claim derives much of its plausibility from the exaggerated description of adversarial bargaining with which problem solving is contrasted. Accord SILBEY & SARAT, *supra* note 23, at 98 n.71. For example, it is said that a problem-solving bargainer "articulates reasons why a particular solution is acceptable or unacceptable, rather than simply . . . [rejects] an offer or [makes] a concession." Menkel-Meadow, *supra* note 1, at 825. Now, while it undoubtedly happens that some bargainers only reject or concede, no one claims that this represents a particularly distinguished, or even typical illustration of adversarial bargaining. Take-it-or-leave-it bargaining, which is what refusing to discuss reasons amounts to, is generally regarded as bad technique, adversarial or otherwise. Menkel-Meadow's claim that the approach is widely used seems to rest principally on the popularity of Herb Cohen's book, HERB COHEN, *YOU CAN NEGOTIATE ANYTHING—HOW TO GET WHAT YOU WANT* (1980), which was first serialized in *Playboy* magazine, and Michael Meltsner and Philip Schrag's unfortunate work on hardball tactics for legal services lawyers, see MICHAEL MELTSNER & PHILIP SCHRAG, *PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION* ch. 13 (1974) [hereinafter MELTSNER & SCHRAG, *PUBLIC INTEREST ADVOCACY*]. The Cohen book is breezy and flip, but hardly mean-spirited, and while the Meltsner and Schrag work is occasionally nasty, it must be read against the backdrop of the early 1970s, when it was first published, see Michael Meltsner & Philip G. Schrag, *Negotiating Tactics for Legal Services Lawyers*, 7 CLEARINGHOUSE REV. 259 (1973) [hereinafter Meltsner & Schrag, *Tactics*], and the politically charged context in which it was debated and used, which Menkel-Meadow acknowledges, see Menkel-Meadow, *supra* note 1, at 779 n.107. Neither publication is a brief for "take-it-or-leave-it" bargaining, however, or a bargaining manual for much of the bar, legal services or otherwise, in the 1970s or now, and to attribute their occasional excesses to all of bargaining practice is not fair. For more representative descriptions of conventional bargaining methods, see KRITZER, *FORM OF NEGOTIATION*, *supra* note 7, at 12-16; Galanter, *Settlement Judge*, *supra* note 22. For a more representative bargaining manual, one that combines cooperative and competitive perspectives into a thoughtful and nonreductionist view of the bargaining process, see CHARLES B. CRAVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* (1986). The practice of comparing idealized manifestations of one bargaining approach with failures of another no doubt

the attempt to satisfy "real" needs,<sup>100</sup> the "underlying," "basic," or "actual" needs parties bring to negotiation, and not legal needs, which are the parties' real needs expressed in terms of money or goods.<sup>101</sup> Real needs are more complicated, diverse, and numerous than legal needs, less likely to be irreconcilably in conflict, and more likely to provide grounds for agreement.<sup>102</sup> A client's real needs are discovered through "searching" and "comprehensive lawyer-client dialogue" (e.g., "how would you like to see this all turn out?"; "what would you like to accomplish here?"; "why do you want to do that?").<sup>103</sup> An adverse party's real needs are discovered "primarily

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helps sharpen the differences between the two approaches, but sharpening differences does not always advance understanding, or help one to determine which approach is better. Exaggerated claims of novelty occur in scholarship, however, and they are not a reason to be distracted from the task of discovering what problem-solving theory has to offer.

100. See Menkel-Meadow, *supra* note 1, at 794 n.155. Problem-solving theory uses the language of "needs," but it is not clear what it means by this term. Cf. Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256, 257 n.8 (1989) ("It is not clear how, if at all, Fiss would differentiate 'beliefs' about what 'should' be done from 'preferences' and 'wants.'"); see also LUBAN, *supra* note 7, at 20 n.22 (discussing differences between "needs," "tastes," and "beliefs"); SILBEY & SARAT, *supra* note 23, at 94-100 (describing needs analysis' addition of relational and therapeutic perspectives to interest analysis); Galanter, *supra* note 23, at 68 (discussing the difficulty of distinguishing "authentic needs from inappropriate, illegitimate and improper ones"). Problem solvers do not literally need many of the things they are permitted to ask for in bargaining, in the sense that if they did not get them something drastic, disastrous, or fatal would happen. In fact, if problem solvers could ask for only those things required for subsistence, physical or psychological, a negotiation between two problem solvers would almost always leave items on the table. Yet, problem solvers are not supposed to do that. See Menkel-Meadow, *supra* note 1, at 760 n.15, 784 n.118, 811 n.220, 822. Problem-solving theory, therefore, must use the term "needs" in some more expansive sense than the literal one. While it does not capture it completely, the idea of "wants" seems to come closest to that sense. Cf. SILBEY & SARAT, *supra* note 23, at 93 ("[I]nterest based claims say 'I want it.'"). The right to bargain for what one "wants" is more difficult to justify, however, than the right to bargain for what one "needs." See Galanter, *supra* note 23, at 68; SILBEY & SARAT, *supra* note 23, at 113-20. This might be an instance of "persuasive definition," see CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* 81-110 (1944), substituting for argument. See also Brian Barty, *Priorities of the Selfgoulist*, TIMES LIT. SUPP., Feb. 5-11, 1988, at 140 ("We tend to think that needs possess a kind of peremptory status that mere desires lack: if you say you need something you seem to be presenting a weightier claim than if you say you want it."); Trubek, *supra* note 89, at 130-32 (critical legal sociology critique of needs discourse). To avoid confusion in discussing problem-solving theory, however, I will continue to use the term "needs."

101. See Menkel-Meadow, *supra* note 1, at 795.

102. *Id.*

103. *Id.* at 801-03. By describing the process of discovering needs solely in terms of asking clients what they want, problem-solving theory adopts a form of the conservative legal theory premise that expressed preferences are sacrosanct, and are therefore beyond investigation. Because the formation of preferences is influenced by extant social structures, however, and because social structures do not operate equally in everyone's interests, expressed preferences are sometimes a poor representation of an individual's

by asking one's client," but also by making stereotypical assumptions, posing direct questions, making principled offers, and disclosing information, all of which encourage or provoke equivalent action by and thus information about the other side.<sup>104</sup>

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true interests. Thus, this conservative legal theory premise is sometimes just wrong. See Rhode, *supra* note 8, at 629; West, *supra* note 8, at 670-75. Moreover, the view that preferences are beyond investigation entails the additional view that they are also beyond comparison, the famous impossibility of interpersonal comparisons of utility, see LIONEL C. ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 138-54 (3d ed. 1984), and this view is incompatible with problem solving's requirement that a bargainer understand empathically the bargaining relationship's joint needs. In effect, problem solving's directive to take a client's preferences at face value but to investigate those of an adversary, seems to ask a lawyer to behave more empathically with an adversary than a client, but it cannot mean to say this. Problem-solving theory must discuss how client needs are probed, interpreted, analyzed, and tested, rather than just inquired into, if it is to sort out these contradictory messages and escape this uneasy alliance with conservative legal theory. For a description of a familiar method of doing this, and the suggestion of a new and different one, see West, *supra* note 8, at 675-88. For those who find the approach useful, the most recent discussion of "client-centered lawyering" also describes a range of techniques for use in the interest-investigation task. DAVID BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 310-13, 322-31, 334-35, 345-46, 351-52, 356-59 (1991).

For a more detailed illustration of the needs investigation process in operation, see GIFFORD, *supra* note 1, at 47-48. For Gifford, the term "real needs" (or "interests" in principled bargaining) appears to be a synonym for "reasons," and the suggestion that bargainers discover their clients' real needs is seen as advice to understand a client's reasons for expressing particular positions. This seems a more accurate way to put the point. Like principled bargaining, see *supra* notes 87-89 and accompanying text, problem solving is more hopeful about the prospect of identifying client needs at the front end of the bargaining interaction than the nature of such needs would seem to warrant. See Galanter, *supra* note 23, at 68 ("We are not told how the problem-solving negotiator is going to select . . . authentic needs from inappropriate, illegitimate, and improper ones."). Problem solvers must know what they need before beginning to bargain, yet this is almost impossible to do. What one needs is partly a function of what one can get (even when one does not want "everything," knowing the most another will give is helpful in figuring out what a claim is worth), and what one can get cannot be known fully before bargaining. See *supra* notes 88-89 and accompanying text. The identification of needs must proceed simultaneously and interdependently with bargaining, not separately and in sequence, and a theory of bargaining must explain how this is done. Gifford seems to recognize this problem, but does not say how it is overcome. See GIFFORD, *supra* note 1, at 6-7. Menkel-Meadow acknowledges that "needs may change over the long run" but does not say anything more about the point, see Menkel-Meadow, *supra* note 1, at 802, and she also states that "[i]n order to engage in problem-solving negotiation the lawyer must first ascertain her clients' underlying needs or objectives." *Id.* at 804 (emphasis added). Proponents of problem solving often charge adversarial bargaining with being overly linear, see *id.* at 767-71, 793-94, but to assume that needs can be identified fully at the outset of bargaining is to introduce a different but equally objectionable kind of linearity into the conceptual arena. Menkel-Meadow may acknowledge this problem when she says that it is possible to meet needs even when they are only "perceived" or "incomplete," see *id.* at 821 n.262, but if so, it is not clear how this can be reconciled with the directive to satisfy "real" needs.

104. Menkel-Meadow, *supra* note 1, at 804, 818-29. Information sharing is not "totally uninhibited" in problem solving, however, as only information that can be received,

Problem solvers operate "on a multi-dimensional field,"<sup>105</sup> in which they generate multiple solutions to the bargaining problem, consider the solutions simultaneously, and do not get locked into a pattern of argumentation and concession over single demands.<sup>106</sup> They "articulat[e] reasons why a particular solution is acceptable or unacceptable, rather than simply reject[] an offer or make a concession."<sup>107</sup> Giving reasons focuses attention on the process of "solving the problem . . . rather than winning an argument . . . [and] may cause negotiators to see still other solutions . . . ."<sup>108</sup> Problem solvers sometimes "focus on the legal merits as a justification for a particular proposal,"<sup>109</sup> but when the parties "have widely divergent views," one of the "primary advantages" of problem solving "is that no judgment need be made about whose argument is right [and whose] . . . wrong."<sup>110</sup>

When party needs are not sufficiently complementary, and the bargaining pie not naturally divisible, problem solvers manipulate the material available for distribution by "exploring shared interests, . . . exploiting value differences, . . . looking to third parties, . . . sharing, . . . aggregating or disaggregating [resources], . . . seeking substitute goods, [and] . . . exploring long- and short-term val-

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understood, and related concretely to the problem is sought or provided, *id.* at 822-23, though it is not clear who makes these judgments, or on the basis of what evidence or standards. While also not discussed, perhaps so as not to undercut the claim that problem solving does not require bargainers to be "nice," *id.* at 827, it would seem that a cordial and respectful interactional style, of the type rated highly by Williams, *see supra* note 39 and accompanying text, would help encourage disclosure and exchange of information about needs, and thus be an important part of the problem-solving approach.

A program for identifying adverse bargainer needs must also deal with the problem of deception. Even in problem-solving bargaining it can be to a bargainer's advantage to fool the other side, *see* Wetlaufer, *supra* note 11, at 1226-30. As a consequence, problem solvers must know how to separate the genuine from the manufactured in proffers of information about the other bargainer's needs. Menkel-Meadow makes a brief acknowledgement of this problem at the end of her discussion, *see* Menkel-Meadow, *supra* note 1, at 833 n.306, but she does not discuss it, and seems to agree that problem-solving theory does not provide much help in this regard. In fact, problem-solving theory's assumption that bargainers will be candid because it is in their interest to be so, *id.* at 837 n.326, makes the question of how to recognize and deal with deception largely irrelevant. There is nothing incoherent about circumspect or suspicious problem solving, however, and though analytically less distinctive, it is just such a variation of the theory that is needed to explain how one determines when an unwilling bargainer has provided the accurate information needed to make problem solving work.

105. Menkel-Meadow, *supra* note 1, at 822.

106. *Id.*

107. *Id.* at 825.

108. *Id.*

109. *Id.* at 825.

110. *Id.* at 826.

ues,"<sup>111</sup> so that the final agreement can include something for everyone. Resources are distributed between the parties rather than left on the table or wasted in needless wrangling, and distributions are improved until the most efficient solution is achieved.<sup>112</sup> Problem solving is said to be faster and more efficient than adversarial (or positional) bargaining, to reach more satisfying and thus more lasting solutions, and to be more straightforward and pleasant. When real needs are known, a comprehensive set of solutions identified, and battles for competitive advantage avoided, bargaining becomes a process of matching means with ends. This can be complicated, but when bargainers work diligently and in their joint interests (and even when they do not),<sup>113</sup> they ultimately can make such matches.

At first glance, it might appear that problem solving is a not so very different variation on the theme of principled bargaining, with real needs playing the part of interests and legal needs the part of positions. The two theories share the same faith in the absence of genuine conflict in the world and believe that adversarial position-taking is the root of all bargaining evil. Both theories also assume that interests underlying positions are invariably compatible, at least in some of their manifestations, and that sufficiently clever bargainers can always define the bargaining problem to provide for a distribution that will leave everyone contented and compensated; that skillful bargaining is just a matter of breaking analytical, emotional, and intellectual log-jams through acts of the imagination. This is a lot for the two to hold in common, and perhaps it is enough to establish identity rather than overlap. But there are also differences between the two that in the end may turn out to be as important, if not more important, than their similarities.

The key to the differences lies in the contrasting metaphors the two theories use to identify the essential character of bargaining. Principled bargaining is grounded in the belief that determinative principle can ultimately identify the right solution to any dispute. In other words, that there is always a background belief structure of regulatory norms—legal, ethical, and moral—which participating

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111. *Id.* at 813.

112. *Id.* at 822. Problem-solving theory also uses the concept of Pareto optimality. See *id.* at 760 n.15, 789 n.128, 811 n.220.

113. See *id.* at 822 ("Even a single problem solver can propose alternative ways of measuring liability that may eventually be successful, if she has accurately determined the other party's needs."); *id.* at 838 ("A problem-solving conception need not be abandoned simply because both parties don't use the same negotiation behaviors."); *id.* at 838 n.328 ("It doesn't take 'two to tango.'").



bargainers accept as authoritative, and from which correct answers to bargaining problems can be deduced. Finding the right norms ("objective criteria") and deducing correct answers can be complicated and difficult tasks, in the performance of which reasonable persons can disagree, and working through these disagreements can require considerable skill. But principles come first, and they, not bargainers, are the most important variable in the determination of bargaining outcome.

For problem-solving bargaining, on the other hand, the bargainer is most important. Norms can be useful tools for finding solutions, but only as an adjunct to bargainer maneuvering; norms in themselves are not dispositive. The bargainers' willingness to treat the bargaining task as a joint venture, in which both sides' shared interest in reaching an agreed-upon solution outweighs each particular side's individual interest in a most favorable solution, is the principal determinant of outcome. Parties working together, creatively, and in their mutual interest, on a problem that vexes them both, literally "solving a problem," makes settlement possible and defines its contours. Bargainer open-mindedness, inventiveness, flexibility, and evenhandedness are the important influences on this process, and while principle can play a role, it is not inevitable that it do so. Principled bargaining also emphasizes the importance of joint action,<sup>114</sup> but it is the *raison d'être* of problem solving, an end in itself, and not just a felicitous means for discovering correct principles.

Problem solving ultimately is based on a managerial view of the bargaining world. Unlike principled bargaining, which is essentially adjudicatory,<sup>115</sup> it asks parties to treat bargaining as a process of looking into the future to determine how best to use resources efficiently. It asks "where do we go from here?" or "how do we get out of this predicament?" and is less interested than is principled bargaining in questions of fault or responsibility, or in discussions of how the present state of affairs came about.<sup>116</sup> If principled bargaining resolves political questions by recourse to status quo con-

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114. See FISHER & URY, *supra* note 21, at 73-79.

115. Williams disagrees, seeing principled bargaining as "predominantly problem-solving" in its approach. See WILLIAMS, *supra* note 1, at 76.

116. See SILBEY & SARAT, *supra* note 23, at 27-31 (developing consensus about future conduct rather than finding fault is at the base of problem solving); see also Lerman, *supra* note 25, at 86-87 (discussing the need to take blameworthiness into account). Often, fault is the only thing about which one can be certain. Accurate predictions about future consequences of present choices are far more difficult to make.

servative<sup>117</sup> norms, problem-solving bargaining forgoes political discussion altogether. This is not to say that it has no politics—suppressing political inquiry is itself a political agenda—but just that problem-solving theory does not view explicit discussion of the fairness, justice, and legitimacy of outcomes as a necessary part of the bargaining conversation. Rather, bargaining is a technical process concerned with tactics, techniques, and maneuvers, and not with the direct or explicit discussion of substantive norms, with the possible exception of the norm of efficiency.<sup>118</sup>

117. "Conservative" here is not used in its organized politics sense. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 542 n.89 (1988).

118. Occasionally, problem-solving theory acknowledges the justice issue in bargaining and makes suggestions for dealing with it. For example, Menkel-Meadow expresses the hope that justice will take care of itself in the needs ascertainment dialogue between lawyer and client. She predicts that doing justice will be one of the client's needs, that lawyer and client will agree about what justice requires, and that this agreement, in turn, will match the views of the adversary. See Menkel-Meadow, *supra* note 1, at 813-17. If all of this does not happen, she agrees that "[t]here is nothing in the problem-solving model which necessarily compels parties to consider the justice of their solutions . . ." *Id.* at 817. While she believes that the "lawyer and client should hold each other in some kind of moral check," she does "not supply any answers . . . for what the lawyer and client ought not to do." *Id.* at 815 n.239. She also does not discuss the separate problem created when parties to a negotiation collude against the system and resolve the bargaining problem in a manner inconsistent with positive law. Cf. Fiss, *supra* note 25, at 1085-86 ("when . . . [p]arties settle [while leaving justice undone], society gets less than what appears, and for a price it does not know it is paying"); see also Peter C. Hoffer, *Honor and the Roots of American Litigiousness*, 33 AM. J. LEGAL HIST. 295, 297-98, 302, 314, 317-19 (1989) ("The litigant sues for us all." *Id.* at 298.); Schuck, *supra* note 22, at 337 ("We cannot assume that a settlement is legitimate simply because the parties' lawyers voluntarily subscribe to it.").

Problem solvers, in Menkel-Meadow's view, think that efficient solutions are the best solutions. See Menkel-Meadow, *supra* note 1, at 813. They want to "[put] aside . . . philosophical debates about the appropriate measures of justness [sic] or fairness," *id.* at 815, and see it as unfortunate when "one is simply thrown back on moral or political philosophies of justice," *id.* at 835-36. They are self-described utilitarians, *id.* at 838-39, but seemingly with a constricted sense of the limits of utilitarianism as a theory of justice. See generally LUBAN, *supra* note 7, at 34-35 (discussing the utilitarian-based participant satisfaction rationale of alternative dispute settlement); SAMUEL SCHEFFLER, *CONSEQUENTIALISM AND ITS CRITICS* (1988) (offering justice as an alternative to utilitarian thought); J. J. C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* (1973) (critique of utilitarianism); *UTILITARIANISM AND BEYOND* (Amartya Sen & Bernard Williams eds., 1982) (discussing criticism of utilitarianism and suggesting possible alternatives); Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1085-91 (1979) (discussing the need to insert moral values into the utilitarian calculus). There are refined versions of utilitarian theory, of course, which attempt to meet the objections leveled at their first generation ancestors, see SCHEFFLER, *supra*, at 1-13; David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 440-43 (1990) [hereinafter Luban, *Freedom and Constraint*], but there is no indication, at least in Menkel-Meadow's discussion, that problem-solving theory wants to rely on these refinements. With the exception of a quotation from Mill extolling the virtues of noncosmic moral thinking, none of the citations Menkel-Meadow

While problem solving developed last, and was able to learn from and build on the cordial and principled theories, it does not yet make a knock-down argument for the superiority of cooperative bargaining.<sup>119</sup> For example, its principal tactical contribution, the claim that zero-sum bargaining can be made positive-sum (or, to use

vides could plausibly be thought of as referring to utilitarian philosophers. Ironically, Jürgen Habermas's decidedly nonutilitarian theory of "discourse ethics," with its requirement of general and reciprocal perspective taking, seems more compatible with the problem-solving world view than utilitarian equivalents. See JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 43-109 (1990).

This is not to single out Menkel-Meadow. Her statement to the contrary notwithstanding, see Menkel-Meadow, *supra*, at 815 n.237, there is little philosophically sophisticated discussion of the topic of justice anywhere in the bargaining theory literature. This should not surprise us, however, for as John Roemer has pointed out, "bargaining theory . . . is informationally too impoverished to capture the important issues in distributive justice." See Roemer, *supra* note 67, at 90, 97-102. For examples of equally casual treatments, see MURNIGHAN, *supra* note 16, at 180-202; HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 267-69, 288-99 (1982). Even Lax and Sebenius's excellent book fails in this regard. See LAX & SEBENNIUS, *supra* note 15, at 150-53. A notable exception is David Luban. See generally LUBAN, *supra* note 7; Luban, *supra* note 25. See also Wetlaufer, *supra* note 11, at 1221-23 n.3 (for some writers "there is just not much to be said about [negotiation] ethics from [their] perspective," listing Howard Raiffa as one example). But see Coleman et al., *supra* note 93, at 669-70 ("Concession or bargaining theory . . . makes the division of the gains from contracting . . . a matter of rationality.").

119. As before, see *supra* note 78, I will limit discussion of the difficulties with problem-solving theory to a few illustrative comments. For example, while the theory is characterized as much by its definition of the appropriate ends of bargaining as by its views on effective means, see Menkel-Meadow, *supra* note 1, at 801-16, for the most part I will limit my comments to its suggestions about means. David Luban has analyzed the communitarian social theory at the root of problem solving's conception of ends. He suggests that the interest in "transforming the disputants and their mutual relationships so that they can come to acknowledge each other's point of view and common humanity," see LUBAN, *supra* note 7, at 50-55, "seems to place a higher value on social order and conviviality than on fairness," *id.* at 50, and that this increases the risk "that people can become reconciled [to] morally outrageous relationships." *Id.* at 53. (Luban's view may be different now that he has made a rule-consequentialist version of role morality, which "takes the social self as basic," the "default position." See Luban, *Freedom and Constraint*, *supra* note 118, at 443-52.) See also SILBEY & SARAT, *supra* note 23, at 26-31 (describing communitarian social vision at the base of the problem-solving world view); Dworkin, *supra* note 89, at 479-99 (critique of communitarian social theory). Luban also suspects that one form of reconciliation urged by problem-solving theory (reconciliation as solidarity) runs afoul of Kant and Rawls's publicity principle, and he concludes that the Kantian notion of respect "provides a better reading of what reconciliation is all about." See LUBAN, *supra* note 7, at 54. The image at the base of problem solving seems similar to Milan Kundera's "great fugue," used (in *The Book of Laughter and Forgetting*) to describe the ideal collectivist society, in which each individual is a single note, related to the other notes and the work as a whole in a perfectly harmonious way. Kronman, *supra* note 13, at 30. "In such a society," Professor Kronman points out, "there could, by definition, be no conflict because each person would see his own interests as identical to the interests of everyone else, all being merged to a single, indivisible melody . . ." *Id.* at 30. Professor Kronman calls this vision a "monstrosity," see *id.* at 31, and there is much to be said for that characterization. See also SILBEY & SARAT, *supra* note 23, at 105-

the popular terminology, win-lose made win-win<sup>120</sup>) by expanding the size of the bargaining pie, is based on analytical sleight of hand as much as insight. The strategy of expanding the pie is relatively straightforward. To soften the harsh and obvious effects of having to compromise interests in a single item, parties should add another item (or other items) to the hopper, one that means little to one side but a lot to the other (an apology is a common example), and then trade the items evenly.<sup>121</sup> When each side gets something, each will

06 ("Contemporary dispute resolution promises to reconceptualize the juridical subject to conform to the logic and insight of the human sciences.").

The response that problem-solving methods are preferable because they result in greater participant satisfaction with bargained-for results, by providing greater flexibility in and participant control over the bargaining process (see ERLANGER et al., *supra* note 6, at 21-27, 34-40; Galanter, *supra* note 23, at 56-59, for a summary of the various arguments to this effect), does not meet this criticism unless problem-solving theory can show how feelings of satisfaction and perceptions of flexibility and control are warranted. It is not clear even that informal processes are seen as more satisfying. See ERLANGER et al., *supra* note 6, at 11; E. ALLAN LIND ET AL., *THE PERCEPTION OF JUSTICE: TORT LITIGANTS' VIEWS OF TRIAL, COURT-ANNEXED ARBITRATION, AND JUDICIAL SETTLEMENT CONFERENCES 61-74* (Rand Inst. for Civil Justice, 1989) (There is an "absence of any substantial connection between perceived justice or satisfaction and perceptions of participation and informality [and this] is especially noteworthy in light of the prominence given to these factors in critiques of traditional procedures." *Id.* at 66-67.). Participants walk away happy from bad deals as well as good ones, because they do not know how badly (in the comparative sense) they have done, and the illusion of control works just as effectively as real control as long as a person's ignorance is complete. See LUBAN, *supra* note 7, at 37-40 (discussing "adaptive preference formation"); see also Galanter, *supra* note 23, at 59-62 (discussing the difficulties in estimating the accuracy of arguments that informal processes provide higher quality resolutions); *id.* at 64-65 ("[T]he existence of a general preference for settlement does not mean that the pursuit of settlement in any particular instance is an informed and uncoerced expression of such a preference.").

For example, how many of the bargainers in Williams's simulated negotiation, settling for between \$15,000 and \$25,000, would have been satisfied with their efforts if they had been told that the average settlement for the problem was \$37,500, that more than half of the bargainers settled for more than \$50,000, two for more than \$80,000, and one for \$95,000? See WILLIAMS, *supra* note 1, at 6-7; see also Hillary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1676 (1990) ("The fact that someone feels satisfied with a situation means little if the person has no information or false information concerning either her own capacities or the existence of available alternatives to her present way of life."). In real life, of course, it is the absence of such information that makes even bad settlements stable. Stability is not justice, and ignorance is not bliss, however, no matter how many people say so, and being reconciled to a bad deal is often worse than not being reconciled at all. Federal judicial policy, however, may be to the contrary. See *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986) (It is a "familiar axiom that a bad settlement is almost always better than a good trial.").

120. See Wetlauffer, *supra* note 11, at 1228 n.22 (describing the concept of "win-win" bargaining). One is reminded of the Dodo in Alice in Wonderland: "Everybody has won and all must have prizes." LEWIS CARROLL, *THE ANNOTATED ALICE* 49 (1960).

121. See Menkel-Meadow, *supra* note 1, at 771-72, 800 n.171. It appears that lawyers

have won, or at least believe it has won. Even if this kind of maneuvering would fool anyone, though, which is doubtful, it is a mistake to think that it will reduce zero-sum bargaining. The party uninterested in the newly added item will still value it as a bargaining chip, and will want (or at least be entitled to want) something for playing it. One who agrees to apologize, for example, will want more than the item previously on the table, to which she had an independent claim, because the new proposal, apology included, is worth more than its pre-apology counterpart. The net effect of expanding the bargaining pie is to introduce new items to be bargained over, and this can increase zero-sum bargaining as frequently as it can reduce it.<sup>122</sup>

Similarly, the claim that bargainers should be rational and efficient resource users by treating agreements as tentative until Pareto optimal, is attractive in the abstract, but not realistic in practice. No bargainer wants to waste money or any other resource by leaving it on the table. But if you and I have just worked out a draft agreement, based in major part on representations about needs and wants each of us has made to the other, any attempt to improve upon that agreement risks throwing those representations into

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do not use this maneuver often. See KRITZER, *supra* note 1, at 46-47 ("very few lawyers reported offers or demands centered on simple acknowledgments of interpersonal obligations").

122. Menkel-Meadow indirectly responds to this criticism by claiming that it is unlikely "that the parties [will] have absolutely competitive preferences on all the issues so that trade-offs will not be possible." Menkel-Meadow, *supra* note 1, at 787 n.123. For a related discussion of the "Homans principle," see *id.* at 800 n.171 ("[B]ecause people have different preferences or values it is possible to increase the number of outcomes in situations where several differentially valued items are at stake."). But while it may be true that parties will value bargained-for items in widely varying ways, there is no reason to believe that they will want to give any of them away—nor should they. If they have valid claims to items on the table, supported by reasons that have not been rebutted, the advice that they manufacture new items to trade, rather than argue out their substantive differences, asks them to engage in an elaborate charade for the purpose of making a face saving retreat. Unless good reasons and authenticity are to be ruled out of bounds in bargaining, however, bargainers are surely entitled to refuse to dissemble in this way. But if that is so, then they will have to bargain over the new items with all of the honesty and enthusiasm of the old, and the sum total of such bargaining is just as likely to produce more competition as it is to produce less. It is ironic that problem solving, which so values authenticity and joint action, should indirectly encourage dissembling. Like principled bargaining, see *supra* note 86 and accompanying text, it is not always easy to be faithful to all parts of the problem-solving program. For an excellent discussion of the importance of honesty and candor in lawyer-client and lawyer-lawyer dealing, see Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1031-33, 1043, 1046 (1981). For a defense stronger than Menkel-Meadow's of the tactic of expanding the bargaining pie to facilitate trade-offs, though one that ultimately is subject to the above criticisms as well, see MURNICHAN, *supra* note 16, at 167-79.

doubt. If I acknowledge that there are other arrangements that would make me as happy or happier, I may undercut some of the things I have just said in justifying our agreement. If I go back on what I have said, however, you will wonder about the rest of my statements and doubt the wisdom of our agreement, which you would now realize was based on incomplete and inaccurate information about my needs. This doubt would place the draft agreement in jeopardy and make settlement itself less likely. Only the rare bargainer will take the risk of losing an agreement for the chance of making it marginally better, particularly if there is no reason to believe that representations made the second time around will be more trustworthy than the first. The suggestion that agreements be made Pareto optimal is based on the psychologically suspect premise that bargaining conversation can proceed without commitment, and that bargainers can play with a bargaining problem much as they would with a problem of mathematics. This premise is out of place in the nonplayful world of real life bargaining.<sup>123</sup>

There is also a trace of nihilism in the problem-solving world view that raises questions about the method's fit within a system of law. Problem solving is committed to the discussion of substantive legal standards to the extent such discussion can proceed agreeably; but when it does not, problem solvers are free to ignore the issue of whose substantive arguments are right and whose are wrong. This is "one of the primary advantages" of problem solving.<sup>124</sup> Discussion does not proceed agreeably when the parties "have widely divergent views" on the merits.<sup>125</sup> But if bargainers are free to ignore legal standards whenever views differ widely, they will be free to ignore legal standards much of the time. Cases in which both sides interpret the law in the same way do not usually generate bargaining problems. It is difficult to know, of course, exactly how determinate legal argument can ever be.<sup>126</sup> But by eschewing law and legal prin-

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123. The suggestion that agreements be made Pareto optimal before being finalized is most often associated with the economics or mathematics branches of bargaining theory. See, e.g., RAIFFA, *supra* note 118, at 158-64.

124. See Menkel-Meadow, *supra* note 1, at 826.

125. *Id.*

126. The level of discourse at which the indeterminacy problem arises is considerably more abstract than that reached in most bargaining conversations, and even then, the case for indeterminacy is based more on the nature of law than on characteristics or perceptions of those making legal argument. See Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 227-35 (1986); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 351-54 (1973); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 13-14 (1984). But see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 258 (1987) (Lawyers often can predict how a judge

principle whenever they might introduce friction into the bargaining relationship, problem solvers adopt a view of argument as impolite rather than indeterminate, and in the process distort both argument's nature and its purpose. They see conversion and capitulation, rather than learning and doubt, as argument's possible outcomes, and believe that for argument to succeed, one, but not both, of the parties must alter all (not part) of her views.<sup>127</sup>

Whatever the outcome of the debate about indeterminacy, reconciling conflicting legal claims—or at least appearing to—will continue to be indispensable to dispute settlement, principally because legal disputes, at their core, are about different views of what the law requires. Maneuvering around or finessing such differences may suppress disputes for a time, but it will not resolve them. Problem solving's real gripe is probably with the belligerent and hyperbolic style used by many lawyers in making legal argument,<sup>128</sup> and not with argument itself. This is a different problem, however, than the one it emphasizes, and one that calls for remedies other than avoidance.

Finally, there is something disconcerting about the evidence marshalled in support of the problem solving (and, for that matter, principled) view. Because problem solvers criticize theories of adversarial or positional bargaining for their lack of empirical grounding,<sup>129</sup> one would expect problem solving to have emerged

will decide or what arguments will convince another lawyer; the justification of the legal order is indeterminate, the regularities of legal practice are not.); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 284 (1989) (“[M]oderate indeterminacy, even if true, has at most modest and not devastating consequences for political legitimacy and kindred concepts . . . . [A]rguments for radical indeterminacy fail.”); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 478-99 (1990) (“From the practicing lawyer’s perspective, the law is not radically indeterminate[;]” nevertheless, “legal realism substantially undermines the normative foundation” of the command to represent clients’ interests “within the bounds of law.” *Id.* at 496, 497.). Sometimes even those convinced by the critique of indeterminacy acknowledge that predicting legal outcome is possible, though they disagree about the type and nature of the predictors. See Anthony D’Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 179-88 (1990).

127. Principled bargaining, perhaps because of its greater affinity for principled disagreement, seems to understand these points. See FISHER & BROWN, *supra* note 27, at 11-12. Stuart Hampshire argues that “correctness” is a defining quality of thought, so that not to be concerned with correctness is to be thoughtless. See STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 38-39 (1990). Luban’s discussion of the “informational poverty” of bargaining also makes a strong case for the need to base bargaining outcome on principle and not just strategy. See LUBAN, *supra* note 7, at 19-22; see also Lesnick, *supra* note 9, at 442-54 (skeptical and thoughtful discussion of the possibility of argument being a “transformative experience,” and “invitation” to proceed in another way).

128. See Menkel-Meadow, *supra* note 1, at 775-78; see also *infra* notes 248-249 and accompanying text.

129. See Menkel-Meadow, *supra* note 1, at 766-67.

ineluctably from the carefully documented nature of the bargaining process. Yet, aesthetic arguments aside (e.g., problem solvers seem to think that disagreement is unpleasant, and to provoke it is tacky<sup>130</sup>), the case for problem solving is supported by a series of Jack Sprat hypotheticals, in which the material bargained over is always divisible by two, each half of which, fortuitously, is attractive to a different side. Problem solvers live in a world in which half of the people want cake and the other half frosting,<sup>131</sup> half orange and the other half peel,<sup>132</sup> or half mountains and the other half ocean (where there is an ocean resort next to the mountains).<sup>133</sup> This is not always a familiar world. These examples are intended only to illustrate a point, of course (that because bargainers do not invariably value things in the same way, items are sometimes naturally divisible to both parties' individual satisfaction), and in that regard their simplistic, catchy, and nonlegal nature may help. But the point having been made, more realistic examples are called for to show the practical force of this problem-solving insight. Realistic examples are in short supply, however, and when they do appear their complicating features are not discussed.<sup>134</sup> Problem solvers, like proponents of other bargaining theories, cooperative and adver-

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130. This is never said directly, of course, but I believe it is a fair interpretation of Menkel-Meadow's discussion of the "unproductive competition" produced by positional bargaining. See *id.* at 775-83.

131. *Id.* at 771. Cake does heavy duty for cooperative bargaining theory. Menkel-Meadow uses it to illustrate the role of complementary interests in dividing bargaining stakes, and principled bargaining uses it to illustrate the role of fair procedures. See *supra* note 71. At least Menkel-Meadow does not say to bargainers as a class "let them eat cake." Some get only frosting. For the economic perspective on cake, see Katz, *supra* note 7, at 232-33.

132. Menkel-Meadow, *supra* note 1, at 771 n.70.

133. *Id.* at 799-800.

134. See, e.g., *id.* at 772-75. In Menkel-Meadow's extensive discussion of the James case (perhaps the "Brown" case in her version, though it is not clear because she uses both names, see *id.* at 772 n.75), the problem-solving remedy would require Mrs. Brown to remain in a relationship with an automobile dealer who has been unwilling or unable (the problem suggests that either explanation is equally plausible) to fix her car for several months, costing Mrs. Brown her job, peace of mind, and most of her discretionary income. The problem of whether Mrs. Brown can trust Snead Motors (or Stead, again depending on the version of the problem) to start doing things correctly, all of the evidence to the contrary notwithstanding, should seem substantial to anyone familiar with the case. And the advantages of cutting Mrs. Brown's losses by making a cash settlement with Snead should seem worthy of serious consideration. But Professor Menkel-Meadow relegates these issues to a single sentence in a footnote, at the end of a three page discussion of problem-solving remedies, in which she acknowledges that "it is possible, of course, that the parties would prefer not to deal with each other . . ." *Id.* at 772-75. Amen! See also KRITZER, *supra* note 1, at 43 (In some cases where nonmonetary remedies are available, lawyers and litigants do not want them "because they do not want to have an ongoing relationship with someone who has forced them into court.").



sarial alike, seem committed as much for reasons of taste as for what the evidence requires.

In the end, problem solving, along with the other cooperative theories, is based on the belief that avoiding conflict is the key to effective bargaining.<sup>135</sup> Unlike cordial bargaining, it recognizes that friendliness alone will not do this,<sup>136</sup> and unlike principled bargaining, it recognizes that principles often will come up short. But its alternative, to conceive of the bargaining task as a form of joint venture in which bargainers work together to crack puzzles that trouble them both, creates new difficulties which, in some ways, make the argument for cooperative bargaining less persuasive than the case already in place. This is largely because the theory's over-arching, explanatory metaphor, that of problem solving, does not always work. Generic problem solving, the social and work world phenomenon from which the theory draws much of its content and evocative appeal, involves voluntary relationships, undertaken by persons genuinely united around common goals, working from shared (and often mutually prepared) information bases, but blocked as to means. The purpose of problem solving is to invent new paths through analytical thickets, to propose alternate definitions of operative problems, to reconfigure fuzzy data, and to achieve common goals where the issue of commonality and the definition of goals are not in dispute.

But bargaining, particularly the dispute settlement variety, is less single-minded and harmonious than this. It is voluntary only in the sense that it is the best of a bad lot of choices one would not have chosen if one had been given a true choice, and unified in a common goal only in the sense that parties may have interests that overlap or dovetail and then again, they may not. Sometimes the joint interest of reaching an agreement outweighs individual interests in reaching different particular agreements, but this is true only some of the time, and the question of whether it is true in any given

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135. Ironically, this is the converse of the mistake made by adversarial bargaining theory. Adversarial bargaining often inflates differences to create conflicts, perhaps so that bargainers will be motivated at least to discuss the differences. Some need to feel angry to express pique. See Marvin W. Mindes & Alan C. Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 1982 AM. B. FOUND. RES. J. 177, 221 ("rather than being aggressive because they are angry, lawyers may be angry in order to be aggressive . . ."). On the other hand, cooperative bargaining minimizes differences to deny conflict, perhaps so that the disputes will go away and bargaining (accommodation, compromise) will be unnecessary. Each conception distorts the nature and extent of the disagreement, albeit in opposite ways, and makes the same mistake of having the parties solve the wrong problem.

136. See Menkel-Meadow, *supra* note 1, at 827.

instance is always answered from the selfish (in a nonpejorative sense) perspective of the individual bargainer, not that of the bargaining relationship. The assumptions generic problem solving takes for granted are too optimistic for dispute bargaining most of the time. It is not that dispute bargaining does not involve problem solving, for it almost always does. It is just that the metaphor of problem solving, standing alone, is too limited to capture the complexity of the dispute bargaining relationship.

While the foregoing arguments for cordial, principled, and problem-solving bargaining do not always work, this is not a reason to reject cooperative bargaining approaches generally. The case for cooperative bargaining is analytically and intuitively appealing. It is believable, for example, that competition polarizes relationships, wastes resources, and, as often as not, results in bad settlements or needless deadlock. There is also something intrinsically sensible about the claim that bargaining for mutual benefit, based on accurate information and principle, in a friendly and empathic manner, would be better. Given a choice, who seriously would prefer a system based on deception, arbitrariness, belligerence, and greed? One would like and expect to agree with the case for cooperation, therefore, but in the legal literature the case is not yet fully convincing.<sup>137</sup> The reasons, I believe, are that legal commentators have adopted too narrow a frame of reference, and have not taken sufficient account of the role of self-interest in discussing the choice of a bargaining approach. Only when bargaining is examined from the perspective of an entire career rather than a single negotiation, and on the basis of an analysis of self-interested trading in addition to the uses made of cordial, principled, and problem-solving methods, will it be clear why bargainers are better off cooperating with one another than competing for zero-sum prizes. Nonlegal scholarship can be helpful here.

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137. Lack of persuasiveness notwithstanding, these arguments are taken seriously in large domains of legal scholarship, and even more so in legal education. They are cited frequently in coursebooks as authoritative, *see, e.g.*, GIFFORD, *supra* note 1, at 32, 48, 50-51, 55, 59, 69, 92-95, 110, 113, 152-52, 158; STEPHEN S. GOLDBERG ET AL., *DISPUTE RESOLUTION*, 19-22, 49-60, 63 (1985); MURRAY et al., *supra* note 42, at 77-80, 82-89, 96-101, 111-13; LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS*, 38-45, 61-63, 112-14, 121-27, 129, 131-34, 138-40, 162-75, 180, 192, 195 (1987), and form the basis of widely offered courses of instruction, for both law students and lawyers, *see, e.g.*, Galanter, *Deals, supra* note 22, at 271, 275; Robert B. Moberly, *A Pedagogy for Negotiation*, 34 *J. LEGAL EDUC.* 315, 316, 322 (1984); Jacqueline M. Nolan-Haley & Maria R. Volpe, *Teaching Mediation As a Lawyering Role*, 39 *J. LEGAL EDUC.* 571, 575 (1989).

### D. Coordinated Bargaining

The question of whether rational bargainers should choose competitive or cooperative strategies has been a subject of study in the game theoretic branch of mathematical science since the 1950s. Recent work in perhaps the most well-known part of this subject, that based on the formal problem of the "prisoner's dilemma,"<sup>138</sup> lends support to the conclusion that, under conditions approximated in legal dispute settlement, cooperation is the strategy of choice for bargainers interested in distributing resources efficiently and maximizing individual return.<sup>139</sup> This work to a large extent corroborates the claims of cordial, principled, and problem-solving bargaining, and when combined with them makes a more powerful case for the efficacy of the cooperative approach. To appreciate the full force of the argument for the legal bargainer's practical need to cooperate, therefore, it is necessary to understand the lessons of this recent work.<sup>140</sup>

The prisoner's dilemma is a game between two players, descriptively named *A* and *B*, each of whom is faced with a choice of two strategies, cooperate or defect. The game board is a four-box matrix (see below) consisting of different payoffs for each of the four pairs of strategies for playing the game. In the most basic form of the game, the players are allowed only to choose a strategy and may not discuss their choices with the other player, either before or after playing.<sup>141</sup>

138. See Robyn M. Dawes et al., *Cooperation for the Benefit of Us—Not Me, or My Conscience*, in BEYOND SELF-INTEREST 97, 100 (Jane J. Mansbridge ed., 1990) (estimating "at least two thousand studies" of the two-person prisoner's dilemma to date). Many commentators have described the dilemma from the perspective of real life prisoners. See GIFFORD, *supra* note 1, at 26-29.

139. See AXELROD, *supra* note 13. But see Coleman et al., *supra* note 93, at 666 ("the prisoner's dilemma is best thought of as illustrating the problem of rational defection, not the problem of rational agreement"); Dawes et al., *supra* note 138, at 100 ("When experimenters avoid substantial payments by having a prize for the subject who garners the most points, they are implicitly instructing subjects to seek not just maximal gain, but maximal relative gain—a strange task for studying cooperation.").

140. The description of the prisoner's dilemma game that follows is an elaboration on and paraphrase of the description provided in AXELROD, *supra* note 13, at 7-10, 206-07.

141. Melvin Dresher and Merrill Flood of the RAND Corporation discovered the 2 x 2 matrix, and Albert W. Tucker wrote an unpublished paper on it giving it its name. Reportedly, Tucker was asked to give a talk on game theory to the psychology department at Stanford, and invented a story to go with the matrix. See DOUGLAS R. HOFSTADTER, *The Prisoner's Dilemma Computer Tournaments and the Evolution of Cooperation*, in METAMAGICAL THEMAS: QUESTING FOR THE ESSENCE OF MIND AND PATTERN 715 (1985); RASMUSEN, *supra* note 16, at 38. R. Duncan Luce and Howard Raiffa wrote the classic work on game theory. See R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS* (1957). For other important works, see KEN BINMORE & PARTHA DASGUPTA, *THE ECONOMICS OF BAR-*

## PRISONER'S DILEMMA MATRIX

		PLAYER B	
		COOPERATE	DEFECT
PLAYER A	COOPERATE	3	5
	DEFECT	0	1

Player *A*'s payoff is given in the lower left hand corner of each quadrant, and Player *B*'s in the upper right hand corner. If *A* defects while *B* cooperates, *A* successfully double-crosses *B*. This is the best *A* can do and the worst *B* can do, so *A* gets a payoff of 5 and *B* gets 0. Conversely, if *A* cooperates and *B* defects, the northeast quadrant, then *A* gets 0 and *B* gets 5. If both players cooperate, each gets 3, if both defect, each gets 1. *A*'s preferred ordering of the quadrants is southwest, northwest, southeast, northeast, and *B*'s preferred ordering is northeast, northwest, southeast, southwest.

The numbers are not important in themselves. That is, it does not matter that the payoff increments are 5, 3, 1, and 0. They could be any set of *T*, *S*, *R*, and *P* that satisfy the following conditions:

$$(1) \quad T > R > P > S$$

$$(2) \quad (T + S)/2 < R$$

That is, *T*, the temptation to defect (the five payoff), must be greater than *R*, the reward for mutual cooperation (the three payoff), which in turn must be greater than *P*, the punishment for mutual defection (the one payoff), which in turn must be greater than *S*, the sucker's return for unilateral cooperation (the zero payoff). The second condition simply says that mutual cooperation is better than the average of the other two, so that if bargainers are playing several repetitions of the game they cannot improve on cooperation by tak-

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GAINING 6-7, 28, 37, 62, 238 (1987); GAME-THEORETIC MODELS OF BARGAINING (Alvin E. Roth ed., 1985); KRITZER, *supra* note 1, at 80-83; MURNIGHAN, *supra* note 16; ANATOL RAPOPORT, TWO-PERSON GAME THEORY (1966); ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER'S DILEMMA (1965); RASMUSEN, *supra* note 16, at 13-14.

ing turns suckering each other (which itself is a form of cooperation).

Game theorists have been intrigued by this paradox: both players prefer mutual cooperation, the three-three square, to mutual defection, the one-one square, but if both are rational they will find themselves, to their infinite frustration, trapped in the one-one square. Why is that? Look at the problem first from *A*'s point of view. *A* reasons: "*B* can either cooperate or defect. If *B* cooperates, I should defect because then I get 5 instead of 3. If *B* defects, I should also defect, because then I get 1 instead of 0. No matter what *B* does I am better off defecting than cooperating."<sup>142</sup> *B* of course reasons in the same way, so both players defect and end up in the one-one square.

One might argue that *A* and *B*, recognizing their dilemma, should make a leap of faith and trust each other to decide unilaterally to cooperate. But just as *A* (or *B*) says to herself, "well maybe I should cooperate and gamble that *B* will cooperate as well," she realizes two things. First, if *B* is rational she will defect, and second, even if *B* wants to cooperate she will have to count on the fact that *A* is rational and will defect. *A* defects, therefore, and acts out the logic of the prisoner's dilemma. It is difficult to produce a cooperative outcome when rational behavior points in the opposite direction.

There is a wealth of literature on playing the game, but relatively little about how to play it well.<sup>143</sup> Nonetheless, certain conclusions emerge. First, there is no optimum universal strategy, that is, no strategy that is better than all others under all circumstances. How one plays depends upon with whom one is playing. Second, there is no way out of the dilemma if there is only one play to the game because a player is trapped in the southeast corner if she is going to be rational.<sup>144</sup> If the game is played many times over, though, without a fixed ending point (the so-called iterated prisoner's dilemma), players can use the future ability to cooperate or

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142. David Luban, Presentation at the Meeting of the Section on Alternative Dispute Resolution of the Association of American Law Schools, January 1988.

143. This is because virtually all of the experimental literature is based on analyzing choices made by players who are seeing the formal game for the first time. Axelrod therefore decided to draw on "people who had a rich understanding of the strategic possibilities inherent in a non-zero sum setting." AXELROD, *supra* note 13, at 29-30.

144. *See id.* at 15. This noncooperative or defecting strategy is referred to as "dominant" or "dominating," "because no matter what others choose, the personal rewards are higher for choosing it than for making a cooperative choice." Dawes et al., *supra* note 138, at 97. *See RASMUSEN, supra* note 16, at 28.

defect as a kind of carrot and stick to coordinate choices and to develop a pattern of mutual cooperation.<sup>145</sup> The interesting question, then, is how one plays the iterated prisoner's dilemma so that such a pattern develops.

In an interesting and clever experiment,<sup>146</sup> Robert Axelrod took up this question. He invited game theory professionals from all over the world, including people who had published articles on the prisoner's dilemma, to submit computer programs for playing a round robin, iterated version of the game, in effect to participate in

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145. See AXELROD, *supra* note 13, at 14-16. For a description of four proposals advanced by game theorists over the years to encourage people to eschew choice of the dominating strategy in favor of strategies more in the collective interest, see Dawes et al., *supra* note 138, at 98-99. Not everyone assumes that the motives of prisoner dilemma game players necessarily must be self-interested. See MURNIGHAN, *supra* note 16, at 148-49. There are empathy-based explanations of the game, see Jane J. Mansbridge, *On the Relation of Altruism and Self-Interest*, in BEYOND SELF-INTEREST, *supra* note 138, at 133, 134, and Dawes and his colleagues have argued that patterns of play in the iterated version of the game can be understood as influenced by the development of a group identity with other game players that induces individual players to cooperate for the benefit of the group. See Dawes et al., *supra* note 138, at 98-110; see also MURNIGHAN, *supra* note 16, at 146-48 (discussing the effects of establishing a group identity).

146. Notwithstanding the inventiveness of Axelrod's analysis, and its implications for lawyer bargaining, his book has not been discussed widely or carefully in the legal bargaining literature. There are some perfunctory references, see, e.g., GIFFORD, *supra* note 1, at 17 n.9; GOLDBERG et al., *supra* note 137, at 61; MURRAY et al., *supra* note 42, at 91-92; Menkel-Meadow, *supra* note 1, at 827 n.285; Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 7, 42-44 (1987), calling the reader's attention to or discussing the work, but for the most part legal bargaining scholars do not seem to be fully aware of the force of Axelrod's analysis. Gifford's is a particularly strange omission since he has an extended discussion of the prisoner's dilemma game, see GIFFORD, *supra* note 1, at 26-28, in which he does not refer to Axelrod, even though Axelrod's analysis supports Gifford's points more substantially than some of the references used. See, e.g., *id.* at 39 n.24.

Roger Fisher and Scott Brown also have discussed Axelrod, arguing that prisoner's dilemma analysis does not apply to relationship issues. But their arguments are based on reasons that do not seem to reflect an understanding of the nature of Axelrod's discussion. See FISHER & BROWN, *supra* note 27, at 197-202. The basic problem with Fisher and Brown's analysis is that it does not distinguish between learning and bargaining (recall that this was also a problem with principled bargaining's directive to invent options for mutual gain, see *supra* notes 130-37 and accompanying text), and this omission causes the authors to misinterpret Axelrod. Learning what another bargainer values or needs is only part of the process of coordinating bargaining choices with her. Even with perfect knowledge, if needs are incompatible or based on competing conceptions of the good, bargainers still must reconcile and accommodate their respective views, and this will involve more than increasing their respective understandings of what the other thinks and feels. Axelrod's analysis is about coordinating choices, not just learning about another's interests, and these are the same only in the fictitious conflict-free universe of principled bargaining.

a prisoner's dilemma game tournament.<sup>147</sup> Each program would

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147. See AXELROD, *supra* note 13, at 30-31. For a list of participants, see *id.* at 193 (round one); *id.* at 195-96 (round two).

It is the *iterated* version of the prisoner's dilemma game, and the particularly interesting use Axelrod makes of it, and not the prisoner's dilemma itself, that is the important part of Axelrod's analysis for purposes of the discussion that follows. Ordinarily, the prisoner's dilemma would not be thought of as an apt framework for analyzing dispute bargaining. Dispute bargaining is "cooperative" (i.e., participants communicate directly with one another as part of the process of coordinating choices), and the prisoner's dilemma is not (i.e., direct communication between players is not allowed); dispute bargaining is asymmetrical (i.e., participants have different levels of private information and resources for playing the game), and the prisoner's dilemma is symmetrical (i.e., players have the same information base); and dispute bargaining is "extensive" (i.e., participants make multiple offers, sequenced over time, which can be influenced by prior offers and have a like effect on subsequent ones), and the prisoner's dilemma is one-shot (i.e., players make only one, simultaneous offer). There are cooperative, asymmetric, and extensive-form games that simulate dispute bargaining more fully than the prisoner's dilemma, see, e.g., KRITZER, *supra* note 1, at 90-92; MURNIGHAN, *supra* note 16, at 92-101, 127; RASMUSEN, *supra* note 16, at 43-54, though none yet captures its multidimensional nature, see KRITZER, *supra* note 1, at 83-86 ("Although game theory can be extremely useful as a device to clarify conceptual and theoretical issues, it has many problems as a paradigm for the empirical study of the bargaining situations that occur in the litigation context." *Id.* at 84.); DONALD A. SCHÜN, *THE REFLECTIVE PRACTITIONER* 44 (1983) ("Formal modelling has become increasingly divergent from the real-world problems of practice."), and typically these other games would be thought better bases on which to ground a discussion of dispute bargaining. See, e.g., MURNIGHAN, *supra* note 16, at 92-101 (discussing the Diamond Bidding Game, where the simple additional feature of known asymmetric outcomes makes alternating between competitive and cooperative strategies (logrolling) a more likely route to cooperative action than consistent mutual cooperation).

These concerns notwithstanding, Axelrod's discussion is instructive because an iterated prisoner's dilemma game tournament has many of the same properties as a career in bargaining, even if a single play of the game does not have all of the properties of a single negotiation. Over a career, a reputation for bargaining cooperatively, established through behavior rather than words, makes it easier for others to coordinate choices with a bargainer (and thus to produce maximum distributions for everyone), than do other bargaining reputations. When rational bargainers believe that their counterparts will cooperate, and that only by cooperating themselves will they obtain the largest returns, they will take the lead in cooperating and will not wait for the other side to prove itself trustworthy. See MURNIGHAN, *supra* note 16, at 145-46. They also will be more likely to expect cooperation and thus less quick to interpret ambiguous adversary behavior as defecting, less attracted to pre-emptive competitive strikes that attempt to end bargaining in single power-based moves, and less likely to see other bargainers as objects to be manipulated rather than persons to be accommodated.

Because it may be possible to develop an overall reputation for cooperating without bargaining cooperatively in every negotiation, or even all of the time in single negotiations, Axelrod's analysis is not necessarily instructive in determining how best to make individual tactical choices in particular negotiations. For help in this regard, analysis based on models that more fully represent the complexity of the single bargaining encounter is needed. But Axelrod's work does tell bargainers what overall strategic attitude or frame of reference to take to the bargaining process in general, and what kind of bargaining reputation to cultivate. In that limited sense, his comments are directly relevant to actual bargaining practice. The popularity of routine processing as a major bar-

play every other program, a clone of itself, and a random (i.e., coin-flipping) program, two hundred times.<sup>148</sup> Fourteen teams participated, with programs ranging from the very simple to the moderately complex. When the tournament was over, the simplest program, called "*tit for tat*," had won. *Tit for tat* cooperated on the first play of the game, and mimicked its opponent on each successive play, so that if the other player defected, *tit for tat* punished it on the next play by also defecting; if the other player cooperated, *tit for tat* rewarded that move on the next play by also cooperating. At the end of two hundred rounds, *tit for tat* had cleaned up.<sup>149</sup>

Now it is at least peculiar that a program which cannot, by definition, win any single play of the game, can win the tournament. Compare *tit for tat*, for example, with the equally simple "*Always Defect*."<sup>150</sup> *Always Defect* never loses (i.e., never gets zero, the *S* payoff) in head-to-head play. The worst it can do is tie (i.e., get one, or the *P* payoff) if the other party also always defects. If the other cooper-

gaining mode, see *supra* note 22, suggests that many bargainers already understand his point.

I should add, if it is not clear, that this article is not intended as a discussion, even descriptive, of the state of the art in game theory scholarship, or its application to legal bargaining. Much has happened in the field since Axelrod wrote, and even then there were many who would have found his experiment design overly simplistic as a piece of pure research, even while acknowledging the virtuosity with which he teased truly momentous lessons from so modest and limited a data base. A complete discussion of game theory's contributions to the understanding of legal dispute bargaining is beyond the scope of this Article.

148. See AXELROD, *supra* note 13, at 30-54, for a description of the tournament.

149. See *id.* at 30-32. In addition to analyzing its results, Axelrod performed a number of "subjunctive replays" of the tournament, that is, replays with different sets of entries. He found, for example, that the strategy called *tit for two tats*, which tolerates two defections before retaliating (but which retaliates only once), would have won had it been in the lineup. *Id.* at 39. Likewise, two other strategies he discovered, called *Revised Downing* and *Look Ahead*, also would have beaten *tit for tat* had they been in the tournament. *Id.* at 38-40. But the ostensible lesson of the tournament was twofold: be "nice" (i.e., do not be the first to defect), and be "forgiving" (i.e., punish only once for each defection). *Id.* at 33-36.

*Tit for tat* was submitted by Anatol Rapoport of the University of Toronto, one of the world's most illustrious game theoreticians, who cautions against overstating the strategy's advantages. He believes that it is too harshly retaliatory on occasion, just as Douglas Hofstadter believes that it is sometimes too lenient. See Hofstadter, *supra* note 141, at 728. Axelrod himself warns "against the facile belief that an eye for an eye is necessarily the best strategy" for playing the prisoner's dilemma. See AXELROD, *supra* note 13, at 39. In fact, the very idea of a "best strategy" is incoherent, given the extent to which the success of any strategy depends on the nature of the other strategies in the game. *Id.* at 40; see also RASMUSEN, *supra* note 16, at 120 ("Care must be taken in interpreting the results of the tournament. For a variety of reasons it does not prove that *tit for tat* is the best strategy . . .").

150. This is presumably the program Thomas Hobbes would have submitted. See AXELROD, *supra* note 13, at 4.



ates on even one move, *Always Defect* is five points up. *Always Defect* never loses and sometimes wins, *tit for tat* never wins, and yet *tit for tat* eventually drives *Always Defect* out of the bargaining universe.<sup>151</sup> How does this happen? The answer, when one thinks about it, is obvious. *Tit for tat* collects "threes," the reward for mutual cooperation, in many instances where *Always Defect*, and defecting strategies generally, collect "ones," the punishment for mutual defection. Over the long haul, the difference between three and one, multiplied many times, adds up. By eliciting sustained cooperation from a wider range of strategies, *tit for tat* makes up in the aggregate what it loses in some particular plays of the game. Like the professional golfer who always finishes second, it leads the money list at the end of the year.<sup>152</sup>

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151. See *id.* at 51-53, 63-66, 99. Axelrod was able to demonstrate this by means of a so-called "ecological tournament." See *infra* notes 157-161 and accompanying text.

152. See AXELROD, *supra* note 13, at 35-36; see also RASMUSEN, *supra* note 16, at 120 ("Tit for tat is suboptimal for any given environment, but it is robust across environments, and that is its advantage."). Another explanation for *tit for tat*'s success, Axelrod concluded, was that most program designers looked only "two levels deep" when they should have looked three. AXELROD, *supra* note 13, at 38. Consider the entry called JOSS. JOSS's strategy was similar to *tit for tat*'s, in that it began by cooperating, it responded to defection by defecting, and it nearly always responded to cooperation by cooperating. But JOSS also used a random number generator to decide when to pull a "surprise defection," and had a ten percent probability of doing so each time the other player cooperated. By trying to capitalize on what it hoped would be seen as its generally good nature, JOSS tried to get the benefits of both cooperation (C) and defection (D). In playing against *tit for tat*, JOSS did fine until it tried to sneak in a defection. The game began with mutual cooperation, or CC. When JOSS first defected randomly, *tit for tat* retaliated on the next play with a single defection, and JOSS went back to cooperating. Thus, there was a DC pair, followed, on successive plays, by a switching of the C and D places, because each program mimicked the previous play of the other. From the point where JOSS first defected the game went like this: D(JOSS) C(*tit for tat*), C(JOSS) D(*tit for tat*), DC, CD, DC, and so on. Sooner or later, however, JOSS threw in another random defection, producing a DD pair, and from that point, mimicking each other, both programs defected until the end of the game. The "echo effect," resulting from JOSS's first attempt at exploitation and *tit for tat*'s single punitive response, led ultimately to complete distrust and lack of cooperation. JOSS suffered more from this strategy because it tried it on partner after partner, and in many cases this led to the same kind of breakdown in trust, whereas *tit for tat*, by never defecting first, had fewer such breakdowns. *Id.* at 36-38. Axelrod summarized the lesson of echo effects in this way:

A sophisticated analysis of choice must go at least three levels deep . . . . The first level of analysis is the direct effect of [the] choice. This is easy, since a defection always earns more than a cooperation. The second considers the indirect effects, taking into account that the other side may or may not punish a defection. This much of the analysis was certainly appreciated by many of the entrants. But the third level goes deeper and takes into account the fact that in responding to the defections of the other side, one may be repeating or even amplifying one's own previous exploitative choice. Thus a single defection may be successful when analyzed for its direct effects, and perhaps even when its secondary effects are taken into account. But the real costs may be in the terti-

After the first tournament, Axelrod invited a larger list of players to submit programs for a second tournament. In this tournament, there were sixty-two entries from six countries, people of all ages and levels of expertise, and from eight different academic disciplines.<sup>153</sup> All of the entrants were familiar with the results of the first round, and yet *tit for tat* won again.<sup>154</sup> *Tit for tat* was still able to evoke cooperation when other more sophisticated programs were not, even after these other programs saw *tit for tat* operate. Axelrod traced *tit for tat*'s robustness to four qualities that other programs did not share in the same measure. *Tit for tat* (and successful strategies generally) succeeded because it was nice, provokable, forgiving, and transparent.<sup>155</sup> It was nice in that it was never the first to defect; provokable in that it did not let a defection go unpunished; forgiving in that it punished each defection only once; and transparent in that its playing patterns were easy to figure out, so that opponents did not see it as defecting randomly or behaving obscurely, and thus they were not suspicious of it. The combination of initial trust in the opponent (never be the first to defect), a capacity for certain but restrained retaliation for transgressions (defect once and then forgive), and clarity of purpose (be transparent), accounted for *tit for tat*'s success.<sup>156</sup>

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any effects when one's own isolated defections turn into unending mutual recriminations. Without their realizing it, many of these rules actually wound up punishing themselves. With the other player serving as a mechanism to delay self-punishment by a few moves, this aspect of self-punishment was not picked up by many of the decision rules.

*Id.* at 38.

In other words, the only way to have a reputation for being a cooperative bargainer is to cooperate all of the time. One cannot periodically cash in on the reputation, even quietly and infrequently (at least at the level of strategy), without eventually losing it.

153. AXELROD, *supra* note 13, at 40-41. *See id.* at 195-96 (listing the participants). Participants included a ten-year old as well as one of the world's leading experts on game theory and evolution. *Id.* at 41; HOFSTADTER, *supra* note 141, at 723. In the second tournament Axelrod added a probability that the game would end after each round, so as to avoid the chainstore paradox present whenever an iterated game is played a finite number of times. *See* RASMUSEN, *supra* note 16, at 88-89 (discussing the chainstore paradox).

154. *See* AXELROD, *supra* note 13, at 42. This time it beat even *tit for two tats* and *Revised Downing*, *see* HOFSTADTER, *supra* note 141, at 723, which had won subjunctive replays of the first tournament. *See also supra* note 149. This may seem nonintuitive, but recall that a program's success depends entirely on the context in which it is operating. There is no single best strategy for playing the game in all environments.

155. *See* AXELROD, *supra* note 13, at 20, 54.

156. *See id.* at 43-47. In a similar tournament run at Indiana University, Douglas Hofstadter found that several *tit for tat*-like strategies did better than pure *tit for tat*, but they all shared the above "character traits." They simply did a better job of detecting nonresponsiveness, and when they were convinced that the other player was unrespon-

Axelrod then ran a series of hypothetical replays of the tournament in which the environment of each replay was determined by the results of the previous one.<sup>157</sup> A program's score indicated its fitness, and fitness determined the number of progeny the program had in the next round. As the tournament progressed through generation after generation, the environment gradually changed. At the beginning, poor programs and good programs were equally represented, but as time passed, the poorer ones dropped out and the good ones flourished.<sup>158</sup> The rank order of the good programs changed, however, because goodness was no longer measured against the same universe. Programs whose success came from interaction with other good programs continued to succeed. But programs that won because they were able to exploit dumb programs found their base of support eroding as dumb programs were gradually squeezed out, and eventually they suffered the same fate.<sup>159</sup>

*Tit for tat* fared spectacularly well in this "ecological tournament."<sup>160</sup> After a thousand generations, its rate of growth was greater than that of any other program, even though it did not outscore a single one of its rivals in any of its encounters. *Tit for tat* succeeded because it was able to elicit cooperation from the greatest number of other players. Axelrod concluded that *tit for tat* was able to do this because

other rules anticipate [its] presence and are designed to do well with it. Doing well with [*tit for tat*] requires cooperating with it, and this in turn helps [*tit for tat*]. Even rules . . . that were designed to see what they could get away with, quickly apologize to [*tit for tat*]. Any rule which tries to take advantage of [*tit for tat*] will simply hurt itself. [It] benefits from its own nonexploitability . . . .<sup>161</sup>

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sive, they switched over to an "always defect" mode. See HOFSTADTER, *supra* note 141, at 728; see also RASMUSEN, *supra* note 16, at 120 (describing other circumstances in which *tit for tat* would not do as well as other strategies).

157. See AXELROD, *supra* note 13, at 48-53.

158. *Id.* at 49; see also Axelrod & Dion, *The Further Evolution of Cooperation*, 242 SCIENCE 1385 (1988) ("The population dynamics of the ecological simulation were determined by setting the change in frequency of each strategy in any given round to be proportional to its relative success in the previous round.").

159. See AXELROD, *supra* note 13, at 50-52.

160. The tournament simulated ecological rather than evolutionary adaptation because it introduced no new rules of strategic behavior into the game-playing environment. *Id.* at 51. It consisted of "the shifting of a *fixed* set of species' populations according to their mutually defined and dynamically developing environment, as contrasted with evolution via mutation, where *new* species can come into existence." HOFSTADTER, *supra* note 141, at 726.

161. AXELROD, *supra* note 13, at 53.

On the basis of the ecological tournament, Axelrod offered preliminary answers to three questions about the evolution of cooperative bargaining norms that had long troubled bargaining theorists.<sup>162</sup> The first asks how cooperation gets started in an environment of unconditional defection. The answer is through the invasion of small clusters of conditionally cooperating bargainers. In Axelrod's words, "mutual cooperation can emerge in a world of egoists without central control by starting with a cluster of individuals who rely on reciprocity."<sup>163</sup> Small clusters of cooperators can propagate even in a hostile environment, provided that they defend themselves in *tit for tat*-like fashion. Programs that are just nice (i.e., complete pacifists), on the other hand, will not survive. The second question concerns robustness: What strategy does well in a shifting and unpredictable environment? The answer is that any strategy with the traits of niceness, provocability, forgiveness, and transparency will do so. Such strategies, once established, tend to flourish in an ecologically evolving world.<sup>164</sup> And the final question is about stability: Can cooperation protect itself from invasion? The ecological tournament proves that it can, that once cooperation establishes itself, it is permanent. As Axelrod puts it, "[t]he gear wheels of social evolution have a ratchet."<sup>165</sup>

Axelrod's analysis is fascinating in its own right, and has pro-

162. *See id.* at 95.

163. *Id.* at 69.

164. *Id.* at 48, 54.

165. *Id.* at 21. This description does not do justice to the sophistication and subtlety of Axelrod's analysis, or game theory generally. *See, e.g.*, KRITZER, *supra* note 1, at 86, 86-98 (setting out "recent developments in the application of game theory to litigation"); RASMUSEN, *supra* note 16, at 21-66 (describing variations in academic games); Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291, 1298-1314 (1990) (discussing theoretical refinements in modern game theory research); Katz, *supra* note 7, at 236-38. Axelrod's discussion is far more complicated than I have shown, making adjustments for all kinds of factors including nature of the bargaining relationship, tactical choices available, payoff structure, access to bargainer histories, probability of the game ending, difficulty of communicating and understanding choices, and the structure and dynamics of the relevant bargaining population. As the content of each of these factors changes, so too does the strength of the argument for playing *tit for tat*. In the end, it is more accurate to describe his discussion as suggesting a kind of attitude or motivation toward bargaining than as a set of rules governing how to play. *See* Bernard Williams, *Formal Structures and Social Reality*, in TRUST, *supra* note 14, at 3-5. Axelrod also says as much, with a collaborator, in an article discussing studies conducted after the publication of his results. *See* Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Hypotheses and Strategies*, in COOPERATION UNDER ANARCHY 226, 231 (Kenneth A. Oye ed., 1986). Bargainers always will need to base the choice of particular moves on what they know about factors such as the other bargainer, the setting, the chances of bargaining again, the likelihood that they are being understood, and so on. Often it will be appropriate for them to choose not to play *tit for tat*. But even if supporting only an attitude

duced the wide range of comment and elaboration one would expect in the wake of such provocative and insightful work.<sup>166</sup> But his analysis also has important implications for legal bargaining theory to the extent that such bargaining is accurately modelled by the prisoner's dilemma, and for a career in bargaining, the model is accurate to a significant extent. To begin with, the payoff structure of the prisoner's dilemma— $T > R > P > S$ <sup>167</sup>—characterizes real life dispute bargaining as much as it does the prisoner's dilemma game. Successful defection, where one party exploits the other's unilateral disclosure, forbearance, or concession, time after time, without fear of retaliation or loss of cooperation, produces the largest returns in life as well as in games. Similarly, mutual cooperation results in bigger payoffs for both sides than mutual defection because bargaining stakes are divided between the parties rather than wasted in ego battles, or left on the table out of exhaustion or polarization. The work of cordial, principled, and problem-solving theory established this. Unilateral cooperation, that is, being gratuitously generous, produces the poorest returns because it is usually exploited. Real-life bargainers take what they are given, even when it is overly generous, and rarely think to ask if they should refuse part of it, or give some back.

More importantly (and more controversially), the decision involved in selecting a bargaining strategy can accurately be characterized as a choice between cooperation and defection. Bargaining consists of three interdependent, overlapping, and intertwined processes, which I have described elsewhere as assessment, persuasion, and exchange.<sup>168</sup> Collectively these processes make up all bargaining strategies. Bargainers try to determine whether adversaries will do what they predict and mean what they say; to convince others to view the issues in dispute favorably to themselves (the original bargainers); and to make the fewest and smallest concessions neces-

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about or predisposition toward bargaining, Axelrod's analysis requires a major rethinking of the adversarial conception of effective bargaining strategy.

166. See, e.g., Axelrod & Dion, *supra* note 158; Axelrod & Keohane, *supra* note 165, at 226; Gambetta, *supra* note 14, at 227-28; Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in COOPERATION UNDER ANARCHY, *supra* note 165, at 1, 12-18; Duncan Snidal, *The Game Theory of International Politics*, in COOPERATION UNDER ANARCHY, *supra* note 165, at 25, 38-40; Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory and Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 51 (1990); Williams, *supra* note 165, at 5-6.

167. See *supra* text accompanying notes 141-142.

168. See Condlin, *supra* note 6, at 67-70. For a recent book also adopting this conceptualization, see ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING 405 (1990).

sary for agreement. Each of the dozens if not hundreds of individual tactical maneuvers and moves available to bargainers in carrying out these tasks can occur in both a cooperative and defecting version. For example, a decision to disclose privately-held information relevant to the bargaining problem that the other party has a right to know is, in effect, a decision to cooperate; a decision to conceal the information, or make it unnecessarily difficult to obtain, is a decision to defect. Refusing to exploit leverage for more than is justified by the strength of one's substantive claims is cooperating, while cleaning out the other side because one is in a position to do so is defecting. Refusing to follow local "courtesies" (e.g., pretending that one's schedule is too crowded to meet at times the other suggests as convenient) is defecting, whereas abiding by such courtesies is cooperating. Strategies for entire negotiations are similarly either cooperative or defecting, at least "on balance," when one or the other type of tactical move predominates, or when the most important or salient parts of the strategy have either a cooperative or defecting quality.

Categorization of moves and strategies as cooperative or defecting often will be controversial because the content of bargaining community conventions and norms, upon which such categorizations depend, will not always be shared. Conventions and norms are often specific to types of practice, settings, and regions in which the practice occurs, to strata of the bar that bargainers come from, and to the culture of bargaining they have learned to understand and accept, and bargainers from different cultures will not always agree on the meaning of shared practices.<sup>169</sup> As a consequence, bargainers must learn to understand different bargaining cultures and practices, and to think and speak in a manner appropriate to the occasion. This process has many of the same properties as learning to do moral reasoning, in the sense that it requires participants to see the world from the perspective of someone else, to develop a

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169. See, e.g., CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 712 (1986); Thomas F. Guernsey, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99, 100-01 (1982); Hazard, *supra* note 1, at 193; Peters, *supra* note 146, at 13; James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926, 927-31. There are many sources for the content of such conventions and practices. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 cmt. (1983) [hereinafter MODEL RULES] (describing three "generally accepted conventions in negotiation . . ."); Guernsey, *supra*, at 103-21 (listing of bargaining conventions); William H. Simon, *The Trouble With Legal Ethics*, 41 J. LEGAL EDUC. 65, 66-67 (1991) (The negligence doctrine of standard of care "represents a set of collectively defined but uncodified and partially unwritten general norms whose application to particular situations is assumed to require the reflective judgment of a qualified practitioner.").

capacity for practical (bargaining) wisdom, and to avoid purely sophisticated or instrumental perspectives on norms by following their spirit as well as their letter.<sup>170</sup> With all of these difficulties, however, like moral reasoning, it still will be possible to say most of the time, albeit often in a qualified or contingent manner, whether a particular bargaining practice or strategy is cooperative or defecting within the governing bargaining norms.<sup>171</sup>

If prisoner's dilemma analysis has implications for legal dispute settlement,<sup>172</sup> one still must be clear about the extent of those impli-

170. On seeing the world from the perspective of somebody else, see HANNAH ARENDT, *EICHMANN IN JERUSALEM* 49 (1963); on developing a capacity for practical (bargaining) wisdom, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 169-74 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*]; Bartlett, *supra* note 8, at 849-58 (describing feminist practical reasoning); Robert Condlin, *The Moral Failure of Clinical Legal Education*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 317, 323-26 (David Luban ed., 1983); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 68-71 (1980); and on avoiding purely sophisticated or instrumental perspectives, see LUBAN, *LAWYERS AND JUSTICE*, *supra*, at 18-19. Even Professor Schneyer now seems to agree (or "concedes" as he might put it) that "legal rules should be invoked only when doing so is consistent with their purposes . . ." Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 25 (1991). It may be, of course, that conventions and norms have effects only when bargainers are ethnically homogeneous, see Gilson, *supra* note 4, at 312, and that it is hopelessly idealistic to expect bargainers to see the world from the perspective of somebody else, at least to any significant extent.

171. The requirement of no pre-choice communication is the point of greatest departure between prisoner dilemma game playing and dispute settlement, because real life bargainers can talk with one another and make promises about what they will do, and prisoner's dilemma game players usually cannot. The game can be played either way, but in Axelrod's tournament, where the players were computer programs, "the players [could] communicate with each other only through the sequence of their own behavior." AXELROD, *supra* note 13, at 12.

If Carol Rose is correct, the opportunity to communicate may be the most important variable in the prisoner's dilemma game. As she puts it, "preference orderings don't just come out of nowhere; they may be constructs of narrative and negotiation, and may change over time, as we digest the stories of the places that our preferences have led us . . ." Rose, *supra* note 166, at 56. Furthermore, "narratives change our minds . . ." *Id.* at 55; see also Daniel Good, *Individuals, Interpersonal Relations, and Trust*, in TRUST, *supra* note 14, at 31, 37 (the greater the communication, all other things being equal, the greater the likelihood of beneficial outcome); Mansbridge, *supra* note 145, at 138 ("Blushes, 'an honest face,' and other subtle but involuntary signals in body language allow potential cooperators to communicate accurately that they can be trusted even when they have had no earlier interaction in which to establish a reputation."); Williams, *supra* note 165, at 5-8 (attitudes toward cooperation change under impact of information about reliability of different kinds of assurances). Rose's discussion shows how narrative and feminist theory can supplement and complement game theory, and while she does not deal fully with the problem of deception, that is, the situation where the carefully constructed narrative is a lie, in every other respect she strengthens Axelrod's argument. Nevertheless, she does not seem to see it that way. See Rose, *supra*, at 51 n.49.

172. One can extrapolate too quickly and too far from the results of academic gaming. See KRITZER, *supra* note 1, at 82 ("Results based on the Prisoner's Dilemma are difficult

cations. In a one-time negotiation (with no prospect of the bargainers meeting again),<sup>173</sup> Axelrod's conclusions are of limited use. *Tit*

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to apply to bargaining in civil litigation because of several features of the game."); Good, *supra* note 171, at 34, 38-43, 45-46 (limits of the extent to which laboratory experiments reflect real life, and the lessons to be drawn from them); Katz, *supra* note 7, at 243-49. After all, there are perhaps some implausible parts to Axelrod's analysis. See Williams, *supra* note 165, at 5-6, 11-13 (arguing that Axelrod's analysis relates only indirectly to human cooperation in society; in real life none of the available motivations to cooperate is adequate). For example, if *tit for tat* is destined to take over the bargaining world, presumably signs of its ascendancy would have already appeared. Dispute settlement has been with us long enough, one would think, for lawyers to discover the disutility of competitive approaches and the corresponding advantage of *tit for tat*-like cooperation. Yet, by all accounts, this has not happened, at least not if one accepts the premise of alternative dispute resolution scholarship, which is that zero-sum competition is the principle bargaining game in town. See *supra* note 23 and accompanying text. Axelrod might respond that one thousand plays of a prisoner's dilemma game are the equivalent of much more than a few hundred years of bargaining practice, and that we are still in the early stages of an evolutionary cycle. There is some appeal in this response because each play of the game so compresses bargaining that it would take many more actual bargaining experiences to communicate all of the same information, with all of the same clarity, and thus to produce all of the same learning and development. Or, conversely, Axelrod might argue that in an unacknowledged sort of way *tit for tat* has taken over the bargaining world, or at least that part of it made up of institutionalized bargaining, where bureaucratic processing of cases is the norm. See *supra* note 22; accord GIFFORD, *supra* note 1, at 17, 41-42. This response also has some appeal, but neither response helps much with a second problem.

A bargaining world in which everyone plays *tit for tat* is an unlikely picture of a world run by humans. It seems bland, predictable, mechanical, and thoroughly unexciting, a world in which there is no outlet for aggressive or competitive energies and no room for artistry, skill, or individual virtuosity. See *infra* note 256. It asks humans to act like computer programs, and that will never do. To this Axelrod might reply that choosing a proper bargaining strategy and bargaining skillfully are two very different things. Bargainers at present arguably agree on strategy, that of "always defect," but that does not prevent them from being artistic in the manner in which they implement that strategy, or from bargaining in ways that are exciting and individually distinctive. While *tit for tat* may look dull when run by computers, it is as colorful as any bargaining strategy when used by humans, and would differ from present bargaining approaches mostly in the fact that aggressive energies would be marshalled in the aid of only sound substantive beliefs. Others have described the differences between game playing and bargaining in insightful detail, see, e.g., Menkel-Meadow, *supra* note 1, at 780-82 n.111, but they have not been as successful as Axelrod in pointing out the similarities.

173. See AXELROD, *supra* note 13, at 174. There are reasons to believe that this condition will not always be met. Much of bargaining is discontinuous, in the sense that a bargainer does not see a present adversary again for a long time, and when she does, the memory of prior experience often has been lost. The effect, in prisoner's dilemma language, is that neither bargainer has access to the history of the other's pattern of play. It is true that one does not have to bargain with someone on a daily basis to know her patterns of play. The other's reputation, based on experiences with a wide range of members of the bargaining community, and transmitted by word of mouth, can serve the same function. Reputation is a notoriously unreliable source of data, however, and it does not always provide information at the level of detail required to make coordinating bargaining choices possible. See Partha Dasgupta, *Trust as a Commodity*, in TRUST, *supra* note 14, at 49, 53-56, 66-71 (discussing the manner in which reputation is acquired);



*for tat* is a strategy for repeat bargaining and it can do no better than a "good" result in any single encounter. Just as the power of *tit for tat* is not apparent until one looks at its results over time, so too the argument for bargaining cooperatively is not convincing until it is applied to a bargaining career. A lifetime of negotiation is, in a significant sense, like a long-playing, iterated prisoner's dilemma game tournament. Individual negotiations are separate plays of the game, and negotiator histories, known through direct experience and reputation, are records of the patterns of play. Unlike bargaining in a single encounter (where an opening or random defection may determine outcome), over the course of a career, bargaining in a cooperative manner will pile up hundreds of "threes," the reward for mutual cooperation, which will cancel out the occasional "zeros" suffered at the hands of others who always or randomly defect. The argument that one should cooperate, therefore, applies only to strategies for bargaining relationships in which there is reason to believe that the parties will bargain again, in person or through the proxy of their reputations in the bargaining community. In such relationships, achieving a "tie," or never losing by more than one move, is like always finishing second. It returns more in the end than competitive strategies that produce occasional victories, but that more often produce middling deadlocks and mutual defeats.

The insight that a bargaining approach must be judged at the strategic as well as at the tactical level, and by its long as well as its short term effects, may seem obvious in retrospect, but it has not always been thus.<sup>174</sup> The idea may be implicit in discussions of cor-

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Good, *supra* note 171, at 38 (limits of a party's control over the process of acquiring a reputation). Some types of institutionalized bargaining (e.g., between public defenders and prosecutors, insurance adjusters and personal injury lawyers, collection agency lawyers and legal aid attorneys) are continuous enough to fit the iterated prisoner's dilemma model almost perfectly, and other types often will approximate it. See Gilson, *supra* note 4, at 309-10 (Axelrod's conditions may be approximated in the Japanese system of contracting where parties "develop a substantial stake in [their] reputations for cooperative behavior" and do not behave opportunistically *vis-a-vis* each other, and also in some business settings in the United States.). But there always will be areas of bargaining where the "future does not cast a shadow" and where Axelrod's analysis, by its own terms, does not apply.

174. The requirement that one take a long range perspective in defining success may make the argument for cooperative bargaining difficult for some to accept. While it is intellectually believable that always tying negotiations will produce more in the long run than winning and losing, in some ways it is just another illustration of "slow and steady wins the race;" there may be something emotionally unsatisfying about it. To pass up the opportunity to make a killing by exploiting vulnerability, ignorance, lack of resources, or lack of skill, will seem naive to many lawyers, the advice of someone who has never entered the fray. Yet, the development of a reputation for cooperating requires just that, that one cooperate all of the time, at least at the level of strategy, even when it

dial, principled, and problem-solving bargaining, but Axelrod made it explicit, developed it, and gave it the emphasis we now know it warrants. The idea may even be counterintuitive. Lawyers typically believe that good bargainers get disproportionately large settlements most of the time, that is, that they regularly or at least frequently end up with the larger share of the bargaining pot. The idea that one could win by losing or tying is not so widely grasped. In Axelrod's words:

[*Tit for tat*] won the tournament, not by beating the other player, but by eliciting behavior from the other player which allowed both to do well . . . [I]n a non-zero-sum world you do not have to do better than the other player to do well for yourself. This is especially true when you are interacting with many different players. Letting each of them do the same or a little better than you is fine, as long as you tend to do well yourself. There is no point in being envious of the success of the other player, since in an iterated prisoner's dilemma of long duration the other's success is virtually a prerequisite of your doing well for yourself.<sup>175</sup>

What was true of Axelrod's game players could be said of lawyer bargainers as well:

. . . there is a lot to be learned about coping in an environment of mutual power. Even expert strategists from political science, sociology, economics, psychology, and mathematics made the systematic errors of being too competitive for their own good, not being forgiving enough, and being too pessimistic about the responsiveness of the other side.<sup>176</sup>

Successful bargainers, then, live in and contribute to a world of other successful bargainers. They try only for their fair share of bargained-for resources, and they work hard to insure that others, including adversaries, get their deserved shares as well. For them, doing well is a group phenomenon in which the real returns come over time.

But so it is clear, bargaining cooperatively does not mean being

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is possible to take advantage. One cannot be thought of as cooperative and at the same time sneak in random defections when it suits one's purposes. That was the problem with *JOSS* and the point of the discussion about "echo effects." See *supra* note 152. A reputation of randomly defecting may not be as bad as one of always defecting, but it also is not as good as one of cooperating.

175. See AXELROD, *supra* note 13, at 112.

176. *Id.* at 40.

a patsy,<sup>177</sup> splitting the difference, or giving away the store. Cooperative bargainers are as aggressive and energetic as their adversarial counterparts in the pursuit of strong claims, even to the point of demanding most of the bargaining pot when the strength of a client's case warrants it. The extent to which a strategy is cooperative is determined not by looking at the outcome it produces, but at the manner in which it proceeds. Cooperative bargainers are those who do not unilaterally defect on adversaries not known to be competitors, and unless provoked, do not defect at all. That is, they do not conceal information the other side has a right to know, nor advance false arguments on the hope that they will be believed. They do not use leverage or make demands that cannot be justified on some substantive ground, nor otherwise betray reasonable adversary expectations about cooperative behavior based on the bargainers' past histories (or, when that evidence is too thin, based on community standards of fair bargaining practice). When these ground rules are followed, bargaining outcome becomes a function of the substantive strength of the parties' respective claims and the bargainers' skill and persuasiveness in arguing for them. Cooperative bargaining sometimes produces even distributions and sometimes rewards one side more than the other; what happens in any particular case depends on the relative strength of the parties' respective claims. One thing is clear, however: being cooperative is not just another way of saying divide everything in half.

Its insights notwithstanding, there are sizable practical problems involved in translating Axelrod's analysis into real life bargaining practice. In life, bargaining strategies do not come in the sharply dichotomous categories of the prisoner's dilemma, and bargainers often must select from strategies that seem a little more or a little less cooperative (or competitive). Similarly, because bargaining strategies often are quite complex, and real life information about their nature fuzzy, it is sometimes difficult or even impossible to know, immediately and occasionally ever, whether the other side

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177. *See id.* at 184.

[O]ne of my biggest surprises in working on this project has been the value of provocablity. I came to the project believing one should be slow to anger. The results of the . . . [t]ournament . . . demonstrate that it is actually better to respond quickly to a provocation. It turns out that if one waits to respond to uncalled for defections, there is the risk of sending the wrong signal. The longer defections are allowed to go unchallenged, the more likely it is that the other player will draw the conclusion that defection can pay . . . . The implication is that it is better to be provokable sooner, rather than later.

*Id.* at 184-85.

has cooperated or competed, and therefore equally difficult to know which message to send back, or even how to send it.<sup>178</sup> Yet, these are difficulties of execution and not strategy. They are questions not of how to bargain in a situation of an iterated prisoner's dilemma, but of how to put one's bargaining strategy into operation and carry it out successfully. And like all questions of execution, they ultimately will yield to the pressure of diligence and insight.

Given the similarities between a career in dispute bargaining and the iterated prisoner's dilemma, Axelrod's analysis should interest lawyers. It suggests, apparently counter to some lawyers' intuition,<sup>179</sup> that when faced with a choice of adopting either a competitive or cooperative approach to bargaining in relationships or communities in which one will bargain again, lawyers should cooperate. They should choose strategies that are nice, forgiving, provokable, and transparent, even when the other side does not.<sup>180</sup> As long as the bargaining community contains a "small cluster of cooperators," lawyers will do better over the long haul by being cooperative.

Axelrod's argument is not an aesthetic one, and it does not depend on a personal stylistic preference for cordial social relations. It suggests in a powerful way that when bottom line outcome over time is the measure, cooperation is the means—indeed, that a cooperative strategy may be even the nasty, brutish, and self-inter-

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178. See Gregory Bateson, *Biological Evolution of Cooperation and Trust*, in TRUST, *supra* note 14, at 15, 28 ("[I]n cooperative behavior, conditions matter a lot."). Axelrod recognizes these limitations and cautions against making important life choices without taking the complicating factors of real life into account. See AXELROD, *supra* note 13, at 19; see also Axelrod & Keohane, *supra* note 165, *passim*. The lack of a perfect fit between real life bargaining and a prisoner's dilemma game is no accident. Bargaining games are valuable research tools precisely because they strip away the fuzziness of life. *Id.* at 131. Games identify winners and losers, and provide direct information about the relationship of strategy to outcome. The complicating detail of real life bargaining, by contrast, often makes it difficult to determine how one did in comparison with another, and in the process serves the important practical function of promoting agreement. Nevertheless, it also slows down learning and sometimes causes one to learn the wrong lessons. See also RASMUSEN, *supra* note 16, at 14-16 (discussing advantages of "no-fat" modelling in academic games).

179. When the game theory language is stripped away, Axelrod's norms look a lot like a version of the golden rule (do unto others as they do unto you), the Talmudic idea of measure for measure, or the Old Testament norm of an eye for an eye. Although Axelrod's norms are framed in the presently popular language of consequentialism, they may not be so counterintuitive after all.

180. One of the benefits of Axelrod's analysis is that it provides a strategy for use in the present day world of dispute settlement and deal making, and it does not require system-wide reform to be effective.

ested<sup>181</sup> bargainer's best hope (as long as large returns are the reason she is nasty and brutish<sup>182</sup>). Legal commentators had made similar claims,<sup>183</sup> but by focusing on bargaining in the aggregate, by isolating the trading process, the single best barometer of bargaining success, and by defining guidelines for successful trading, Axelrod provided those claims with an important additional base of support.

### III. THE ETHICAL OBLIGATION TO COMPETE

Bargaining, as we have said, is a moral and political phenomenon as much as a strategic one, governed by ethical norms as well as practical ones, and good bargainers must take both normative systems into account. Bargaining's ethical norms are found in each state's Rules of Professional Conduct or Code of Professional Responsibility and in its case and statutory law defining the nature and limits of adversary advocacy. The American Bar Association's Model Rules of Professional Conduct (Model Rules)<sup>184</sup> will be the

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181. Notwithstanding its popularity, see ANTHONY DE JASAY, *SOCIAL CONTRACT, FREE RIDE* 4, 125-27 (1989); GAUTHIER, *supra* note 93, at 154-55; DEREK PARFIT, *REASONS & PERSONS* (1984); DONALD REGAN, *UTILITARIANISM AND CO-OPERATION* 125-42, 207-11 (1980); EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 41-44 (1977), there is a certain irony in basing an argument for being other-regarding on self interest. In an era of economic man and woman, self interest seems to be taken as natural or fundamental, but it is no less problematic than altruism or idealism, and needs to be inquired into, not stipulated. See William H. Simon, *Babbit v. Brandeis: The Decline of the Professional Ideal*, 37 *STAN. L. REV.* 565, 582 (1985). For an excellent collection of articles calling this stipulation into question, including in the area of game theory research, see *BEYOND SELF-INTEREST*, *supra* note 138.

182. An adversarial bargainer is not necessarily interested in the largest bottom line return. Some disputes are litigated rather than settled, even when it is uneconomic to do so (i.e., when there is little hope of improving on a settlement offer to the extent needed to offset litigation and lost opportunity costs), because the bargainer would rather win an election, advertise her services, pay back a past wrong, teach a lesson, or the like, than settle favorably. Axelrod's analysis does not apply, at least in the same way, in these situations.

183. Similarity is an important point. Axelrod's argument is not identical to those of cordial, principled, and problem-solving bargaining, distinguished only by the extent to which it is more systematically stated and empirically grounded. His conception of cooperation is also different in several significant respects. It includes a retributive element, recommends reciprocal rather than unilateral cooperation, acknowledges the limits of setting, relationship, and context, and admits of circumstances in which cooperation is inappropriate. He does not just dress up legal bargaining theories and correct cosmetic flaws. He has produced a new understanding of cooperation.

184. See generally *MODEL RULES*, *supra* note 169. See also *MODEL CODE OF PROFESSIONAL RESPONSIBILITY* (1981) [hereinafter *MODEL CODE*]; Penegar, *supra* note 89, at 309 ("[T]he Code may be viewed as . . . a mature expression of the profession's most comprehensive and widely authoritative effort to define itself."). Among the many texts interpreting and elaborating on the Model Rules, two are excellent, both in their own

focus here, however, because they provide the most widely used synthesis. Notwithstanding some excesses, ambiguity, and contradiction, the Model Rules articulate a relatively coherent conception of lawyer bargaining role,<sup>185</sup> although attempts to capture it in single justificatory metaphors have foundered.<sup>186</sup> The Model Rules define the ethical obligations of lawyer bargaining in terms of the interlocking duties of competence, diligence, deference, loyalty, and communication. In different ways, and to different extents, depending on context, lawyers owe these duties to clients, third parties, and institutions that make up the legal dispute settlement system. Collectively, the duties define a lawyer dispute bargainer's ethical role.<sup>187</sup>

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right and as sources of further authority, see GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* (1989); WOLFRAM, *supra* note 169. Professor Wolfram is also the Reporter for the American Law Institute's *Restatement of the Law Third, The Law Governing Lawyers*, of which four tentative drafts have been published. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Tent. Draft No. 4, 1991); LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170, at xxix. My distinction between practical and ethical norms is similar to and inspired by David Luban's distinction between moral norms and professional norms. See David Luban, *Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 460-62 (1981). The present Article is an elaboration of a point first made in Condlin, *supra* note 6, at 76-78 n.31.

185. See WOLFRAM, *supra* note 169, at 710-27 (describing lawyer bargaining role and illustrating some of its ambiguities and contradictions); Penegar, *supra* note 89, at 310 ("the Code reveals a set of coherent ideas which are part of the mindset with which lawyers conduct their work"); see also *infra* note 187.

186. See, e.g., Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (characterizing the lawyer bargainer as a hired gun); see also MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 65-86 (1990), where Professor Freedman makes it clear that he is still unrepentant after all these years, by "saying it again, louder"; Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 581-82 (1977) (lawyer acts as "amateur" human (see also *infra* note 217)); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (diviner of truth); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1975) (friend of sorts); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (conscience). While all of these discussions predate the Model Rules, the conception of lawyer role they consider is essentially the same as that embodied in the Rules.

187. In the sketch that follows I have tried to adhere to what Gerald Postema, so far as I can tell, first called the "standard conception" of lawyer role. See Postema, *supra* note 170, at 73-74. Others laid the groundwork for the description of it as the standard conception, see MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672-75 (1978); Simon, *supra* note 186, at 34-38, and still others have discussed it at length, see Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 595-626 (1985); LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170, at xx, 7, 393-403. David Luban has taken a refined version of it, called moral activism, to perhaps its highest form, see *id.* at 160-61; Luban, *Freedom and Constraint*, *supra* note 118, at 425-52; David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Ste-*

The duties apply in general to all types of lawyer work, but each contributes something distinctive and specific to the definition of dispute bargaining role. Take competence, for instance. For a time mostly a synonym for legal knowledge, and demonstrated or acquired by knowing or learning relevant law,<sup>188</sup> the duty of competence now requires that lawyer bargainers act skillfully. In the

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*phen Ellmann*, 90 COLUM. L. REV. 1004, 1007-17 (1990). The Model Rules incorporate this standard conception. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170, at 159, 393-403; Gary T. Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411 (1988); Deborah L. Rhode, *supra*, at 600-01, 611. It is also the "Profession's narrative." See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1242-46 (1991). For a description of the Progressive-Functionalist predecessor to the standard conception, vestiges of which linger in the Model Rules, see Simon, *supra* note 181, at 565-68. See also ROSENTHAL, *supra* note 44, at 7-28 (describing standard conception as "traditional" model of lawyer client relationship, contrasted with "participatory" model); WOLFRAM, *supra* note 169, at 156 n.69 (arguing that the Model Rules incorporate the standard conception, called "hired gun" view, along with Progressive-Functionalist conception, called "lawyer-dominant" view). Not everyone agrees that it is the standard conception, see Stephen Ellmann, *Lawyer for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 120-29 (1990) (reviewing DAVID LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170); Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1568-69 (maintaining that "legal ethics has no paradigm, only some fragmentary conceptions of the lawyer's role vying inconclusively for dominance"); Schneyer, *supra* note 170, at 11-22 (arguing that standard conception is "something of a straw man" constructed by its critics); M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 LAW & PHIL. 67, *passim* (1990) ("Lawyers cannot expect useful advice from philosophers about the practical moral problems which they encounter in their daily professional lives." *Id.* at 90-91.); but see David Luban, *Smith Against the Ethicists*, 9 LAW & PHIL. 417 (1990-1991) (rejoinder to Professor Smith); that it represents the reality of practice for most lawyers, see Rhode, *supra*, at 590; or that it is different from nonlawyer role in any significant sense, see Ellmann, *supra*, at 129-45; David Wasserman, *Should a Good Lawyer Do the Right Thing? David Luban on the Morality of Adversary Representation*, 49 MD. L. REV. 392 (1990). There are almost as many variations of the standard conception as there are law professors writing about legal ethics, and I am not able to incorporate all of the unique features of those variations here. See, e.g., Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV. 709, 715-21 (1989); Eric E. Jorstad, *Litigation Ethics: A Niebuhrian View of the Adversarial Legal System*, 99 YALE L.J. 1089, 1103-07 (1990); L.R. Patterson, *A Preliminary Rationalization of the Law of Legal Ethics*, 57 N.C. L. REV. 519 (1979); James Gray Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 OR. L. REV. 1 (1989); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551 (1991). I have tried only to identify a minimalist view of a legal dispute bargaining's ethical norms, on which the largest number of commentators and lawyers could agree. I intend this conception to be mainstream and uncontroversial, to whatever extent that is possible. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170, at 154-67; Wasserman, *supra*, at 393; cf. FREDMAN, *supra* note 186, at 65-86 (discussing the pervasiveness of the "ethic of zeal" in lawyers' professional responsibilities).

188. See MODEL CODE, *supra* note 184, EC 6-2 (stating that "[a] lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments"); *id.* EC 6-3 (stating that a lawyer may "become qualified through study and investigation"). "This standard [is] lower than the established rule of civil liability for malpractice, under which an attorney must 'exercise the skill, apply the

words of the Model Rules, "competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation" of a client.<sup>189</sup> While lawyers may not take action that is frivolous (i.e., primarily to harass or maliciously to injure) or prohibited by law,<sup>190</sup> they must use any legally available move or procedure helpful to a client's bargaining position.<sup>191</sup> Among other things, this means that all forms of leverage must be exploited, inflated demands made, and private information obtained and used whenever any of these actions would advance the client's stated objectives, even if such action would jeopardize a law-

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knowledge, and exert the diligence . . . [of] a lawyer of ordinary competence and diligence.'" Hazard, *supra* note 187, at 1258 (footnote omitted).

189. MODEL RULES, *supra* note 169, Rule 1.1; see also HAZARD & HODES, *supra* note 184, at 5-8; WOLFRAM, *supra* note 169, at 186-89; Robert B. McKay, *Competence and the Professionally Responsible Lawyer*, 29 EMORY L.J. 971, 979-86 (1980) (discussing the obligation of competence); Rex R. Perschbacher, *Regulating Lawyers' Negotiations*, 27 ARIZ. L. REV. 75, 85, 119-20 (1985).

190. MODEL RULES, *supra* note 169, Rule 3.1, cmt. 2 (defining action as "frivolous" if it is "taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law"); see also HAZARD & HODES, *supra* note 184, at 1-2, 329-36.

191. MODEL RULES, *supra* note 169, Rule 3.1, cmt. 1 ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause . . ."); see Richard E. Crouch, *The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behavior in Divorce Litigation*, 20 FAM. L.Q. 413, 414 (1986) (if ethically questionable tactics "work," lawyers must use them or face the possibility of malpractice liability; also cataloguing suggested (borderline) tactics for divorce negotiation); Walter W. Steele, Jr., *Deceptive Negotiating and High-Toned Morality*, 39 VAND. L. REV. 1387, 1391 (1986) (finding the obligation of a lawyer negotiator to make the "best" deal—not the "fairest" deal"). There is a question of whether this duty extends to the use of bargaining technique. Such technique is often context specific rather than generic, and identifying a consensus range of maneuvers that a competent bargainer should always consider and use is more difficult than, for example, identifying an equivalent range of trial tactics. For a statement of the standard of competence for trial, see *Nix v. Whiteside*, 475 U.S. 157, 164-71 (1985), and *Strickland v. Washington*, 466 U.S. 668, 687-98 (1984). This difficulty, coupled with the use of the adjective "legal" in the description of competence (as the duty to use "legal procedure," MODEL RULES, *supra* note 169, Rule 3.1, cmt. 1), may suggest that competence requires only the use of litigation tactics made available by formal rules of evidence and procedure. So restricted, however, the Model Rules would create a double standard, in which the lesser representational burden would be imposed in the more important case (in magnitude of client interests affected). Though not inconceivable, it is doubtful that the Model Rules' drafters had such a double standard in mind, or that they wanted to relieve lawyers of the burden to act competently when bargaining, but not at trial, and courts have not interpreted the competence obligation in so narrow a fashion. See Martin C. Bryce, Jr., *Recent Developments, Rizzo v. Haines: An Attorney's Duty to Exercise Ordinary Skill and Knowledge in the Conduct of Settlement Negotiations*, 35 VILL. L. REV. 435, 444-45 (1990). If competence is a requirement of bargaining, therefore, and presumably it is, and being competent consists of using procedures skillfully for the fullest benefit of the client, as it does, then lawyers are ethically obliged to do all that it takes, within the realm of law, to see that the client's bargaining objectives are achieved.



yer's long-term, working relationship with her bargaining counterpart.

Lawyers also must show enthusiasm for the bargaining task. Once described as the obligation of zealous representation,<sup>192</sup> and now expressed as the duty of diligence,<sup>193</sup> this duty requires lawyers to act with "commitment and dedication to the interests of the client,"<sup>194</sup> and to "carry to a conclusion all matters undertaken" on the client's behalf.<sup>195</sup> Lawyer bargainers, in other words, must develop and play out client-bargaining hands with energy and believability, and not undercut those efforts with a tone or attitude which indicates that their hearts are not in it, or that they do not believe what they say. Plausibility and sincerity are the most important attributes of effective bargaining maneuvers; the duty of competence requires the first, and the duty of diligence the second.

The duty of deference is concerned with which objectives are pursued, not how they are pursued. It makes client judgments supreme in disagreements with lawyers about which objectives to seek and, absent criminality or fraud, obligates lawyers to pursue all goals clients set.<sup>196</sup> Deference is the centerpiece of lawyer-client relations and the feature of lawyer role that makes law practice a fiduciary enterprise. In bargaining, the main function of deference is to require that clients alone decide whether to accept or reject offers of settlement.<sup>197</sup> Lawyers must present offers and may discuss them,

192. See MODEL CODE, *supra* note 184, Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law."); see also WOLFRAM, *supra* note 169, at 578-82 (discussing the obligation of zealous partisanship). The nature and extent of this obligation has always been a matter of debate, but recently the debate has taken on added life. See Condlin, *supra* note 6, at 75-76 n.29.

193. See MODEL RULES, *supra* note 169, Rule 1.3; WOLFRAM, *supra* note 169, at 191-92; HAZARD & HODES, *supra* note 184, at 47-52 (discussions of diligence obligation).

194. MODEL RULES, *supra* note 169, Rule 1.3 cmt. 1.

195. *Id.* Rule 1.3 cmt. 3; see also Penegar, *supra* note 89, at 339 ("[T]he lawyer is not told to moderate his zeal with respect to opponents encumbered with this or that deficiency, relative weakness, or vulnerability. Apparently nothing is to be held back . . ."); Wetlaufer, *supra* note 11, at 1255 (arguing that "lawyers' duty to their clients entails an affirmative obligation to perform all lawful acts without regard to ethics").

196. MODEL RULES, *supra* note 169, Rule 1.2 (a). Wolfram describes this conception of the lawyer-client relationship as the "cooperative" model. See WOLFRAM, *supra* note 169, at 156; see also HAZARD & HODES, *supra* note 184, at 1-2, 17-22; Steele, *supra* note 191, at 1392-93; Perschbacher, *supra* note 189, at 84-85, 101-04. The client control issues are much more complicated when the client is a group and the goal is political action. See LUBAN, LAWYERS AND JUSTICE, *supra* note 170, at 324-57.

197. See MODEL RULES, *supra* note 169, Rules 1.2(a), 1.4 cmt. 1; see also WOLFRAM, *supra* note 169, at 165-66, 168-72; Bryce, *supra* note 191, at 444-46. Under a market view of lawyer-client relations such an issue would be negotiable. See John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1031 (1982).

arguing for or against on the basis of a broad range of legal and extra-legal considerations,<sup>198</sup> but when the dust has settled and it is time for a decision, the client has the final word. Whether the choice is to clean out the adversary, split the difference, or make a gift, if a client's choice is knowingly and freely made, a lawyer must act on and respect it.

The duty of loyalty arises principally from those parts of the Model Rules requiring the preservation of client confidential communication<sup>199</sup> and prohibiting the representation of conflicting interests.<sup>200</sup> In seeking legal help, clients may (many would say must) tell lawyers all that they know,<sup>201</sup> both good and bad, helpful and harmful, embarrassing and praiseworthy, so that lawyers may be prepared for any eventuality the representation might present. This information may be shared in private and, absent consent or tactical necessity, must not be disclosed.<sup>202</sup> When the information is about

198. MODEL RULES, *supra* note 169, Rule 1.4 cmt; *see also* HAZARD & HODES, *supra* note 184, at 303-308.1 (right to argue nonlegal considerations to a client); WOLFRAM, *supra* note 169, at 157-58.

199. *See* MODEL RULES, *supra* note 169, Rule 1.6. For a general discussion of the loyalty obligation, *see* WOLFRAM, *supra* note 169, at 145-88; for confidentiality, *see id.* at 242-68, 296-311. The obligation to preserve confidences under the Model Rules is not the same as the obligation to preserve confidential communication under the attorney-client privilege. For a discussion of the latter, *see* LUBAN, LAWYERS AND JUSTICE, *supra* note 170, at 185-89; WOLFRAM, *supra* note 169, at 250-68.

200. *See* MODEL RULES, *supra* note 169, Rules 1.7, 1.8, 1.9; *see also* WOLFRAM, *supra* note 169, at 312-37.

201. The classic argument to this effect is FREEDMAN, *supra* note 187, at 30-32. *See also* LUBAN, LAWYERS AND JUSTICE, *supra* note 170, at 189-97; Paul D. Carrington, *The Right to Zealous Counsel*, 1979 DUKE L.J. 1291; Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 3-23 (1951); Stephen Landsman, *The Decline of the Adversary System and the Changing Role of the Advocate in that System*, 18 SAN DIEGO L. REV. 251 (1981); John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980); Penegar, *supra* note 89, at 355-64; Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; Stephen A. Saltzburg, *Lawyers, Clients and the Adversary System*, 37 MERCER L. REV. 647 (1986). This argument seems to have convinced the authors of one of the leading negotiation texts. *See* HARRY T. EDWARDS & JAMES WHITE, PROBLEMS, READINGS, AND MATERIALS ON THE LAWYER AS NEGOTIATOR 373-89 (1977). Again, things get much more complicated when the client is a corporation. *See* LUBAN, LAWYERS AND JUSTICE, *supra* note 170, at 217-34.

202. MODEL RULES, *supra* note 169, Rule 1.6(a), (b). For a discussion of the disclosure obligations of the Model Rules generally, *see* HAZARD & HODES, *supra* note 184, at 88-106; LUBAN, LAWYERS AND JUSTICE, *supra* note 170, at 177-234; WOLFRAM, *supra* note 169, at 296-311; Burt, *supra* note 122. *See also* Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989) (analyzing with skepticism the role of confidential communication in making legal advice available and socially desirable); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (challenging many of the Model Rules' confidentiality provisions and the reasoning supporting them).

certain kinds of illegality it may have to be revealed,<sup>203</sup> but under no circumstances may lawyers ignore client instructions to conceal information not having to do with illegality which, if disclosed, might impair or undercut a client's bargaining advantage, even though these instructions may prevent lawyers from bargaining cooperatively.

The loyalty obligation also prohibits the representation of conflicting interests. Conflicts can be simultaneous or successive.<sup>204</sup> They are simultaneous when lawyers argue both for and against the same position in a single dispute, such as representing husband and wife in a contested divorce, buyer and seller in a lawsuit for breach of contract, or joint defendants in a criminal prosecution (where the substance of each defense incriminates the other defendant).<sup>205</sup> Successive conflicts occur when lawyers switch sides and try to undo for present clients what they did for other clients in the past<sup>206</sup> (and may occur when they try to undo for present clients what they could do for other clients in the future<sup>207</sup>). Beyond being bad form, a now rejected but not always unpersuasive rationale,<sup>208</sup> representing conflicting interests is prohibited by the Model Rules because of the belief that it is not possible for lawyers to proceed competently against former clients without in some way using information acquired during past relationships to the former clients' detriment. Such actions would violate the same considerations that underlie the obligation to preserve client confidences.<sup>209</sup> (A conflict between present and future client interests will need a different rationale.<sup>210</sup>)

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203. See MODEL RULES, *supra* note 169, Rule 1.6(b)(1) (allowing a lawyer to reveal confidential information "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm"). Rule 1.6 is sometimes superseded by other Model Rules or the substantive law of the various jurisdictions, but "a presumption should exist against such supersession." *Id.* cmt. 20; see also Rhode, *supra* note 187, at 612-17; WOLFRAM, *supra* note 169, at 268-82, 303-11.

204. Compare MODEL RULES, *supra* note 169, Rule 1.7 with *id.* Rule 1.9.

205. See *id.* Rule 1.7(a) cmt; see also HAZARD & HODES, *supra* note 184, at 128-140.1; WOLFRAM, *supra* note 169, at 349-58.

206. See MODEL RULES, *supra* note 169, Rule 1.9; see also HAZARD & HODES, *supra* note 184, at 174.1-186.3; WOLFRAM, *supra* note 169, at 358-74.

207. See *infra* notes 234-236 and accompanying text.

208. See MODEL CODE, *supra* note 184, Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety."); MODEL RULES, *supra* note 169, Rule 1.9 cmt. 5 (noting that "the term 'appearance of impropriety' is question-begging"); see also WOLFRAM, *supra* note 169, at 319-23 (discussing the coherence of "appearance of impropriety" rationale).

209. See MODEL RULES, *supra* note 169, Rule 1.9 cmt. 5; see also HAZARD & HODES, *supra* note 184, at 121-27 (finding that the loyalty obligation underlies conflicts rules); WOLFRAM, *supra* note 169, at 316-17.

210. See *infra* notes 234-236 and accompanying text.

In short, lawyers may not compromise the interests of clients, present or past, to serve the interests of other clients, or themselves, either by arguing against clients or betraying their trust.

The duty of communication, or the duty to "explain a matter" and "keep the client reasonably informed,"<sup>211</sup> is a corollary of the client's right to control the representation. In order to decide what ends to pursue, what costs to incur, and what harms to inflict, clients must know about relevant evidentiary facts, adverse party interests, offers of settlement, consequences of choices, alternative courses available, and institutional and situational factors likely to influence the outcome of the case.<sup>212</sup> Lawyers are the clients' only or best source for much of this information.<sup>213</sup> This duty to inform may be more substantial in bargaining, where proceedings may be and regularly are suspended to allow for discussion of options, than in other types of proceedings, such as trials, which, once begun, continue to a conclusion on a timetable of their own.<sup>214</sup> While lawyers need not explain bargaining strategy in detail (for they may know it themselves only in retrospect), they must "fulfill [the client's] reasonable . . . expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of the representation."<sup>215</sup> When this is impracticable—when a client is incapacitated, for example—lawyers may act without prior consultation; however, this is a limited exception, narrowly construed and infrequently used. Clients control legal representation, and lawyers must inform them to the extent necessary to allow them to exercise that control.<sup>216</sup>

When these duties are combined, as they must be, it may appear that lawyers are ethically obligated to be skillful, energetic, un-

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211. MODEL RULES, *supra* note 169, Rule 1.4.

212. See WOLFRAM, *supra* note 169, at 163-65 (discussing the rationale for the duty of communication); HAZARD & HODES, *supra* note 184, at 62.1-68; Perschbacher, *supra* note 189, at 115-18; Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 72-122 (1979).

213. See GIFFORD, *supra* note 1, at 6-7; ERLANGER et al., *supra* note 6, at 29.

214. See MODEL RULES, *supra* note 169, Rule 1.4 cmt. 2.

215. *Id.*

216. See *id.* Rule 1.4 cmt. 3, Rule 1.14(b); see also HAZARD & HODES, *supra* note 184, at 269-80 (discussions of the Rules regulating incapacitated clients); WOLFRAM, *supra* note 169, at 159-63, 712. For an extensive discussion of the issues involved in representing the incapacitated client, see Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515. For a discussion of some of the theoretical and practical difficulties involved in making client control a reality in the bargaining setting, see Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987).

critical, and obedient instruments of selfish client ends,<sup>217</sup> but the reality of lawyer dispute bargaining role is slightly less harsh. Lawyers are persons in their own right, with moral and political rights and obligations of their own, and even though they must take direction from their clients, they need not do everything asked.<sup>218</sup> For example, the duty of deference distinguishes between questions of ends and questions of means, and reserves to lawyers the tactical and technical decisions of how best to advance client objectives.<sup>219</sup>

217. There certainly are respected commentators who believe that this is true. In their words,

[L]awyer[s] [are] person[s] who on behalf of some people treat [ ] other people the way bureaucracies treat all people—as nonpeople. . . . [They] . . . use . . . bureaucratic skills—delay, threat, wheedling, . . . negotiation, selective surrender, almost-genuine passion—on behalf of someone unable or unwilling to do all that for himself.

[They] help people who cannot in the particular instance relate successfully to each other as whole human beings to relate to each other as counters in each other's self-protecting and self-maximizing life plans.

Dauer & Leff, *supra* note 186, at 581. As a consequence, the most that can be said for them is that they are "no rottener than the generality of people acting, so to speak, as amateurs." *Id.* at 582; see also Leubsdorf, *supra* note 197, at 1046 ("The traditional system encourages the lawyer to pursue his client's supposed interests to the limit, perhaps further than the client would have pursued them, without taking responsibility for the results."); Penegar, *supra* note 89, at 338-41 ("the lawyer is not told to moderate his zeal . . . [.] nothing is to be held back"); William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487 (1980) (lawyers who represent clients on a therapeutic model typically regard the lawyer-client relationship as a community of two, and the rest of the world as adversaries to be neutralized); Zacharias, *supra* note 202, at 374 n.106 ("lawyers and laymen alike come to view the profession as amoral 'tools' of the client, meriting the right to earn a living, but little else," and "this view is consistent with the general orientation of the professional codes"). The "amoral bureaucrat" view is not unanimously held, of course, see Fried, *supra* note 186, but it is refreshingly free of the civics class hyperbole and self-serving (and self-deceiving) cant, which characterizes much of the literature on being a lawyer, and this gives it a certain appeal.

218. Model Rule 1.2, allowing a lawyer to limit the scope of a representation, and Model Rule 1.16, allowing a lawyer to decline or terminate a representation, are the two most common sources of this power. The process of preventing client misconduct by withholding cooperation is often described as performing the lawyer "gatekeeper" function. See generally Reiner H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J. L. & ECON. ORG. 53 (1986). See also HAZARD & HODES, *supra* note 184, at 2, 30-45 (representation must be within the bounds of law, and nonfraudulent); WOLFRAM, *supra* note 169, at 155 (lawyers sometimes must take charge in client relationships); *id.* at 582-85 (examples of how lawyers do not always have to do what clients request); Burt, *supra* note 122, at 1028 ("limits have always been placed on an attorney's freedom to accept a client's directives without question"); Schuman, *supra* note 21, at 12 (nothing in the Disciplinary Rules prevents lawyers from offering moral advice to clients). On the lawyer's duty to self, see generally John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U. L.Q. 429.

219. See MODEL RULES, *supra* note 169, Rule 1.2 cmt. 1; see also HAZARD & HODES, *supra* note 184, at 19-22; LUBAN, LAWYERS AND JUSTICE, *supra* note 170, at 159-60; WOLFRAM, *supra* note 169, at 156-57; Spiegel, *supra* note 212, at 49-65. All of these commentators

If a client asks a lawyer to use tactics that are repugnant, lawyers may refuse. Lawyers owe clients only substantive competitiveness; they may choose their own style. While clients should decide mixed questions such as how much expense to incur or how much harm to inflict,<sup>220</sup> for the most part lawyers and clients divide bargaining decision responsibility along an ends-means line.

Similarly, as officers of the court and citizens of the community, lawyers have public responsibilities, to third parties<sup>221</sup> and to the law,<sup>222</sup> that clients may not trump. Lawyers may not lie for clients (though they may tell half truths and puff<sup>223</sup>), either to adversaries or courts, or mislead opponents, either by act or omission, when to do so would be civilly actionable.<sup>224</sup> In limited circumstances, occasionally present in bargaining, lawyers must correct adversary misapprehensions and remedy ignorance.<sup>225</sup> They must bargain in good faith, not seek or agree to unconscionable settlements, and

emphasize the difficulty of making the ends-means distinction. The authority to make tactical decisions even permits lawyers to act contrary to client instructions under certain circumstances. See William R. Mureiko, Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys' Procedural Errors*, 1988 DUKE L.J. 733, 740-41.

220. This was clearer under the Model Code, which in Ethical Consideration 7-7, reserved to the client the right to make all decisions "affecting the merits of the cause or substantially prejudicing the rights of a client," though even under the Model Code the scope of this power was subject to debate. See Penegar, *supra* note 89, at 340-41 (Model Code limits the means an advocate may use rather than substantive outcomes she may produce); Spiegel, *supra* note 212, at 65-67.

221. See MODEL RULES, *supra* note 169, Rules 3.4, 4.4; see also HAZARD & HODES, *supra* note 184, at 319-26, 369-86; WOLFRAM, *supra* note 169, at 609-15, 649-51, 709-10; John K. Morris, *Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's Lawyers and Clients*, 34 UCLA L. REV. 781, 791-94 (1987); Perschbacher, *supra* note 189, at 86-94. In limited circumstances these responsibilities may produce civil liability. See WOLFRAM, *supra* note 169, at 223-35; Rabkin & Devins, *supra* note 6, at 207-10 (discussing the legal effects of settlement agreements reduced to consent decrees).

222. See MODEL RULES, *supra* note 169, Rule 3.3; see also HAZARD & HODES, *supra* note 184, at 345-368.1; WOLFRAM, *supra* note 169, at 638-46, 681-86. *But see* Wilkins, *supra* note 126, at 470-78 ("[T]he claim of indeterminacy directly challenges the . . . assertion that legal boundaries effectively mediate between a lawyer's private duty to clients and her public commitments to the legal framework." *Id.* at 470.).

223. See MODEL RULES, *supra* note 169, Rule 4.1 cmt. 1, 2; see also HAZARD & HODES, *supra* note 184, at 426-33; WOLFRAM, *supra* note 169, at 720, 726-27; Lowenthal, *supra* note 187, at 417-23; Steele, *supra* note 191, at 1392-95; Wetlaufer, *supra* note 11, at 1244-45. For a critique of the distinction between fact and opinion on which the idea of puffing is based, see Guernsey, *supra* note 169, at 105-12.

224. Lowenthal, *supra* note 187, at 415-19; see also RESTATEMENT (SECOND) OF TORTS § 529 (1977) (defining incomplete statements as fraudulent misrepresentations); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 727-28 (5th ed. 1984); WOLFRAM, *supra* note 169, at 719-25; Perschbacher, *supra* note 189, at 90-93, 126-29.

225. See HAZARD & HODES, *supra* note 184, at 428-29; Lowenthal, *supra* note 187, at 427-30.

deal fairly with opponents by avoiding the use of force and fraud.<sup>226</sup> These are limited obligations, imposed by law as much as by ethical rules, and while they prohibit few competitive maneuvers—there is still no obligation to make an adversary's factual case, correct analytical errors, or refuse any deal a court would enforce<sup>227</sup>—they are supreme in their own realm.

Finally, when lawyers do not act as advocates for individual clients, the consequences of role, particularly of the duties of deference and loyalty, are not quite so fierce. For example, when hired as intermediaries to "establish or adjust a relationship between clients on an amicable and mutually advantageous basis," lawyers may resolve disputes by "developing the parties' mutual interests."<sup>228</sup> They may bargain cooperatively for each side, in other words, as long as each is consulted on the implications of common representation, knows the advantages and risks involved, has made an adequately informed consent, and faces little risk of material prejudice should the joint representation fail.<sup>229</sup> Even when acting as advocates, lawyers may encourage clients to bargain cooperatively,<sup>230</sup> and when clients agree to do so, practical and ethical norms line up. When lawyers want to be practical and clients zealous, however, lawyers may be in a bind, depending upon how one interprets the foregoing duties of bargaining role, and it is to that problem that we now turn.

#### IV. THE BARGAINER'S DILEMMA

Practical bargaining is cooperative bargaining. Clients do better, at least clients in the aggregate, when represented by lawyers who bargain cooperatively and are known to do so. Nevertheless, a particular client, valuing her own immediate return in an individual case more highly than the interests of clients in the aggregate (which may include the particular client's own future interests), may seek to trade on rather than contribute to her lawyer's history of cooperat-

226. See *Preamble* to MODEL RULES, *supra* note 169; see also LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170, at 16-17, 51; WOLFRAM, *supra* note 169, at 714-27; Perschbacher, *supra* note 189, at 106-07, 123-25, 133-36; Steele, *supra* note 191, at 1396.

227. MODEL RULES, *supra* note 169, Rule 4.1 cmt; see also Lowenthal, *supra* note 187, at 413-14; Penegar, *supra* note 89, at 347 (bargaining is a "no-man's land" in which the restrictions are "very few indeed"); Rhode, *supra* note 187, at 601.

228. MODEL RULES, *supra* note 169, Rule 2.2 cmt. 3; see also HAZARD & HODES, *supra* note 184, at 309-18 (discussing the ethical norms for lawyers acting as mediators); WOLFRAM, *supra* note 169, at 438-43.

229. See MODEL RULES, *supra* note 169, Rule 2.2; see also WOLFRAM, *supra* note 169, at 337-49; HAZARD & HODES, *supra* note 184, at 142-54.2.

230. See MODEL RULES, *supra* note 169, Rule 1.4 cmt.

ing. She may instruct the lawyer to defect when the adversary cooperates, and may ground this instruction on the lawyer's ethical obligations to be deferential and competent. This places the lawyer in a bind. Does she bargain ethically or practically? Does she reject the instruction and preserve her reputation for cooperating, so that she can secure better settlements, on average, for all of her clients, including those in the future? Or does she follow her client's instruction, exploit the adversary's reasonable but, as it will turn out, unwarranted cooperation, and plant the seeds of future retaliation?<sup>231</sup>

The dilemma is serious, not necessarily because it is widespread—it may or may not be—but because lawyers seem to assume that it is the paradigm case. They see the defecting client as every client, and feel the pressure to bargain competitively across the board.<sup>232</sup> Clients do not correct the assumption, some perhaps because they agree with it, others perhaps because they do not know that it has been made, and still others perhaps because they see legal representation as a technical process in which following the lawyer's lead is the proper (and safest) course.<sup>233</sup> Whatever the reasons, the view that clients invariably want to compete has developed a life of its own, and is now treated as received wisdom in large parts of the

231. Insurance companies face such a dilemma in settling individual lawsuits when they must choose between the interests of individual insureds and those of insureds generally. See Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1150-53 (1990).

232. Lawyers do not usually say directly that every client is a defecting client, but that is the premise of the standard conception of lawyer role, see *supra* note 186, which sees law as the only check on lawyer strategic behavior. In academic discussions of lawyer role, the presence of the defecting client is often assumed because it is the hardest case, but the assumption now may have become self-fulfilling. See Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 909 (1990) (positing that "in a market in which the client seeks a champion not a chaperon, a reputation for aggressiveness may well be worth the costs . . . necessary to earn it"); Roland A. Paul, *A New Role for Lawyers in Contract Negotiations*, 62 A.B.A. J. 93, 95 (1976) (explaining that the lawyer's "duty often has gone beyond simple protection to trying to get for his client as much as he can"); Reavley, *supra* note 28, at 642-43 (offering as an explanation for "sharp and nasty practices" by lawyers the perception by lawyers that clients desire such practices); Zacharias, *supra* note 202, at 389 (lawyers do not try to dissuade clients from acting illegally). But see Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1160 (1990) ("Lawyers in private practice should . . . abandon their indifference to the ends being pursued by their clients" and counsel "a client on what the client's position should be."). For a survey of lawyer views about the nature of their obligations in a wide range of ethical bargaining problems, not always conforming to the standard conception, see Scott S. Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 REV. LITIG. 173, 180-97 (1989).

233. See Spiegel, *supra* note 212, at 79-81. For an excellent discussion of why following a lawyer's lead is not always in a client's interest, see ROSENTHAL, *supra* note 44, at 29-61.



profession. Lawyers trapped in this view, as well as those representing clients who truly want to defect, need a reply to the client's argument from deference and competence.

One response, which reduces the extent of the problem but does not solve it, is to argue that the decision to defect is a tactical decision, for lawyers to make, based on tactical considerations. But even if this argument is persuasive—and often it is not—it has two important exceptions that nearly swallow it whole. The first occurs when clients want a disproportionately large part of the bargaining pie, and defection is the only strategy which can achieve that result. When there is only one path to a legitimate (as in legal) client goal, questions of ends, controlled by the client, and questions of means, controlled by the lawyer, merge into one, so that it is largely beside the point to ask who controls the decision. The second exception, which is related, occurs when the decision to defect is the tactically superior choice, even though cooperative strategies are also available to accomplish the same ends. Here, even though the lawyer controls the decision, the duty of competence compels the choice of the competitive option. Lawyers must give client ends their best chance at success.

A lawyer might also argue that defecting unilaterally on an adversary who cooperates puts the lawyer in the impermissible position of representing conflicting interests. The argument goes like this: When a lawyer defects, in the short term she and her present client do better, reaping the benefits of the unilateral betrayal of trust. If the defection is carried out skillfully, which the client has a right to expect, its consequences will probably not be felt until the next negotiation, when the betrayed adversary or one privy to her information, now aware that she was betrayed,<sup>234</sup> retaliates in kind, and harms not the lawyer's present client but a future one.<sup>235</sup> Defecting in the interests of a present client, therefore, compromises the interests of future (unidentified but real) clients, and in the process involves the lawyer in determining which of two incompatible

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234. The assumptions here are that a bargainer expecting to trust (because the other side has a reputation for cooperating) will interpret what she hears and sees in a trusting light whenever the other's motives or purposes are not clear, particularly if the other is skillful at concealing those motives and purposes. As a result, in the short term, defecting behavior often will be missed, minimized, or overlooked. Thus, in most cases it will not be until after the negotiation, if at all, as the bargainer reflects on what happened, that she will realize she was betrayed, and not until she bargains with the same party again that she will have the opportunity to reciprocate.

235. As Axelrod has shown, because of the "echo effects" of unilateral defection, this harm ultimately could extend to many if not all of a lawyer's future clients, if it causes a lawyer to develop a reputation for always defecting. *See supra* note 152.

sets of client interests to serve. This, so the argument goes, is the representation of conflicting interests. The lawyer avoids such a conflict not by refusing to represent clients in the future—this ultimately would make legal representation unavailable to all—but by refusing to defect unilaterally on behalf of clients in the present.

While sensible in the abstract, this argument is not easily grounded in the language of the conflicts rules. A lawyer who defects unilaterally does not so much represent conflicting interests as bargain in conflicting styles. She does not switch sides, argue for and against the same issue, betray the present client who has asked her to defect, or reveal the confidences of past clients whose secrets are still intact. She betrays future clients and the present adverse lawyer (who relied, reasonably, but as it turned out, unjustifiably, on her past history of cooperation), but the conflicts rules do not mention the interests of such persons.<sup>236</sup> Those rules prohibit actual conflicts that are simultaneous or successive. But unilateral defection creates only a potential, not an actual, conflict. And the conflict is successive only in the sense that the lawyer acts inconsistently with a bargaining pattern she previously has used, not an interest she has represented. And it is simultaneous only in the sense that the lawyer betrays someone, not a client, in the present. The duty of loyalty strictly construed, therefore, at least that part of it grounded in the prohibition against representing conflicting client interests, is not directly implicated when a lawyer unilaterally defects on an adversary who expected her to cooperate. In fact, under the Model Rules, a refusal to defect may be the only disloyal act.

In a variation, a lawyer might also argue that the defecting client scenario presents a second type of conflict, one between the lawyer's interest in cooperating to promote the lawyer's material interests over time, and the client's interest in defecting to get the lion's share of a bargaining pot in the present. When a client asks a lawyer with a reputation for cooperating to defect on an adversary who also expected to cooperate, the lawyer's reputation for cooperating is likely to be jeopardized. She understandably will be reluc-

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236. See MODEL RULES, *supra* note 169, Rules 1.7, 1.8, 1.9. But see ROBERT E. KEETON, TRIAL TACTICS AND METHODS 3 (2d ed. 1973).

The duty of supporting the client's cause is sometimes so forcefully stated as to support the argument that . . . a trial lawyer [is] obliged to assert every legal claim or defense available, . . . [b]ut the aim of the trial system to achieve justice, the interests of future clients, and your legitimate interest in your own reputation and future effectiveness at the bar compel moderation of that extreme view.

*Id.* at 4.

tant to undercut this reputation because it allows her to coordinate activities and produce the largest aggregate returns over a bargaining career. This reluctance will make it difficult for the lawyer to make and carry out the decision to defect. Because lawyers may not represent clients when the lawyers' interests prevent them from considering and carrying out courses of action desired by clients,<sup>237</sup> it may seem, at first glance, that a lawyer must either defect or refuse representation. Yet, a closer look at the Model Rules will show that they are more concerned with lawyer "income" and "business interests" specific to the particular representation than to the undifferentiated interest of doing well generally over time.<sup>238</sup> The Rules try to make sure that lawyers do not exploit the influence provided by their clients' dependent circumstances to advance their own (the lawyers') interests by making favorable book deals, buying property at bargain prices, receiving gifts, unfairly appropriating resources held by clients, and the like. The Rules are less concerned with preventing lawyers from representing clients in ways that also maximize lawyer long range monetary return. In fact, if the latter was prohibited, representation would be denied to all but the most compliant clients.

Finally, a lawyer could argue to the defecting client:

I'm not selling you out by being cooperative. Being cooperative allows me to get good results, and avoid getting trapped in the mutual defection box. These benefits are available only because I have a history of cooperating, and you may not rely on that history and simultaneously deny it, as it suits your interests. You may not be a free rider on the efforts of my past clients.<sup>239</sup>

On this view, a lawyer's reputation is analogous to a public good,

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237. See MODEL RULES, *supra* note 169, Rule 1.7(b) cmt; see also HAZARD & HODES, *supra* note 184, at 140.1-42, 156-73; WOLFRAM, *supra* note 169, at 479-89. On the lawyer's reluctance to jeopardize her reputation, see Miller, *supra* note 216, at 210 ("A lawyer with an established reputation may be loathe to push too hard with one client since the costs of doing so, in terms of damage to reputation, may well exceed the value that the lawyer can appropriate in a particular case.").

238. See MODEL RULES, *supra* note 169, Rule 1.7(b); see also *id.* Rule 1.8 (regulating "Prohibited Transactions" between lawyers and clients); Rowe, *supra* note 25, at 870 ("The economic incentives affecting lawyers do not always coincide with what would serve their clients' interests."); Wolfram, *supra* note 169, at 479-84.

239. For a discussion of the free rider problem, see DE JASAY, *supra* note 181, at 137-40; GAUTHIER, *supra* note 93, at 113-14; RAIFFA, *supra* note 118, at 347-49; RAWLS, *supra* note 88, at 9-10, 267-70 (1971). The objection to the free rider is that noncompliance with a cooperative scheme morally wrongs those who comply to the extent that it expresses disrespect for them. See LUBAN, LAWYERS AND JUSTICE, *supra* note 170, at 37-43.

existing for the benefit of citizens generally, and not something individual clients are free to destroy in the service of their own selfish ends.<sup>240</sup> A client might make two replies, however. The first is a variation of the argument from diligence:<sup>241</sup>

Counselor, if you really can guarantee the benefits of mutual cooperation, the good result, you can guarantee the benefits of unilateral defection, the great result. You can guarantee a good result only because you know the other side will cooperate, but if the other side will cooperate you can get a great result by defecting. Since you have an obligation to seek my lawful objectives through reasonably available means, and defecting does not involve doing something illegal, you are not being a zealous advocate if you refuse my request to clean out the opponent when you know he is going to cooperate.

This is a familiar and strong argument. But in a twist on it, which is perhaps stronger, the client continues:

Counselor, I do not believe that you can guarantee a good result, because you cannot guarantee that the other side will cooperate. And if the other side defects, then by cooperating you are helping them to clean me out. You're getting me a terrible result when by defecting you might have gotten me a mediocre one, and that's malpractice.<sup>242</sup>

This argument is more powerful, and when taken together with the others, leads ineluctably to the conclusion that, because the ethical norms of bargaining are client centered, case specific, and individualistic, clients may instruct lawyers to squander the capital of their

240. A "lawyer services as public good" view may underlie Judge Sarokin's decision in the cigarette liability case to deny discovery gag orders so that lawyer discovery material would be available to citizens generally for future litigation. See *Cipollone v. Liggett Group*, 106 F.R.D. 573, 576-77, 586 (D.N.J.), *rev'd on other grounds*, 785 F.2d 1108 (3d Cir. 1986). To hold otherwise, said Judge Sarokin, would have been wasteful, inefficient, and not in the public interest. The same view may underlie the anti-secrecy movement now spreading through the states. See Andrew Blum, *Anti-Secrecy Drive Spreads in the States*, 13 NAT'L L.J., Jan. 14, 1991, at 3; see also MODEL CODE, *supra* note 184, DR 2-108 (prohibiting lawyers from agreeing not to bring future suits on the same issues as part of settlement on the theory that once a lawyer develops an expertise, parties should not be able to suppress it in the interests of an individual client; the expertise should be available to the public generally).

241. The argument that follows is a paraphrase of an argument made by David Luban in a presentation to the Section on Alternative Dispute Resolution of the Association of American Law Schools. See Luban, *supra* note 142.

242. For discussions of the malpractice standard, see HAZARD & HODES, *supra* note 184, at 8-8.3, 11-12.2; WOLFRAM, *supra* note 169, at 206-23; Perschbacher, *supra* note 189, at 107-12.

individual reputations on one-shot cases, and to be individually rational even when it leads to collectively irrational results.<sup>243</sup> Lawyers are charged with representing just one client at one time, and must represent that client against the whole world.

Seemingly trapped in a no-win situation,<sup>244</sup> lawyers have made an interesting and clever, albeit probably unself-conscious, adaptation. Lawyer bargaining is not just adversarial; it is also stylized. It is adversarial because it is made up, in the main, of aggressive communication maneuvers such as argument, challenge, and demand.<sup>245</sup> It is stylized because this aggressive maneuvering is carried out in a slightly exaggerated, somewhat predictable, and es-

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243. See Penegar, *supra* note 89, at 310, 322-36, 354-55. Some consequentialist philosophers argue that cooperation is a moral and not just a practical requirement of relationships, and implicitly, that the contradiction in lawyer bargaining role is between two different types of moral norms, not moral norms and practical norms. See, e.g., GAUTHIER, *supra* note 93. If they are correct, and not everyone agrees that they are, see Annette C. Baier, *What do Women Want in A Moral Theory?*, 19 *Nous* 53, 54 (1985) (dismissing game theoretic moral philosophy as "male locker room"—a "big boys' game, and a pretty silly one too"); HABERMAS, *supra* note 118, at 48 (arguing that "empiricist ethical theories have no enlightening impact because they remain fundamentally cut off from the intuitions of everyday life"); Roemer, *supra* note 67, at 91 (seeing it as a mistake to view bargaining axioms as capturing our moral intuitions directly), bargaining's ethical norms would require immorality, not just impracticality, and this would produce a more profound and disabling kind of role contradiction than the one I have identified. So viewed, the problem would be a variation on the professional morality versus role morality debate, for which David Luban's work is the most important. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170, at 104-74; Luban, *Freedom and Constraint*, *supra* note 118.

244. The contradiction imbedded in this clash between ethical and practical norms is not a variation of the "contradiction" built into all lawyer role by virtue of the fact that lawyers are simultaneously officers of the court and representatives of clients, and often must do different things to satisfy their obligations to each. See *Preamble to MODEL RULES*, *supra* note 169. The duties to court and client exist in a sliding scale relationship to one another, with rules for determining which gives way when there is a conflict. Both are part of a single system of lawyer role, whose content is sometimes controversial or unclear, but is rarely incoherent. *But see* Wilkins, *supra* note 126, at 479 (A lawyer always has "two arguably contradictory normative frameworks from which to construct a 'legal' response" to an ethical dilemma resulting from a conflict between the "officer of the court" and "zealous advocacy" paradigms.). For a recent example of how courts are able to reconcile these sometimes conflicting obligations, see *In re Himmel*, 533 N.E.2d 790 (Ill. 1988). See also COMMISSION ON PROFESSIONALISM, AMERICAN BAR ASS'N, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) [hereinafter COMMISSION ON PROFESSIONALISM]. The contradiction between ethical and practical norms is another matter, however. These norms are not part of a single system, and they do not exist in a clearly defined status hierarchy. They produce conflicts that cannot be resolved by appeal to predefined meta norms or decision procedures, and they create a genuine contradiction.

245. This was one of the principal points in cooperative bargaining theory's critique of positional or adversarial bargaining. See *supra* notes 23-25 and accompanying text.

sententially impersonal fashion.<sup>246</sup> Both dimensions are important to wriggling out of the dilemma of lawyer bargaining role. The adversarial part allows lawyers to believe that they have fought hard for their clients, and in the process that they have been deferential to client wishes and diligent in their pursuit. The stylized part allows them to preserve bargaining relationships with other lawyers by signaling, through a set of rhetorical conventions, that the aggressiveness is not personal, but is just part of the lawyer act.<sup>247</sup> Behavior that is both adversarial and stylized is a lawyer's way of being (or believing she has been) both ethical and practical, of protecting her reputation for cooperating, while at the same time arguing zealously for the interests of her clients. It is an effort to walk a line between the important but conflicting normative pulls of bargaining's ethical and practical sides, complying minimally with each and not openly violating either.

In a sense, of course, stylized aggressiveness is not a successful response to the dilemma of bargaining role. It often routinizes client interests and thus is not diligent, while at the same time it frequently offends other lawyers and thus is not cooperative. This objection misses the point, however. There is often no way to be both diligent and cooperative, to be practically effective and ethically scrupulous, at least in the hardest of cases.<sup>248</sup> Yet lawyers need to be practical to prosper and want to be ethical to make prosperity

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246. For an illustration of law students and lawyers arguing to one another in a highly stylized manner, in order to convince themselves that they had protected their "client's" interests, see Condlin, *supra* note 6, at 96-102 & n.81. Popular instructional videotapes of lawyer bargaining, used in law school courses in negotiation, also contain many of the same properties, see *id.*, at 126 n.95, as do articles by lawyers in law journals. For a good recent example of the latter, even in the face of efforts to encourage "dialogue" rather than "argument," see Sarah E. Burns, *Notes From the Field: A Reply to Professor Colker*, 13 HARV. WOMEN'S L.J. 189, 200-02 (1990), providing a response to Ruth Colker's suggestions for litigating abortion cases in a more "feminist" manner.

247. This stylized quality of bargaining behavior may be no more than a carryover from the habits of trial, where the dramatic dimension of a public proceeding is thought to require participants to act in ways that are slightly larger than life, and the only error, if it is one, is seeing bargaining as analogous to trial. Because stylized behavior is a feature of all types of lawyer bargaining, whether done by litigators or not, and because stylized behavior also pervades other types of lawyer work, even that with colleagues not involving adversary relationships, see Condlin, *supra* note 6, at 126 n.95, something more fundamental than the transfer of trial habits must be going on.

248. *But see* GIFFORD, *supra* note 1, at 41. Gifford seems to understand the contradiction between practical and ethical norms, but thinks that it can be resolved "by packaging competitive negotiation tactics, when justified, in a cooperative style." He seems to believe, in other words, that it is possible to compete against another without the other finding out that you are competing. While this might be true in particular circumstances for limited periods of time, it does not take the "echo effects" problem into account, see *supra* note 152, nor is it consistent with Lincoln's popular wisdom.

palatable. They need to reconcile bargaining's confused normative universe, or at least appear to do so, and stylized adversarial advocacy is simply the best of a bad lot of present options for allowing them to believe this has been done.

The understandable, if ultimately mistaken, wish to be true to all facets of a complex and sometimes contradictory bargaining role is a less exciting explanation of competitive lawyer bargaining behavior than explanations based on the legal profession's deeply rooted and pathological need to fight, or a failure of technique, but most reality is more mundane than the most exciting stories that are told about it.<sup>249</sup> Lawyers know how to cooperate (the existence of private dispute settlement in a system of adversary advocacy is proof of that), but they are unclear about the extent to which they are permitted to do so consistently with their other important role-related obligations. The problem of ineffective lawyer bargaining behavior must be solved at the level of role, therefore, if it is to be solved at all. Until that is done, other solutions, such as more and better skills training, the principal prescription of the alternative dispute resolution literature, will be largely premature or beside the point, no matter how cleverly conceived or carried out.

## V. A WAY OUT OF THE DILEMMA

Programmatic responses to the foregoing dilemma of lawyer bargaining role tend to focus on one part of bargaining's multidimensional nature and argue that better bargaining will be produced by more training in the dimension selected.<sup>250</sup> The allure of this reductionist move is easy to see. It is difficult to reconcile con-

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249. See, e.g., Schuman, *supra* note 21, at 3 (The "combative and aggressive nature of the legal profession" is the root cause of "professional pathology," making law practice a "Waste Land."). No doubt some lawyer bargainers slug it out with adversaries because of strongly felt anger or a deeply buried need to fight, or because they know of no other way to talk about differences, but I assume that most lawyers, like most people, are uncomfortable with such practices and would let them go in an instant if they thought they could do so and still do their job well. Cooperative bargaining theorists must think so as well, or they would not have worked so hard to convince lawyers of the advantages of the cooperative approach. If lawyer practices were rooted in pathology, rational argument would not change them.

250. This is the approach of the leading proponents of cordial, principled, and problem-solving bargaining theories, and similar to the approach taken by Gifford, who recommends that bargainers learn to do all of the above, as appropriate. GIFFORD, *supra* note 1, at 13-18, 22-24. For a recent example of an attempt to write a particular skill conception of bargaining into the profession's formal definition of role, see ABA TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES 54-60 (Tent. Draft 1991). See generally Leubsdorf, *supra* note 197 (discussing approaches to reform of lawyer role).

tradictory role commands sharing no common denominator, and always easier to pretend that the world is simpler and that role obligations are clearer than one knows at better moments to be the case. The collapse of the distinction between aspiration and duty in the slowly becoming defunct Code of Professional Responsibility, for example, shows how comfortably people trained in law embrace reductionism.<sup>251</sup> The coherence of simplification has its costs, however. Dispute bargaining is a multifaceted, multidimensional, and contradictory process, whether one thinks of it as such, or not, and elements that are ignored will force their way into the picture whether one's theory makes room for them or not. It would be better, then, to develop a conception of bargaining role that accounts for all of the "blooming buzzing confusion"<sup>252</sup> of the process, rather than to ignore that confusion in the hope that form will follow focus. But to say this is not yet to provide a way out of the dilemma of bargaining in the dark.

There are essentially four responses to the problem. The first is to do nothing, that is, to accept the system of unself-conscious, stylized, adversarial advocacy as the most that is possible, and ask lawyers to continue to "adapt" as they have in the past. For proponents of this view, existing ethics rules, sufficiently glossed, are flexible enough to allow lawyers who want to resolve the difficult problem of the free-riding client to do so, and yet are not so explicit or confining as to require it of those who are unaware of, uninterested in, or not up to the task. And while the rules could be clearer, the prospect of actually improving them is not sufficiently great to

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251. For a description of the distinction between aspiration and duty in the Model Code, see LON L. FULLER, *THE MORALITY OF LAW* 3-32 (rev. ed. 1969); Charles Frankel, *Code of Professional Responsibility*, 43 U. CHI. L. REV. 874, 877 (1976) (book review); John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 258 (1970). One of the principal problems with the Model Code was that too many lawyers complied only with the minimum standards of the Disciplinary Rules, ignoring the aspirational norms of the Ethical Considerations, thereby collapsing the latter norms into the former. Treating this response as a given, the Model Rules eliminated the distinction. See MODEL RULES, *supra* note 169, Scope to the Rules; see also COMMISSION ON PROFESSIONALISM, *supra* note 244, at 258 (aspirational standards of the Model Code did not work because they were "hard to enforce"); Geoffrey C. Hazard, *Rules of Legal Ethics: The Drafting Task*, 36 Record of the Bar of City of New York 77, 85-90 (1981) (discussing tripartite division of the Model Code, into Canons, Ethical Considerations, and Disciplinary Rules, and the way in which only the Disciplinary Rules were taken seriously).

252. The expression is usually associated with William James, but he attributes it to "someone." See William James, *Percept and Concept—The Import of Concepts*, in SOME PROBLEMS OF PHILOSOPHY 32 (1979). What I have in mind here is an account of lawyer role that is as rich and multifaceted as that provided by Mindes and Acock. See Mindes & Acock, *supra* note 135, at 218-19.



justify the risk of perhaps making them worse. This is a "muddling through"<sup>253</sup> theory of social reform, and to close observers of recorded history it may have some appeal.<sup>254</sup>

While muddling through may have a semirespectable pedigree, putting one's head in the sand probably will not command widespread support among those who understand the contradiction in lawyer bargaining role. It is one thing to muddle through, not knowing that it is being done, accepting the problems that muddling creates as part of the background noise of everyday life, but it is quite another to do so willfully in an attempt to avoid a difficult but perhaps manageable problem. The former is merely ignorance, a regrettable but understandable condition since one cannot know everything. But the latter is cowardice, and our faith in the power of the human animal to "control its destiny" does not allow us to give in to cowardice, and probably rightfully so. Furthermore, stylized adversarial advocacy has its costs, for clients, lawyers, and the system of dispute settlement alike, and those costs alone make changing it an attractive course. Doing nothing is probably not an acceptable choice.

The second option is to make bargaining's practical norms more ethical (i.e., adversarial) by convincing lawyers that zealotness in the pursuit of individual client ends, and the antagonism and contentiousness it engenders, should be the natural order of lawyer bargaining relationships; and that to temper zealotness in order to make bargaining run more smoothly is to elevate etiquette over politics, and to miss the point of what legal dispute settlement is all about. This argument will encounter heavy going with bargainers who understand the payoff structure of the prisoner's dilemma, and who are rational. They will want to bargain cooperatively because over time cooperation is better for them, most of their clients, and the dispute settlement system in general. Only the unilaterally defecting client will want to exploit rather than contribute to the system of mutual trust created by cooperative bargaining, but there is

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253. The expression is attributed to John Bright, and was first used during the American Civil War. See 1 JUSTIN MCCARTHY, *REMINISCENCES* 75 (1900). Charles Lindblom turned it into a theory of organizational management. See Charles E. Lindblom, *The Science of "Muddling Through,"* 19 *PUB. ADMIN. REV.* 79 (1959).

254. A theory of the "second best" seems the basis for Dauer and Leff's proposed defense of lawyer role. See *supra* note 217; see also Lipsev & Lancaster, "The General Theory of Second Best," 24 *REV. ECON. STUD.* 11 (1957) (attempting to develop a general economic theory of the second best). One has to search no further than the ABA's rewriting of the Model Code into the Model Rules for evidence that things can always get worse.

no right to be a free rider on the efforts of past bargainers,<sup>255</sup> or to deprive future bargainers of the rewards of mutual cooperation. Because almost everyone is better off when dispute settlement is cooperative, therefore, the argument that lawyer bargainers ought to make adversariness the rule is likely to fall, and appears to have fallen, on deaf ears.

There is a point to this second response, however, that is often overlooked in the legal literature on cooperative bargaining. If lawyer bargaining role is to be defined in more cooperative terms, cooperation must involve more than being friendly, splitting differences, and avoiding conflict. It must be thought nonremarkable and even appropriate for cooperative bargainers to disagree, even stridently and intractably, about differences that are fundamental, or to argue contentiously and with feeling about beliefs that are sometimes incommensurable. It is in the nature of things that views sometimes conflict, and when this happens contentiousness is a perfectly natural part of conversation.<sup>256</sup> Cooperative dispute settlement must make room for disagreement, and the anger, frustration, disappointment, and strong feeling that accompany it. Otherwise, it will not ring true to lawyer bargaining experience, or be capable of more than relocating conflict. Contentiousness is inappropriate only when it becomes personal, when *ad hominem* attack, threat, and extra-legal leverage replace substantive argument as a bargainer's main source of authority. All strong statement is not personal attack, however, even when thought to be so by the one on the receiving end. All assertiveness is not belligerence, all straightforwardness is not rudeness, all conviction is not arrogance, and all

255. See *supra* notes 239-240 and accompanying text.

256. One sometimes gets the sense that cooperative bargaining theorists hold no political or moral beliefs passionately, and think that the effective discussion of differences consists of massaging bad manners with technique. See SILBEY & SARAT, *supra* note 23, at 117 (maintaining that needs discourse is "apolitical and distinctly technocratic"). Principled bargaining may be of a different view. See FISHER & BROWN, *supra* note 27, at 8-9. Owen Fiss sees the problem in a slightly different light. He thinks that proponents of informalism

begin with a certain satisfaction with the status quo. . . . [The problem with this is that] when one sees injustices that cry out for correction . . . the value of avoidance diminishes and the agony of judgment becomes a necessity. Someone has to confront the betrayal of our deepest ideals and be prepared to turn the world upside down to bring those ideals to fruition.

Fiss, *supra* note 25, at 1086-87; see also Hoffer, *supra* note 118, at 306-09 (discussing the role of "honor" in explaining disputants' motives to litigate); Tanase, *supra* note 94, at 685 (quoting a former judge of the traffic section at Tokyo District Court who stated that "lawyers should litigate more and argue more aggressively before the court than now to get the award which best suits for [sic] the individual case at hand").

enthusiasm is not insensitivity, even if each is often and easily mistaken for the other. Everything that makes one uncomfortable is not, by definition, out of place in the bargaining conversation, nor is the one who is uncomfortable always in the best position to determine whether the comments are warranted.

It is certainly true that bargainers must be able to protect themselves from personal attack, and *a fortiori* must be able to recognize when they are being attacked (put another way, they must be able to tell when an adversary has defected), but they must not see attack everywhere, or read their own worst fears into the other's behavior. Even cooperative bargainers must have a healthy understanding of, skill at, and tolerance for the robust, excited, and strongly stated give and take that is an inevitable part of the discussion of differences. The generality that allows law to apply to broad categories of cases simultaneously makes uncontroversial interpretations rare, and the possibility of differential interpretation, with differential advantages for the respective parties, makes disagreement almost unavoidable. The party whose view of law, in whole or in part, is adopted as the basis of settlement does better, all else being equal, than the party whose view is not. There is no escape from this reality, and no way to make it inconsequential. As long as law is a source of authoritative principle on which settlement can be grounded, skill at argument of legal claims will be an inescapable and influential part of dispute settlement. To believe otherwise is quixotic.

One would think that bargainers, and lawyer bargainers in particular, would have an above average tolerance for disagreement. Disagreement is, after all, widely thought to be a large part of the nature of dispute settlement and the culture of lawyering. But the exaggerated and stylized conversational methods lawyers have adopted to manage and circumscribe bargaining conflict suggest the opposite. Dealing with differences head-on and matter-of-factly seems to be thought too risky, too likely to disrupt the bargaining relationship, to be an integral feature of the bargaining interaction. Instead, lawyers often seem to prefer the psychological safety of ritual and caricature, where it is easier to deny that comments are sincerely felt or personally directed. If it is true that there is something in the psyche of the profession that abhors a dispute, the promise of conflict-free dispute settlement, one interpretation of the presently popular theories of "win-win" bargaining, is likely to be an attractive yet dangerous pill. Lawyers do not need to learn to avoid conflict, or deny its presence, but to recognize and accept it as understandable under certain conditions, and be able to analyze and

discuss it directly, without making more or less of it than bargaining problems themselves require. As a corollary, they also need a conception of advocacy not tied to theater, which sees disagreement as an appropriate part of work relationships and ordinary conversation as the proper vehicle for working it out. Proposals to change the profession's conception of bargaining to make disagreement go away are a step in the other direction.<sup>257</sup>

That brings us to the third and most popular response to the problem of lawyer bargaining role, that of making dispute bargaining's ethical norms more practical, or put another way, of defining the ethics of lawyer dispute bargaining in more cooperative terms. This response has three prominent variations. The first seeks to undo adversary advocacy altogether, usually to replace it with a more "inquisitorial" approach to fact finding and judgment.<sup>258</sup> On this view, the adversary system is fatally flawed, a vulgar scientific

257. *But see* Lesnick, *supra* note 9, at 442-47 (discussing the "deceptive" nature of argument and the limits of rational discourse in resolving disputes and making public choices). A cooperative conception of lawyer bargaining must also accept and make room for the opportunity to demonstrate comparative bargaining skill. There are people motivated exclusively by the psychic return of doing good work, judged against a standard of what is absolutely possible (putting aside for the moment the question of how absolute standards are identified), but they are an exception to the rule. Most also like to be appreciated for the comparative quality of their work, particularly by others who know how to judge (which can include adversaries), and do not work as hard if there is no opportunity for such appreciation. If lawyer bargainers do not work hard, however, client claims will be overlooked, compromised, and abandoned, and in the process clients will be denied complete protection of their interests, wants, and needs. In other words, the opportunity to be judged to have done better work than an adversary is ultimately linked to an in-depth and comprehensive consideration of all of the issues in a dispute, and to try to prohibit the former is to make the latter less likely. Thus, cooperative bargaining must value comparative cleverness, imagination, persistence, and the like, at the same time that it tries to avoid the excesses of dirty tricks, and it must provide a place for judgments about comparative bargaining skill to be made. Hannah Arendt makes a similar point about political action, observing that because of its extraordinary competitive and individualistic nature, it must make room for an element of "virtuosity." See HANNAH ARENDT, *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 153 (1968); *see also* Morris, *supra* note 221, at 791 (making a similar point in terms of "craft"); Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 ST. JOHN'S L. REV. 680, 703 (1983) ("The will to win—so essential to effective advocacy—cannot be limited to the courtroom; it does and to an extent should permeate the discharge of all the attorney's services to the client."); Wetlaufer, *supra* note 11, at 1230 (noting that stakes in negotiation are raised by the high value lawyers place on their reputations for comparative instrumental effectiveness). This is not to advocate the "sporting theory of justice." *See* Rhode, *supra* note 187, at 604. Comparative skill is not everything in bargaining, but it is too important to be overlooked.

258. *See* David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER*, *supra* note 170, at 83, 93-118; Rhode, *supra* note 187, at 596-600 (criticizing adversary advocacy); Schuman, *supra* note 21, at 9 (describing adversary system as a "waste land"). For a

method under the best of circumstances, but now little more than a wildly out of control system of orchestrated fights, which ought to be put out of its misery so that it will no longer cause misery to those caught in its web. This, like most clean slate reforms, is especially attractive in times like the present, when rapid change has made it difficult for legal institutions and conventions to adapt to new social conditions and events.

Trying to take adversariness out of this society's system for settling disputes, however, is likely to prove fruitless and unwise. Fruitless, because adversariness simply mirrors the possessive individualism<sup>259</sup> at the center of the culture itself, and whatever dispute settlement system is ultimately selected is almost certain to do the same.<sup>260</sup> Unwise, because the legal system of a multicultural society should not relinquish the values of loyalty and diligence as the centerpiece of its definition of lawyer role. We are not a homogeneous tribe, linked by kinship, sharing a common race, religion, culture,

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discussion of the differences between adversarial and inquisitorial systems, see LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170, at 94-96.

259. See generally CRAWFORD B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962).

260. The question of whether ideology shapes institutions or institutions shape ideology is, of course, complicated and difficult. For an intelligent discussion, see William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *LAW & SOC'Y REV.* 63 (1974); Richard Danzig & Michael S. Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 *LAW & SOC'Y REV.* 675 (1975); William L.F. Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 *LAW & SOC'Y REV.* 695 (1975). I believe, however, that it is a mistake to think that our system of adversary dispute settlement is an accident of history, that we could have had any of a number of dispute settlement systems, adversarial and non-adversarial alike, and that we have an adversarial one because of contingent historical events. Adversarial dispute settlement fits our culture perfectly. It reflects our longstanding suspicion of the state, makes freedom of the single individual central, and recognizes the importance of diffusing power by placing it in many hands. Its procedural emphasis is suited perfectly to a heterogeneous culture not principally bound together by shared substantive ends, and its slow, redundant pace provides the room needed for deliberation, the most valued process in a representative democracy. If it is only coincidental that we have this system, it is a remarkable coincidence indeed that it fits us so well. See SILBEY & SARAT, *supra* note 23, at 101 (arguing that an attempt to change the adversarial nature of our dispute settlement system would require a reworking of our entire culture). This is not to say that we are inevitably and incorrigibly individualistic and adversarial, but just that a dispute settlement system is an institution of the culture, and not the other way around. It is certainly possible that the culture could change, that other-regarding could become more important than self-interest, and that this could produce a radical reworking of our dispute settlement system; but the process does not work in reverse. Dispute settlement is a tail, not a dog. For discussions of the difficulties involved in adapting a nonadversarial system of dispute settlement to the American legal culture, using the German system as an example, see LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170, at 98-103; John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 *IOWA L. REV.* 987, 992-1007 (1990).

socialization process, and set of moral beliefs. We do not always agree on the appropriate assignments of power, status, opportunity, and goods, and are not always able to resolve differences by recourse to peer pressure, neighborhood councils, and gentle suasion. Many citizens are outsiders in this society, powerless without formal legal rules and procedures, and without access to impartial courts, to prevent unfair deprivations of liberty and property on a regular basis. Lawyers make these rules, procedures, and courts accessible and effective, and a citizen should not have to worry during this process that the lawyer is not putting the citizen's interests first.<sup>261</sup>

The adversary system might be modified rather than replaced, however, without undercutting the loyalty and zealousness ethic or radically reworking the legal system's conception of lawyer role. This is the approach taken by the other two variations on the third response to the problem of lawyer dispute bargaining role. One of these variations seeks to redefine the ethical duties of diligence and competence to permit and perhaps require lawyer cooperation in situations of purely civil dispute settlement.<sup>262</sup> Much of the elaboration of those duties, both academic and doctrinal, occurs in the context of criminal cases, imagined and real, where circumstances give

261. Putting client interest first is what clients like about lawyers. See Post, *supra* note 6, at 380.

The lawyer is the public and unavoidable embodiment of the tension we all experience between the desire for an embracing and common community and the urge toward individual independence and self-assertion; between the need for a stable, coherent, and sincerely presented self and the fragmented and disassociated roles we are forced to play in the theater of modern life.

*Id.* at 389; see also Hoffer, *supra* note 118, at 302-03 (discussing the transformation of American dispute settlement from informal and communal processes to uniform and predictable, i.e., rule bound, ones); Rowe, *supra* note 25, at 827 ("[I]n America [procedure's] role is relatively prominent perhaps because of our society's heterogeneity and comparative shortage of shared substantive values."); Schneyer, *supra* note 170, at 23 ("[H]ired gun norms, however unattractive in the abstract, become appropriate insofar as they serve as a measured response to real temptations and pressures in law practice . . ."). But see Steele, *supra* note 191, at 1397, 1402-04 (fairness, not loyalty to the client, should be the lawyer's highest value). For defenses of the adversary ethic, see generally FREEDMAN, *supra* note 186; Landsman, *supra* note 201; Pepper, *supra* note 201; Saltzburg, *supra* note 201; Schneyer, *supra* note 170. For a different, though not incompatible, perspective on this topic, see Galanter, *supra* note 2, at 17-27 (discussing how law operates in the shadow of indigenous ordering, or in Galanter's words, "[i]f we have lost the experience of an all-encompassing inclusive community, it is not to a world of arms-length dealings with strangers, but in large measure to a world of loosely joined and partly overlapping partial or fragmentary communities," *id.* at 22).

262. The most well-known statement of this view is Murray L. Schwartz, *The Zeal of the Civil Advocate*, in THE GOOD LAWYER, *supra* note 170, at 158. For another sophisticated and sympathetic discussion, see LUBAN, LAWYERS AND JUSTICE, *supra* note 170, at 59-66, 202-05.

the duties a necessarily competitive caste.<sup>263</sup> For reasons rooted deep in our legal and political history, the rules of criminal adjudication provide citizens with special advantages when the state moves to deprive them of their liberty. Built into criminal adjudication at its most basic levels is a panoply of procedural and substantive rules designed to make prosecution difficult to undertake and complete. Grounded in an all-out commitment to liberty, these rules have as one of their principal effects the equation of criminal representation with "no holds barred" advocacy, requiring, among other things, that lawyers (plea) bargain with the use of what in other contexts might border on, or be thought of, as dirty tricks.<sup>264</sup> In criminal defense, anything that works, short of illegal or criminal conduct itself, is permitted and therefore required.

Civil representation does not come with all of the same historical or political baggage, however, and so the argument goes, need not be adorned with all of the same trappings.<sup>265</sup> The character of the civil dispute is not defined by the constitution, at least not to the same extent as the criminal case, and its form does not derive historically from the fear of the unbridled use of state power against the

263. See Luban, *supra* note 258, at 91-93; Penegar, *supra* note 89, at 367 ("[A] good bit of the broad debate has been colored by the imagery of the criminal case."); see also Powell v. Alabama, 287 U.S. 45, 68-70 (1932) (discussing counsel's role in a criminal prosecution). For academic and doctrinal discussion of the lawyer's ethical duties in the context of criminal cases, see MARVIN E. FRANKEL, *PARTISAN JUSTICE* 32 (1980); FREEDMAN, *supra* note 186; Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983); Carrington, *supra* note 201; Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 30 (H. Berman ed., 1961); Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 84 MICH. L. REV. 1011 (1986) (discussing David Luban's *The Good Lawyer*, *supra* note 170, and STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* (1984)); Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987); Geoffrey C. Hazard, Jr., *Quis custodiet ipsos custodes?*, 95 YALE L.J. 1523 (1986) (reviewing KENNETH MANN, *DEFENDING WHITE COLLAR CRIME* (1985)); John Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223 (1986); Landsman, *supra* note 201; Mitchell, *supra* note 201; Pepper, *supra* note 201; A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921; Saltzburg, *supra* note 201; Harry I. Subin, *The Criminal Defense Lawyer's "Different Mission: Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987).

264. See DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 188 (1973); WOLFRAM, *supra* note 169, at 588-90; Burt, *supra* note 122, at 1035-45; Luban, *supra* note 258, at 92; Rhode, *supra* note 187, at 605-06; Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135, 1140-47 (1988). On society's commitment to the pre-eminence of individual liberty, see BERNARD BAILYN, *FACES OF REVOLUTION: PERSONALITIES & THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE* (1990); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

265. See Rhode, *supra* note 187, at 606; Schwartz, *supra* note 264, at 1149-53; Schwartz, *supra* note 262, at 155-69; see also Zacharias, *supra* note 202, at 356-57 (the constitution makes criminal representation a special case).

individual. It is about money and property, not liberty, and it has few if any of the stigmatizing or ripple effects of criminal prosecution. Civil dispute settlement is about commerce more than politics, it is to criminal defense what commercial speech is to political speech,<sup>266</sup> and it could be held to a correspondingly different standard. It is not necessary, therefore, the argument concludes, that civil bargainers subscribe to a "no holds barred" conception of bargaining role, and because it is also not desirable, such a conception should not be adopted. The practical effects of acting on such an argument would be numerous, but they might not be momentous. In fact, they may do little more than bring the formal norms of civil bargaining into line with a large part of existing bargaining practice, in particular that segment conducted by repeat institutional players such as insurance companies, banks, administrative agencies, and the like, in the routine processing of citizen and customer claims.<sup>267</sup>

The other variation on modifying rather than replacing adversary advocacy distinguishes not between civil and criminal representation, but between different types of lawyer tasks.<sup>268</sup> It seeks to reformulate the ethical duties of competence and diligence so as to cut down on, and in some instances prohibit entirely, the use of whole categories of dirty tricks, while still leaving room for the operation of adversarial interaction and the determinative effect of dif-

266. For a discussion of the distinction between commercial and political speech, see Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989); Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 340-48 (1986); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-66 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-59 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-62 (1976).

267. See *supra* note 22 (discussing routine processing).

268. The leading exponent of differentiating among various types of lawyer tasks is John Langbein. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) [hereinafter Langbein, *The German Advantage*]. There are critics of his claim for a "German Advantage" in civil dispute settlement, see, e.g., Ronald J. Allen et al., *The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship*, 82 NW. U. L. REV. 705 (1988); Herbert L. Bernstein, *Whose Advantage After All?: A Comment on the Comparison of Civil Justice Systems*, 21 U.C. DAVIS L. REV. 587 (1988), and Langbein has taken issue with these critics, see John H. Langbein, *Trashing the German Advantage*, 82 NW. U. L. REV. 763 (1988). Nevertheless, his basic suggestion that a dispute settlement system should distinguish between adversarial and nonadversarial processes remains intact. See also Rhode, *supra* note 187, at 640 ("European civil law procedures, which employ neutral as well as partisan modes of investigation, . . . might be adapted for some purposes in American tribunals."). For a variation on this theme, see Schwartz, *supra* note 187, suggesting a division of the lawyering role universe into advocate and nonadvocate categories. The Model Rules adopt the dichotomy between advocate and nonadvocate to a limited extent, in making a distinction between lawyer as counselor, see MODEL RULES, *supra* note 169, Rules 2.1-2.3, and lawyer as advocate, see *id.* Rules 3.1-3.9.



ferential lawyer skill. For example, proponents of this view commonly distinguish between assembling the universe of evidence, information, and rules (the record, so to speak) on which settlement is based on the one hand, and interpreting and arguing from that universe of information on the other.<sup>269</sup> In creating the bargaining record, lawyers should be free, or even obligated, to share relevant evidence, not to coach or hide witnesses, to answer the other side's factual questions, to disclose applicable law, and the like. But when the issue is what this welter of information and rules means, they also should be entitled to argue for the most favorable interpretations they can defend, even when not the most plausible, or when not believed by the lawyers themselves. In this view, adversarial advocacy entails analyzing and arguing self-interestedly from a common record, rather than constructing a one-sided factual picture of what the dispute is about in the first instance.<sup>270</sup> These changes would not make competition go away, but they would limit it to that competition built unavoidably into the structure of the bargaining problem: the indeterminacy of law and facts, the parties' contrasting world views, and differences in the parties' respective substantive beliefs.

These last two approaches may be an attempt to strike a compromise between substantiality and acceptability, that is, to propose changes in the system of adversary advocacy that will improve lawyer bargaining behavior in significant ways, but at the same time not weaken the loyalty and diligence promises made by the profession to the criminal defendant.<sup>271</sup> Such proposals should be easier to enact, one would think, than more comprehensive reworkings of adversary advocacy, because their ripple effects are smaller, and their opponents presumably less numerous. These are the kinds of re-

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269. See Langbein, *The German Advantage*, *supra* note 268, at 830-48; Reitz, *supra* note 260, at 989-92 (summarizing and elaborating on Langbein's argument, making the above distinction).

270. The spirit of this full disclosure approach is embodied in the Judicial Conference Working Group's most recent proposals for rewriting the discovery provisions of the Federal Rules of Civil Procedure. See *Federal Rules: Major Changes Sought By Judicial Conference Working Group*, 60 U.S.L.W. 2158-59 (1991). For an illustration of the manner in which lawyers selectively reconstruct a factual record for purposes of making an argument, see Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDUC. 29 (1991).

271. Schwartz and Langbein did not concern themselves principally with bargaining or bargaining role, or the practicalities of rules reform, see Schwartz, *supra* note 262; *supra* text accompanying note 262; *supra* notes 268-269 and accompanying text, but their discussions are easily extended to these topics consistently with their original purposes, and the motive of wanting to propose something workable is a plausible explanation of the lines they draw.

forms one would expect the organized bar to be quick to support. Nevertheless, the politics of rules reform turns out to be not so simple, as the drafting of the bargaining section of the Model Rules once again made clear.<sup>272</sup> If the politics could be managed, however, it is still not clear that the kinds of distinctions these last two proposals seek to make lend themselves to the format of ethical rules. At the simplest level, lawyer tasks and types of work interlock and overlap in ways that make isolating and regulating pieces of them difficult.<sup>273</sup> The record is always being completed, for example, even as one argues about what it means, and the conceptual separation of fact investigation from argument is just not always true to bargaining reality. While slightly easier to make operational, the civil-criminal distinction has equivalent problems. Apart from the fact that some representation is difficult to categorize,<sup>274</sup> civil disputes often involve greater resource disparities, have more severe penalties, and produce more traumatic and lasting effects on

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272. See Lowenthal, *supra* note 187, at 442-47; see also Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677 (1989) (political account of the development of the ABA's Model Rules of Professional Conduct).

273. For example, in rehearsing questions and answers with a witness prior to a deposition, hearing, or trial, is a lawyer preparing the factual record, or constructing and manipulating it? Witnesses have a legitimate need to prepare for questioning, so that they can communicate understandably and accurately what they have witnessed, and because they know little about how formal evidentiary hearings operate, they should be allowed to ask for help in this process. But, it is also not possible to prepare questions and answers without shaping them to some extent, so what standards of role does a lawyer follow when engaged in such a task? Presumably, Langbein would solve the problem by having "some combination of judges, magistrates, and masters" take charge of the witness examination process, see Langbein, *The German Advantage*, *supra* note 268, at 855, as he views the division of witness examination functions between judge and attorney as a "grand discriminant" among legal systems. See *id.* at 863. But,

[u]nless there is a change in our fundamental cultural definitions, adoption of judicial questioning of witnesses is likely to result in simply engrafting judicial questioning onto our present system of adversarial questioning with relatively unrestricted prehearing witness contact by attorneys and vigorous attempts at cross-examination following judicial questioning. Such a mongrelized system would neither secure the supposed economies of the German system nor avoid the opportunities our system offers for witness influencing.

Reitz, *supra* note 260, at 994.

274. For example, deportation proceedings are civil in theory, but their effects and the manner in which they are conducted often remind one of criminal prosecution. See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: NEGOTIATION* 263 (1981). The same might be said for civil contempt. See ALAN F. WESTIN & BARRY MAHONEY, *THE TRIAL OF MARTIN LUTHER KING* (1974) (citing the superiority of civil contempt over criminal in inhibiting civil rights demonstrations). Deborah Rhode suggests that a distinction might be made along commercial and political lines rather than civil and criminal lines, see Rhode, *supra* note 187, at 606-07, but she does not develop the point, and it seems fraught with many of the same difficulties.

individual lives than do criminal prosecutions. Citizens often need the protection of "anything that works" advocacy in the former as much as the latter.<sup>275</sup>

Perhaps even harder than forcing orderly distinctions on an unruly reality is the task of expressing the idea of cooperative bargaining through the medium of rule-based incentives and constraints.<sup>276</sup> Cooperation is not a formula or technique so much as it is an attitude or state of mind for approaching a bargaining setting.<sup>277</sup> The cooperative move in one context, with one set of parties, is often different from the equivalent cooperative move in another, and the determination of how to cooperate depends more on faculties of judgment than on the ability to decode and apply rules. The idea of legislating cooperation has some of the same oxymoronic properties as ordering freedom or compelling moral action. Genuine cooperation, of the kind envisioned by the legal bargaining theorists, may be too subtle, nuanced, and context specific to be announced. It may be that it can only be learned.<sup>278</sup> And it may need a rule framework that is more suggestive and malleable than didactic.

The fourth and most interesting response to the bargainer's dilemma, though not written as such, is Bill Simon's argument for "ethical discretion in lawyering."<sup>279</sup> Simon divides conventional approaches to the definition of lawyer ethical role into two camps, the

275. See Rhode, *supra* note 187, at 606. There are famous cases in which civil proceedings have been less fair and more punitive than criminal; one of the most outrageous is the Atomic Energy Commission's security clearance hearing in the case of Robert Oppenheimer. See PHILIP M. STERN & HAROLD P. GREEN, *THE OPPENHEIMER CASE: SECURITY ON TRIAL* 402-23, 428-29, 450-59 (1969); see also *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 333 (1985) (finding no need for lawyers, even to present complex medical and scientific evidence, in a nonadversarial proceeding before "a decisionmaker whose duty is to aid the claimant"); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (finding no right to appointed counsel in parole revocation hearings); William D. Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989 (1977) (studying the effect of representation in nonadversary programs). More routine examples occur in small claims court each day.

276. This is the position of the personal responsibility view of professional role. See Leubsdorf, *supra* note 197, at 1047; see also Rhode, *supra* note 187, at 647 ("No such code, however well-drafted, can definitively respond to the complexities of professional practice."). For a thoughtful consideration of what such a rule structure might look like, see Wilkins, *supra* note 126, at 516 (discussing the possibility of developing a set of "middle-level principles" that both isolate and respond to relevant differences in social and institutional context while providing a structural foundation for widespread compliance in the areas where they apply").

277. See Axelrod & Keohane, *supra* note 165, at 231.

278. This learning may occur in much the same fashion that Aristotle envisioned moral norms should be learned. See Condlin, *supra* note 170, at 323-24.

279. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); see also Rhode, *supra* note 187, at 643 ("The rationale for professional action

libertarian, which "emphasizes the lawyer's role as advocate and . . . duty . . . to the client,"<sup>280</sup> and the regulatory, which "emphasizes the lawyer's role as officer of the court and . . . duty . . . to the public,"<sup>281</sup> and rejects both as based on a common style of reasoning that he calls "categorical."<sup>282</sup> Categorical reasoning "restrictively specifies the factors that a decision-maker may consider before she confronts a particular problem," "privilege[s] some elements over others," and "restrict[s] judgment in ways that often preclude lawyers from taking the actions that seem most legally appropriate in particular circumstances."<sup>283</sup> In categorical reasoning "[t]he decision-maker has no discretion to consider factors she encounters that are not specified, or to evaluate specified factors in any way other than that given in the rule."<sup>284</sup> These limitations oversimplify reality, prevent lawyers from assessing the relative merits of their clients' ends, and in so doing, alienate lawyers from legality and justice. Categorical reasoning, in Simon's view, suffers from the same failings as formalism generally, and it is no more appropriate in defining lawyer role obligations than in justifying a judicial decision or grounding a jurisprudential theory.<sup>285</sup>

Elaborating on his earlier idea of "non-professional advocacy,"<sup>286</sup> Simon argues instead for a "discretionary approach"<sup>287</sup> to

cannot depend on a reflexive retreat to role, which denies the need for reflection at the very point when reflection becomes most essential.").

280. Simon, *supra* note 279, at 1084.

281. *Id.*

282. *Id.* at 1086.

283. *Id.* at 1086-87.

284. *Id.* at 1086.

285. *See id.* at 1091.

286. *See* Simon, *supra* note 186, at 130-44; *see also* William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1200 (1983) (suggesting a vision of legality in welfare administration that involves relative informality); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) (critique of professional notions of client and system). For a thoughtful analysis and critique of Simon's view, *see* Bryant G. Garth, *Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite*, 62 IND. L.J. 183, 192-204 (1987).

287. *See* Simon, *supra* note 279, at 1090-91. For the work of another important proponent of the discretionary approach, *see* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988). Presently, discretionary models are attractive in legal scholarship. *See, e.g.*, Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (advocating greater use of discretion and judgment by judges in reasoning "between the poles" of Federalist and Nationalist models of federal courts law); William E. Nelson, *Moral Ethics, Adversary Justice, and Political Theory: Three Foundations for the Law of Professional Responsibility*, 64 NOTRE DAME L. REV. 911 (1989) (suggesting that lawyers be thought of as quasi-bureaucrats, committed to pluralist political ideals rather than individual client ends). The appeal of discretionary models probably owes a great deal to the success of the critique of indeterminacy. *See supra* note 126. The inability of formal

the definition of lawyer role, in which the lawyer's "basic maxim" would be to "take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice."<sup>288</sup> The "seek justice" maxim has two components: First, that a lawyer assess the merits of the client's goals and claims in relation to the goals and claims of others whom the lawyer might serve (relative merit), and second, that she "attempt to reconcile the conflicting legal values implicated directly in the client's claim or goal" (internal merit).<sup>289</sup> In making the determination of relative merit the lawyer should consider "the extent to which the [client's] claims and goals are grounded in the law, the importance of the interests involved, and the extent to which the representation would contribute to the equalization of access to the legal system."<sup>290</sup> In making the determination of internal merit, the lawyer should understand and respect "the role of judicial and administrative officials in law enforcement," but treat "the premises of that understanding as rebuttable presumptions that do not warrant reliance where they do not apply."<sup>291</sup> In the event of "some unusual incapacity on the part of official institutions" the lawyer "should make her own judgment about the proper substantive resolution and take reasonable actions to bring it about."<sup>292</sup> Where institutions are not incapacitated, the lawyer should facilitate official decision.<sup>293</sup>

Simon's is a powerful (one could say power-filled)<sup>294</sup> conception of lawyer role not fit for the tentative or faint-hearted. As with all of his work on the topic, he writes from a deep and abiding faith in the moral insight and strength of character of the single deciding individual. He assumes that the lawyer unilaterally can know and understand all things clearly, and can avoid the doubt or ignorance that often impedes action. The lawyer is the ultimate moral and

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and determinate rules to deal in a nonmythical way with the complexity of real life situations has been laid bare for all to see. The natural response when rules fail is to look to individuals for solutions, and to argue for rules flexible and open-ended enough to provide such individuals with the discretionary authority to make judgments about what needs to be done. The pendulum will no doubt swing back to determinate rules, and in some places, for example, criminal sentencing, perhaps already has.

288. Simon, *supra* note 279, at 1090.

289. *Id.* at 1093, 1096.

290. *Id.* at 1093.

291. *Id.* at 1097.

292. *Id.* at 1098.

293. *Id.* at 1100.

294. For a discussion of Simon's propensity to give individual lawyers extensive unilateral power, see Robert J. Condlin, "Tastes Great, Less Filling": *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 55 n.31 (1986). Luban's "moral activism" is a similarly robust view. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 170, at 160-61.

political authority in a discretionary world. And while she must take many factors into account, including the understandings and capacities of the other individuals and institutions with which she interacts, she need not defer to anyone or anything if such deference, in her view, would be unethical under the circumstances—even to the point of being allowed to nullify law when she finds it in conflict with her own sense of what is morally required. If Dworkin gives us Hercules,<sup>295</sup> then surely Simon gives us Ptolemy.<sup>296</sup>

Ptolemy notwithstanding, Simon's approach is a healthier, more interesting conception of lawyering and lawyer role than the instrumental conceptions it competes with and seeks to replace. It sees the lawyer as a moral and political agent with direct, nonmechanical responsibilities for the justice of legal proceedings. The lawyer must take responsibility for outcome as well as procedure, must correct market failure when it appears that institutions will deny justice, and must consider all of the dimensions of a problem, even the nonlegal, when relevant to a determination of right outcome. She must make individually tailored, fully considered, context-specific judgments about where to spend her resources and how to act each time a new tactical or strategic question presents itself, and she must never fall back on the formulaic dictates of professional role. This is a more fully human and moral way to think about being a lawyer than those methods embodied in ideas like the division of labor, or based on metaphors like "cog in a machine."<sup>297</sup>

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295. See DWORKIN, *supra* note 94, at 105.

296. See Jorstad, *supra* note 187, at 1099 (Simon's error is that of having "a too consistent optimism in regard to man's ability and inclination to grant justice to his fellows . . ." (quoting REINHOLD NIEBUHR, *THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS* 118 (2d ed. 1972))). Whether Simon is too optimistic or not, and this seems difficult to say, it is to his credit that he is willing to trust individuals to make morally and politically wise choices. He does not seem to feel so strongly about particular ends that he builds them into his conception of role in the form of categorical rules, decision procedures, and status hierarchies, so that they will be realized whether lawyers recognize their importance or not. He seems willing to live with whatever people produce, provided they have thought about and argued it out carefully and fully, and this is a refreshingly democratic stance to take. Ellmann thinks that this quality makes Simon's view "preferable to the more exclusively political" conception of lawyer role that Luban presents, but doubts "that . . . individualized discretion can properly guide lawyers' exercise of the broad power to modulate the vigor of their advocacy." See Ellmann, *supra* note 187, at 158 n.96. For another view of Luban, see Wasserman, *supra* note 187.

297. See Simon, *supra* note 169, at 66 ("[T]he effort to apply [general legal norms] to specific circumstances can be experienced as direct participation in the normative life of the community. [It] is the distinctive ethical component of the ideal of professionalism."). For machine-metaphorical or division of labor approaches, see Lee Modjeska, *On Teaching Morality to Law Students*, 41 J. LEGAL EDUC. 71 (1991) (lawyers are "pilots on the river of law," for whom the client's cause is their cause, and the client's safe journey

Simon's lawyer is a fully functioning moral agent, not just a functionary, with noble, even heroic notions of how life is to be lived. And his conception of lawyer role is one that respects and responds to the complexity and multidimensional nature of the lawyer dispute bargaining relationship.

If Simon's view has a fault, it is that it may require someone as knowledgeable, thoughtful, and intrepid as Simon himself (and with the work schedule of a law professor) to solve the complicated political, moral, and technical questions that would be the discretionary lawyer's often frustrating daily fare. Most rule systems are not written with such a person in mind, aiming instead at a lowest common denominator, and requiring only that those regulated rise to a minimum threshold of acceptable conduct, understandable to and within the grasp of almost all to whom the rules apply.<sup>298</sup> Whether the fact that large numbers of lawyers would misunderstand or not have time to work through the problems that discretionary advocacy would present makes the conception a bad idea, is a more difficult question than whether discretionary advocacy is good or bad in the abstract. Simon discusses several objections to his view, but this is not one of them.<sup>299</sup> In the end, however, this objection, rather than problems of coherence or attractiveness, may prove discretionary advocacy's undoing.

If discretionary advocacy were to be accepted, however, and one surely hopes that it would, it would need considerable work

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their passion); Penegar, *supra* note 89, at 376 (discussing Geoffrey Hazard's conception of lawyer role as "mere employee, one of a legion of mere technicians of the corporate enterprise, lacking in moral cachet and unable to direct the client's affairs"); Pepper, *supra* note 201, at 623-24 (a lawyer is a technician or mechanic who helps the client confront the very large and complicated machine that is the legal system, for the purpose of getting it to work); Rhode, *supra* note 187, at 602-05, 643-47. See also Lon L. Fuller & John D. Randal, *Professional Responsibility: Report of the Joint Conference of the American Bar Association and the Association of American Law Schools*, 44 A.B.A. J. 1159, 1160 (1958) ("If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.").

298. This was the stated objective for including Disciplinary Rules in the ABA's Code of Professional Responsibility. See Frankel, *supra* note 251, at 878.

299. See Simon, *supra* note 279, at 1119-44; see also Wilkins, *supra* note 126, at 510-15 ("[T]he likely consequence[] of adopting a system of professional regulation that instructs each lawyer to take only those actions that she believes will help to produce the legally correct outcome in every case," *id.* at 510, is to "shortchange important systemic values in a manner that can neither be controlled *ex ante* nor effectively reviewed *ex post*," *id.* at 514.). David Luban discusses a similar "too much to ask" objection to his "Fourfold Root of Sufficient Reasoning" conception of lawyer role, phrasing the objection as "[requiring] a veritable night in Gethsemane every time a lawyer wants to take what might be described in some circles as 'a lousy four-bill landlord-tenant case.'" See LUBAN, LAWYERS AND JUSTICE, *supra* note 170, at 139-44.

before it could be a workable guide for acting in lawyer bargaining role. For example, it is not clear what implications, if any, the theory has for rewriting the ethics rules of bargaining. Simon's discussion is not about rules, and it is unclear what inferences are justified. Presumably, he would reject the "do nothing" option, since part of the problem with present conceptions of lawyer role, in his view, is that they are too imbedded in categorical rules. A system of discretionary advocacy would need more room to operate. How one writes rules conferring ethical discretion is not obvious, however, if in fact rules are needed at all.<sup>300</sup> If rules are appropriate, presumably they would leave intact the tension between the competitive and cooperative dimensions of lawyer bargaining role. It is not possible to say, ahead of time and for all situations, which of these different dimensions should give way or be subordinated, and an attempt to do so would reintroduce categorical thinking. This and a myriad of other problems would have to be addressed before discretionary advocacy could be made sufficiently specific to satisfy the predictable demand of lawyers to know exactly what they are expected to do. This seems a potentially more interesting and fruitful undertaking, however, than the equivalent work required under each of the other responses to the contradiction in lawyer bargaining role, and one which, even if it did not ultimately prove satisfactory, would improve our collective understanding of the system of informal justice and the lawyer's role in making it operate.

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300. For discussions of the trade-offs between precision and flexibility in rules, see Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Peter Margulies, "Who Are You to Tell Me That?" *Attorney-Client Deliberation Regarding Non-legal Issues and the Interests of Nonclients*, 68 N.C. L. REV. 213, 215-20 (1990); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955). See also Wilkins, *supra* note 126, at 514-15 (creating a system of professional regulation that effectively incorporates the lessons of legal realism requires the "abandon[ment] of the traditional model's commitment to general, universally applicable ethical rules [and the adoption of] an approach . . . that responds to the manner in which lawyers actually interpret and apply legal rules."). But see Schneyer, *supra* note 170, at 25 ("[I]t remains a fact of life that at some point the urge to enumerate different rules for different practice contexts thwarts policy making by favoring a grid of rules and roles that is too complex to be of practical use."). The politically less powerful have many concerns with loose or imprecise standards. See Delgado et al., *supra* note 25; Martha L. Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 U.C. DAVIS L. REV. 829 (1989); see also Lerman, *supra* note 22, at 746 ("In regulating behavior it is better to make a specific rule than to rely on the judgment of the individual members of the group.").



## CONCLUSION

These are exciting times for legal dispute bargaining. A full-fledged subject of law school study for only a little more than a decade, it now finds itself simultaneously popular beyond its wildest dreams, and in the middle of a theoretical dilemma calling into question the coherence of its intellectual core. Its moment of greatest success is also a moment of great precariousness. This is not because of the lively debate between competitive and cooperative theories of instrumental bargaining effectiveness, and the mutually exclusive manner in which those views are sometimes discussed. Such disputes are energizing for an academic discipline, adding patina (albeit sometimes in the form of scar tissue), not tarnish, to a discipline's aura. Because the sharp dichotomies in this debate are more academically constructed than real, however, they are likely to go away on their own, or at least settle into predictable and stable relationships, once the early rush of enthusiastic articles and books is written, seminars and conferences held, and training programs locked into their respective market niches.<sup>301</sup> The conflict between bargaining's practical and ethical norms is another matter, however, and here it is harder to be sanguine about the prospects for long term resolution. Diligence in the pursuit of a client's interest is often a virtue, just as competing with an adverse bargainer is often a vice, and yet it may not be possible to do one and avoid the other much of the time. A bargainer may have to choose. This is a less roseate view of lawyer bargaining role than many of those now popular, but it may be a more accurate one. If a conflict cannot be dissolved, however, it is still important that it be made clear.

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301. See SILBEY & SARAT, *supra* note 23, at 38 (characterizing the alternative dispute resolution movement as a product of a struggle by academics to find a place for themselves in the production of legal scholarship).